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UNDER THE EDITORIAL SUPERVISION OF

THOMAS JOHNSON MICHIE

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SUPPLEMENT

Abandonment.

See the title ABANDONMENT, vol. 1, p. 1, and references there given.

Abatement.

See post, ABATEMENT AND REVIVAL; APPEAL AND ERROR. As to abatement of criminal proceedings, see post, CRIMINAL LAW. As to abatement of nuisances, see post, INTOXICATING LIQUORS; MUNICIPAL CORPORATIONS; NUISANCES. As to abatement of rent, see post, LANDLORD AND TENANT.

ABATEMENT AND REVIVAL.

II. Another Action Pending.

- § 4. Ground of Abatement in General.
- § 5. Nature of Other Action or Proceedings.
- § 7. Pendency of Other Action.
- § 8. Identity of Cause of Action, Issues or Relief.
- § 9. Identity of Parties.
- § 10. Action in Different Jurisdiction.
- § 12. — State Court or United States Court.
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VI. Waiver of Grounds of Abatement and Time and Manner of Pleading in General.

§ 80. Failure to Make Objection in General.

§ 81. Delay in Making Objections or Filing Plea.

Cross References.

See the title ABATEMENT AND REVIVAL, vol. 1, p. 1, and references there given.

In addition, see post, APPEAL AND ERROR; CRIMINAL LAW.

As to abatement by death or removal of personal representative, see post, EXECUTORS AND ADMINISTRATORS. As to sufficiency of plea in abatement, see post, PLEADING.

II. ANOTHER ACTION PENDING.

§ 4. Ground of Abatement in General.

To Avoid Multiplicity of Suits.—Kaplan v. Coleman, 180 Ala. 267, 60 So. 385. See the title ABATEMENT AND REVIVAL, § 4, vol. 1, p. 5.

§ 5. Nature of Other Action or Proceedings.

Equitable Proceedings.—The rule that the pendency of a prior suit for the same cause of action in a court of competent jurisdiction between the same parties will abate a later suit does not extend to a bill in equity as ground for abatement of an action at law, though it may afford ground for requiring plaintiff to elect which action he will proceed with first. Billups v. Gilbert, 180 Ala. 437, 61 So. 901.

The pendency of a suit in equity is not ground for a plea in abatement of an action at law, but the remedy is to apply to equity to require plaintiff to elect as to which action he will first prosecute to judgment. Southern R. Co. v. Hayes, 183 Ala. 463, 62 So. 874.

§ 7. Pendency of Other Action.

Proof of Pendency. — The proofs in

support of a motion to abate and strike from the docket an action of detinue, because, by reason of another such action by another, the property is in the custody of the court, even if the ground of such motion is good, are insufficient; they not showing the other action has not been settled and dismissed, or otherwise disposed of. Sanders v. Rogers (Ala. App.), 77 So. 69.

§ 8. Identity of Cause of Action, Issues or Relief.

Must Conclude Parties.—The plea of another action pending is bad, unless the judgment rendered in the first action would conclude the parties and operate as a bar to the second. Milbra v. Sloss-Sheffield Steel, etc., Co., 182 Ala. 622, 62 So. 176.

Independent Cross Claim.—Kaplan v. Coleman, 180 Ala. 267, 60 So. 385. See the title ABATEMENT AND REVIVAL, § 8 (1), vol. 1, p. 6.

§ 9. Identity of Parties.

Where Names Differ.—A plea in abatement of the pendency of another action is bad unless the parties are the same, and where the names differ defendant

must show the identity of the plaintiffs. *McLaughlin v. Beyer*, 181 Ala. 427, 61 So. 62.

A plea of ne unques administrator, in an action by an administrator for the death of Edward Milbra, his intestate, growing out of the fact that through inadvertence or misunderstanding a letter of administration has been issued to Albert Milburn on the estate of Edward Milburn, and a pending suit by such administrator, was bad, since the names Milbra and Milburn were not idem sonans, and prima facie described different persons. *Milbra v. Sloss-Sheffield Steel, etc., Co.*, 182 Ala. 622, 62 So. 176.

§ 10. Action in Different Jurisdiction.

§ 12. — State Court or United States Court.

Action Pending in Federal Court.—The pendency of an action between same parties and for same cause in a United States District Court is cause for abatement of subsequently instituted action in a state court. *Interstate Chemical Corp. v. Home Guano Co. (Ala.)*, 75 So. 166.

§ 13. — Court of Different State or Country.

The mere pendency of a transitory action for the same cause between the same parties in another sovereignty is not matter upon which to rest an abatement. *Western Union Tel., Co. v. Howington (Ala.)*, 73 So. 550.

§ 15. Dismissal or Other Termination of Other Action.

Dismissal.—It is a complete answer to a plea in abatement on the ground of the pendency of another action that the action has been dismissed. *McLaughlin v. Beyer*, 181 Ala. 427, 61 So. 62.

The second action between same parties for same cause in a court of competent jurisdiction will not be abated for pendency of the first action if first is dismissed before filing of plea in abatement in second; but this rule will not be extended to cases where the discontinuance of the first action occurred after filing the plea in abatement of the second action. *Interstate Chemical Corp. v. Home Guano Co. (Ala.)*, 75 So. 166.

III. DEFECTS AND OBJECTIONS AS TO PARTIES AND PROCEEDINGS.

§ 18. Nature and Form of Action.

Under the express provision of Acts 1907, Sp. Sess. p. 67, the sustaining of defendant's pleas in abatement against counts of a complaint in an action for personal injury sustained in another state, on the ground that they were in form *ex delicto*, was erroneous. *Louisville, etc., R. Co. v. Laney*, 14 Ala. App. 287, 69 So. 993.

§ 36. Reorganization or Consolidation of Corporations.

Consolidation — Statutory Provisions.—Code 1896, § 1151, so far as it apparently made a revivor or change of defendants necessary to prevent an abatement of an action against a corporation upon its consolidation with other corporations, was repealed by Acts 1903, p. 310, regulating corporations, which deals with the same subject, but omits the clause in question, especially as the code commissioner, the code committee, and the legislature evidently regarded it as repealed; it being omitted from the Code of 1907. *Pearce v. Brilliant Coal Co. (Ala.)*, 77 So. 4.

IV. TRANSFER OR DEVOLUTION OF TITLE, RIGHT OR INTEREST IN GENERAL.

§ 44. Insolvency, Bankruptcy or Receivership of Corporations.

The appointment of a receiver for a railroad company pending a property owner's action against such company for damages for the maintenance of a public nuisance did not have the effect of abating the suit. *Alabama Terminal R. Co. v. Benms*, 189 Ala. 590, 66 So. 589.

V. DEATH OF PARTY AND REVIVAL OF ACTION.

(A) ABATEMENT OR SURVIVAL OF ACTION.

As to abatement of action for death by wrongful act in another state, see post, DEATH.

§ 48. Death as Cause of Abatement in General.

Common and Statute Law.—At common

law and in either a real or personal action the death of either party put an end to the action. *State v. Pearce*, 14 Ala. App. 628, 71 So. 656.

§ 50. Statutory Provisions.

Provisions in Pari Materia. — Code 1907, § 2496, providing that all personal actions survive in favor of the personal representative, § 2497, providing that real actions survive in favor of the heirs, devisees or personal representatives, and § 2499, providing that no action shall abate by the death or other disability of the plaintiff or defendant, if the cause of action survives, and that it must be revived in the name of the legal representative of the deceased, his successor or party in interest, being in *pari materia*, must be considered together. *State v. Pearce*, 14 Ala. App. 628, 71 So. 656.

§ 51. Causes of Action Which Survive.

§ 52. — In General.

See post, "Actions on Contract," § 53.

Ejectment or Trespass to Try Title.—

See post, "Ejectment or Trespass to Try Title," § 72 (3).

§ 53. — Actions on Contract.

Under Code 1907, §§ 2496, 2497 and 2499, an action on contract or a personal action, upon the death of the plaintiff, survives in favor of the personal representative. *State v. Pearce*, 14 Ala. App. 628, 71 So. 656.

§ 59. Death of Plaintiff.

§ 61. — One of Two or More Plaintiffs.

See post, "Ejectment or Trespass to Try Title," § 72 (3).

An action of trespass against a railroad company for damages for entering on the lands of the plaintiffs is not abated by reason of the death of two of the plaintiffs after action was begun, the question at issue being the title to the property, for while Code 1907, § 2497, declares that real actions to try the title or for the recovery of the possession of lands survive in favor of heirs, devisees and personal representatives, the defendant is not interested in the rights of personal representatives, and such, as only one recovery could be had against it. *Southern R. Co. v. Hayes* (Ala.), 73 So. 945.

B. CONTINUANCE OR REVIVAL OF ACTION.

§ 71. Nature and Necessity.

Right by Statute.—If the cause of action survived, a new suit might be brought in the case of the death of the plaintiff by his personal representative, and the right to revive and continue an original suit is statutory. *State v. Pearce*, 14 Ala. App. 628, 71 So. 656.

§ 72. Persons Required or Entitled to Continue or Revive Action.

§ 72 (2) Persons by Whom Action Continued or Revived in General.

Where the original plaintiff died, and the action was revived as to one of them by her heir, but there was nothing to indicate that he represented the other, or that he was the only legal heir, there was such defect of parties that a decree for "complainants" was error. *Chapman v. Chapman*, 194 Ala. 518, 70 So. 121.

§ 72 (3) Ejectment or Trespass to Try Title.

Under Code, 1907, §§ 2496, 2497, and 2499, action to try title or to recover possession of lands on the death of the plaintiff survives in favor of the heirs as well as the personal representative. *State v. Pearce*, 14 Ala. App. 628, 71 So. 656.

An action by several plaintiffs in ejectment or in the nature thereof does not abate on the death of one of the plaintiffs, but may be revived on suggestion of death and proceed in the name of the survivor. *Southern R. Co. v. Hayes* (Ala.), 73 So. 945.

§ 72 (6) Revival by Legatee or by Administrator.

See ante, "Nature and Necessity," § 71; "Ejectment or Trespass to Try Title," § 72 (3).

Under Code 1907, §§ 2496, 2497 and 2499, an action on contract or a personal action, upon the death of the plaintiff, survives in favor of the personal representative; the terms "legal representative," "his successor," and "party in interest," having reference to the personal representative of the deceased, who is the only proper or necessary party. *State v. Pearce*, 14 Ala. App. 628, 71 So. 656.

§ 74. Time for Taking Proceedings.

Twelve Months.—Under Code 1907, § 2500, providing the procedure for revivor, and § 2499, requiring a cause to be revived within twelve months of the death of the deceased, where the petitioner had taken all the necessary preliminary steps to entitle him to the order of revivor within 12 months, it was sufficient to authorize the entering of an order of revivor after the lapse of 12 months from the death of deceased. *State v. Pugh*, 14 Ala. App. 585, 70 So. 973.

Under Code 1907, § 2500, providing the procedure for revivor on the death of defendant executrix, pending suit, and authorizing citation to be issued to his representative when known to appear and defend the suit, and § 2499, requiring a cause to be revived within 12 months, petitioner after judgment for himself as plaintiff, and defendant's death October 4, 1914, pending his appeal, on January 16, 1914, at the first call of the suit after defendant's death obtained an order for revivor against the administrator *de bonis non* when appointed, and on his appointment September 19, 1914, at once caused a *scire facias* to issue to such administrator, which was served on September 23, was not chargeable with laches, and was entitled to mandamus to direct the judge of the circuit court to order the cause restored to the docket for trial and reviving it against the administrator *de bonis non*, as suits commenced by *scire facias* are like other actions, and the plaintiff may make out his case in such proceeding. *State v. Smith*, 12 Ala. App. 636, 68 So. 490.

§ 75. Application and Proceedings Thereon.

See post, "Delay in Making Objections or Filing Plea," § 81.

§ 75 (1) In General.

A revivor is not effected until the legal representative of the deceased plaintiff is substituted in his place in the suit. *Holman v. Clark*, 11 Ala. App. 238, 65 So. 913.

Where plaintiff shortly after death of defendant was granted leave by court to revive against defendant's personal representatives, when known, and about six months thereafter H. was appointed ad-

ministrator and within three months thereafter counsel for plaintiff required citation to issue to him as such administrator, service of which was accepted with waiver of further notice, after which counsel for plaintiff filed a so-called revivor and administrator appeared in case filing pleas and interrogatories to plaintiff, and the case was continued from term to term, at one of which administrator granted time within which to file pleas, and a ruling was had on said pleas, it was reversible error for court to dismiss the case, although no formal order or revivor had been entered, in view of Code 1907, § 2500, providing that the proper representative may come in and make himself a party defendant. *Forbes Piano Co. v. Hay* (Ala.), 75 So. 408.

§ 75 (3) Issues Raised or Determined, and Pleading and Proof.

Pleading.—Under Code 1907, §§ 2499, 2500, which furnishes the only authority for reviving a suit, and which allows a revivor only against the personal representative of the deceased, and where the complaint disclosed the fact that the action was one which could be maintained against the respondent only in his representative capacity, a motion for revivor and citation describing the respondent as "J. B., executor of the will of A. B.," sufficiently indicated that the proceedings were against the respondent in his representative capacity, and not individually. *State v. Pugh*, 14 Ala. App. 585, 70 So. 973.

§ 76. Order for Continuance or Revival.

Order Granting Leave to Revive.—An order reciting death of plaintiff and granting leave to revive in the name of his personal representative held not to revive the suit, but merely granted leave to revive. *Holman v. Clark*, 11 Ala. App. 238, 65 So. 913.

Presumption of Motion Made.—The making of the motion for revivor on the death of defendant pending cause, as required by Code 1907, § 2500, is merely a preliminary step to the court's granting leave to revive as a basis for the formal order to complete the waiver, and where a formal order was entered within the prescribed time reciting leave granted to revive against the representative when

known, the mere step of making a motion would be considered as merged in the entry, and it would be presumed that the action of the court in making its formal order was predicated upon a motion to that effect. *State v. Smith*, 12 Ala. App. 636, 68 So. 490.

§ 77. Proceedings after Continuance or Revival.

Failure to Revive—Ground for Abatement.—Where, though an order was made granting leave to revive a suit in the name of the personal representative of the deceased plaintiff, the name of such personal representative was not made known to the court, and she did not appear in the suit as a party thereto in person or by attorney for more than two years after her appointment as administratrix, a motion that the suit be abated should have been granted under Code 1907, § 2499, providing that no action abates by the death or other disability of plaintiff if the cause of action survives, but that it must, on motion within 12 months thereafter, be revived

in the name of the legal representative of the deceased. *Holman v. Clark*, 11 Ala. App. 238, 65 So. 913.

VI. WAIVER OF GROUNDS OF ABATEMENT AND TIME AND MANNER OF PLEADING IN GENERAL.

§ 80. Failure to Make Objection in General.

Filing Interrogatories.—The filing of interrogatories by defendant as provided by Code 1907, § 4049, does not operate as a waiver of grounds of abatement alleged. *Interstate Chemical Corp. v. Home Guano Co. (Ala.)*, 75 So. 166.

§ 81. Delay in Making Objection or Filing Plea.

Where a plea in abatement was filed, before pleading to the merits, and the matter set up therein was not otherwise waived or abandoned, it was within the trial court's discretion to allow it to be filed after the time for filing had passed. *Huntsville Grocery Co. v. Johnson*, 13 Ala. App. 488, 69 So. 967.

Abbreviations.

See post, APPEAL AND ERROR; INDICTMENT AND INFORMATION.

Abduction.

See the title ABDUCTION, vol. 1, p. 41, and references there given.

Abettors.

See post, CRIMINAL LAW; HOMICIDE; INDICTMENT AND INFORMATION.

Abode.

See post, CORPORATIONS; DOMICILE; PROCESS.

Abolition.

See the particular appropriate titles.

Abortion.

See the title ABORTION, vol. 1, p. 42, and references there given.

Abridgment.

As to abstract of record on appeal, see post, APPEAL AND ERROR; CRIMINAL LAW. As to abridgment of evidence in bill of exceptions, see post, CRIMINAL LAW; EXCEPTIONS, BILL OF.

Absconding.

As to arrest or attachment of absconding debtor, see post, ARREST; ATTACHMENT. As to suspension of attachment by limitation, see post, LIMITATION OF ACTIONS.

Absence.

See post, ATTACHMENT, CONTINUANCES; CRIMINAL LAW; JUDGMENT; LIMITATION OF ACTIONS.

Absentees.

See the title ABSENTEES, vol. 1, p. 44, and references there given.

Abstract.

As to abstract of record on appeal, see post, APPEAL AND ERROR; CRIMINAL LAW. As to abstract of judgments, see post, JUDGMENT. As to abstract instructions, see post, APPEAL AND ERROR; CRIMINAL LAW; TRIAL. As to abstract or moot questions, see post, APPEAL AND ERROR; CRIMINAL LAW.

ABSTRACTS OF TITLE.

Cross References.

See post, RECORDS; VENDOR AND PURCHASER.

Right of Abstractor to Purchase Adverse Interest.—An abstractor is not such an agent as to preclude him from purchasing an interest in land adverse to the title for which he has furnished a correct abstract to his client. *Moore v. Empire Land Co.*, 181 Ala. 344, 61 So. 940.

Abuse of Process.

See post, FALSE IMPRISONMENT; MALICIOUS PROSECUTION; PROCESS.

Abusive Language.

See post, CRIMINAL LAW; DISORDERLY CONDUCT; HOMICIDE.

Abutting Owners.

See post, EMINENT DOMAIN; HIGHWAYS; MUNICIPAL CORPORATIONS; RAILROADS; STREET RAILROADS.

Acceptance.

See post, **BILLS AND NOTES; CONTRACTS; SALES**, and other appropriate titles.

Accession.

See the title **ACCESSION**, vol. 1, p. 46, and references there given.

Accessories.

See post, **CRIMINAL LAW; HOMICIDE; INDICTMENT AND INFORMATION.**

Accident.

See post, **CARRIERS; MASTER AND SERVANT; NEGLIGENCE; RAILROADS.** As to mistake and accident as ground for equitable relief, see post, **CANCELLATION OF INSTRUMENTS; EQUITY; JUDGMENT; MORTGAGES; REFORMATION OF INSTRUMENTS.** As to accident insurance, see post, **INSURANCE.**

Accommodation Paper.

See post, **BILLS AND NOTES.**

Accomplices.

See post, **CRIMINAL LAW; HOMICIDE; WITNESSES.**

ACCORD AND SATISFACTION.

- § 1. Nature and Requisites in General.
- § 2. Subject Matter.
- § 5. Consideration of Accord in General.
- § 6. Part Payment.
- § 7. — In General.
 - § 7 (1) In General.
 - § 7 (2) Statutory Regulations.
- § 8. — Consideration in General.
- § 9. — By Bills, Notes or Checks.
- § 10. — Disputed and Unliquidated Claims.
- § 11. — Conditioned on Acceptance as Payment in Full.
- § 12. — Effect of Receipt in Full.
- § 15. Execution of Accord as Satisfaction.
- § 17. — Effect of Accord without Satisfaction.
- § 19. — Acceptance of New Agreement.
- § 22. Impeaching or Setting Aside.
- § 25. Pleading.

- § 25 (2) Sufficiency of Allegations.
- § 25 (3) Demurrer and Replication.
- § 26. Evidence.
 - § 26 (1) Presumptions and Burden of Proof.
 - § 26 (3) Sufficiency.
- § 27. Questions for Jury.

Cross References.

See the title ACCORD AND SATISFACTION, vol. 1, p. 47, and references there given.

§ 1. Nature and Requisites in General.

See post, "Consideration of Accord in General," § 5; "By Bills, Notes or Checks," § 9; "Effect of Accord without Satisfaction," § 17.

An agreement between two persons one of whom has a right of action against the other, that the latter should give and the former accept something in satisfaction of the right of action different from, and usually less than, that legally enforceable, when executed and when satisfaction has been made, is an accord and satisfaction. *Brown v. Lowndes County (Ala.)*, 78 So. 815; *Reliance Life Ins. Co. v. Garth*, 192 Ala. 91, 68 So. 87.

An accord and satisfaction may be the substitution of another agreement between the parties, which the promisee agrees to accept in satisfaction of his rights under a former one. *Reliance Life Ins. Co. v. Garth*, 192 Ala. 91, 68 So. 871.

For an accord and satisfaction of a claim for breach of contract, there must be a meeting of the minds of both parties upon an agreement fully settling the claim for the breach. *Reliance Life Ins. Co. v. Garth*, 192 Ala. 91, 68 So. 871.

Whether there was a rescission of an insurance contract, or an accord and satisfaction of a claim under it, by the return of the policy and all premiums, depended on whether the minds of the parties met in intending that such result should follow. *Reliance Life Ins. Co. v. Garth*, 192 Ala. 91, 68 So. 871.

§ 2. Subject Matter.

Where a newspaper conducting a voting contest, 15,000 votes being given for each subscription turned in by a contestant, breached the contract by increasing the number of votes to be given for

a subscription to 23,000, a receipt for second prize given by a contestant, stating that the amount received was in full settlement of second prize, would be an accord and satisfaction of any right she might have to first prize, since she was not entitled to both prizes, and a receipt operates according to the intention of the parties. *Hertz v. Montgomery Journal Pub. Co.*, 9 Ala. App. 178, 62 So. 654.

§ 5. Consideration of Accord in General.

See post, "Disputed and Unliquidated Claims," § 10.

A valid accord and satisfaction takes place where specific property is delivered and accepted in satisfaction of the demand, regardless of the value of the property. *Ikard v. Armstrong*, 10 Ala. App. 657, 65 So. 849.

§ 6. Part Payment.

§ 7. — In General.

§ 7 (1) In General.

To constitute accord and satisfaction, the debtor must pay as a compromise more than the amount admitted to be due, or pay the amount admitted, subject to a condition that its acceptance would be a settlement of the entire demand. *Borden & Co. v. Vinegar Bend Lumber Co.*, 7 Ala. App. 335, 62 So. 245.

Where the beneficiary of a life policy received part payment of the face of the policy, he was entitled to recover of the insurer the balance unless he agreed and understood that the part received was payment in full. *American Workmen v. James*, 14 Ala. App. 477, 70 So. 976.

Surrender of Evidence of Debt.—At common law, when a less sum than the amount due was accepted by the creditor, he could not thereafter maintain a suit for the difference, if he had surren-

dered the evidence of the debt to the party obligated thereby. *Brown v. Lowndes County* (Ala.), 78 So. 815.

§ 7 (2) Statutory Regulations.

Where a debt or demand is liquidated and due, payment by the debtor and receipt by the creditor of a less sum is not a satisfaction thereof, though the creditor agrees to accept it as such, if there is no release under seal or receipt in writing, as provided by Code 1907, § 3973, declaring all receipts effective according to the intention of the parties. *Ikard v. Armstrong*, 10 Ala. App. 657, 65 So. 849, cited in note in L. R. A. 1917A, 723.

§ 8. — Consideration in General.

See post, "Disputed and Unliquidated Claims," § 10.

§ 9. — By Bills, Notes or Checks.

Where insurance subagents, employed by an agent, tendered him a check with a statement of premiums collected, commissions reserved, and amounts due, which he cashed, the cashing and retaining of the proceeds was not payment to the agent by the subagents of uncollected premiums, unless the agent so accepted the check. *Page v. Barry*, 197 Ala. 449, 73 So. 22.

Where a check for the difference in plaintiff's favor on an exchange of an automobile for two horses was made for \$50 less than the amount for which it should have been made, plaintiff, by cashing the check, was not precluded or estopped from recovering such \$50. *Stewart v. Riley*, 189 Ala. 519, 66 So. 488, cited in note in 9 L. R. A. 1917A, 722.

§ 10. — Disputed or Unliquidated Claims.

Where the claim sued on is disputed, an agreement of compromise, accompanied by payment of a sum less than that claimed, operates as an accord and satisfaction; the concession by one being a sufficient consideration for the concession made by the other, without a release, receipt, or discharge in writing. *Western Railway v. Foshee*, 183 Ala. 182, 62 So. 500.

To constitute an accord and satisfaction the sum less than the amount actually due must have been accepted in full settlement of the disputed claim. Ala-

bama City, etc., *R. Co. v. Gadsden*, 185 Ala. 263, 64 So. 91.

That a beneficiary knew that an insurance adjuster had no authority to make part payment except in full settlement does not relieve the insurer of liability for the remainder actually due, unless there was a bona fide dispute as to liability, or other consideration in addition to the part payment. *American Workmen v. James*, 14 Ala. App. 477, 70 So. 976, cited in notes in L. R. A. 1917A, 719, 723.

§ 11. — Conditioned on Acceptance as Payment in Full.

The sending by a debtor of a check in full payment and the acceptance thereof by the creditor do not amount to a payment in full where the check is for a sum less than the amount admittedly due. *Louisiana Lumber Co. v. Farrior Lumber Co.*, 9 Ala. App. 383, 63 So. 788.

Defendant paid the balance of the principal of a mortgage, \$120 interest remaining unpaid, giving a check, reciting that it was for "balance due on mortgage." The check was accepted by the mortgagee's attorney, and paid. Held, that there being no dispute as to the amount due, there was no consideration for an implied agreement to accept a less sum in satisfaction, and the retention of the check did not extinguish the demand as an accord and satisfaction. *Abercrombie v. Goode*, 187 Ala. 310, 65 So. 816.

Where defendant owed \$460 of principal on a mortgage and \$120 interest and paid the principal by check, reciting that it was the balance due on the mortgage, the acceptance of the check did not constitute an accord and satisfaction, relieving defendant from liability for the interest. *Abercrombie v. Goode*, 187 Ala. 310, 65 So. 816, cited in notes in L. R. A. 1917A, 719, 724.

§ 12. — Effect of Receipt in Full.

A motion to satisfy a judgment in accordance with a receipt was properly denied allowance being made for support actually received from movant, where it appeared that the receipt did not bear witness of a payment made and that its consideration was a promise of future support. *Hare v. Hare*, 195 Ala. 41, 70 So. 630.

§ 15. Execution of Accord as Satisfaction.**§ 17. — Effect of Accord without Satisfaction.**

Code 1907, §§ 3973, 3974, relating to executed as well as executory agreements, and providing that all receipts, releases and discharges in writing, whether of a debt of record or a contract under seal, etc., must have effect according to the intention of the parties, and that all written settlements made in good faith for the composition of debts must be held to operate according to the intention of the parties, though no release under seal is given, and no new consideration passes, do not change the rule that a mere accord or agreement for satisfaction, without performance, has no effect on the debt or demand, and that when satisfaction, though in a less amount than that due, follows an accord, and the evidence of the debt is delivered up, there can be no subsequent recovery of the amount released by the creditor. *Brown v. Lowndes County (Ala.)*, 78 So. 815.

§ 19. — Acceptance of New Agreement.

In an action for money due from defendant county under an agreement whereby plaintiff was to furnish a road at an agreed price, a plea alleging the issuance of a warrant to plaintiff in consideration of warrants in a larger amount surrendered by plaintiff, which substitute warrant was paid, showed an accord and satisfaction of plaintiff's claim, and barred a further recovery on his claim. *Brown v. Lowndes County (Ala.)*, 78 So. 815.

§ 22. Impaching or Setting Aside.

Restoration of Money.—Where a newspaper conducting a voting contest, 15,000 votes being given for each subscription turned in by a contestant, breached the contract by increasing the number of votes to be given for a subscription to 23,000, a receipt for second prize, operating as a compromise and settlement, could not be voided for mistake or fraud, where the contestant claiming first prize did not offer to return the amount of the second prize, conceding that she had assented to the modified contract. *Hertz*

v. Montgomery Journal Pub. Co., 9 Ala. App. 178, 62 So. 564.

§ 25. Pleading.**§ 25 (2) Sufficiency of Allegations.**

A plea of accord and satisfaction, which alleges facts showing a payment of a less amount in full of a larger amount, is insufficient, where it fails to show that the amount was in dispute when the creditor accepted the lessor amount tendered in full. *Louisiana Lumber Co. v. Farrior Lumber Co.*, 9 Ala. App. 383, 63 So. 788, cited in notes in *L. R. A.* 1917A, 719, 722.

The plea, in an action for balance of salary as superintendent of defendant's coal mine, that no fixed sum was agreed on as salary when plaintiff entered defendant's employ, but that it was plaintiff's duty to compile, or cause to be compiled, sheets showing the daily cost of coal, and that the sheets compiled and inspected and followed by plaintiff, without objection, embraced the item of his salary, and that such amount was paid by defendant to plaintiff from time to time, without objection by plaintiff, is insufficient as a plea of accord and satisfaction in not averring that the payment was made or received in full satisfaction of the demand sued on. *Cahaba Coal Co. v. Hanby*, 7 Ala. App. 282, 61 So. 33.

In an action on a life policy, a plea alleging a settlement and satisfaction of the claim held subject to demurrer. *American Workmen v. James*, 14 Ala. App. 477, 70 So. 976.

§ 25 (3) Demurrer and Replication.

A replication alleging that an attorney's lien existed when an agreement of compromise was made would not be an answer to a plea of accord and satisfaction by reason of the compromise agreement. *Western Railway v. Foshee*, 183 Ala. 182, 62 So. 500.

§ 26. Evidence.**§ 26 (1) Presumptions and Burden of Proof.**

In an action on an insurance policy, where the insurer admits the original debt, the burden is on him to establish by a preponderance of the evidence that it was paid or that the beneficiary ac-

cepted a part payment knowing that it was intended to be an extinguishment of the debt and understanding that it was in full payment. *American Workmen v. James*, 14 Ala. App. 477, 70 So. 976.

§ 26 (3) Sufficiency.

Evidence, in an action to recover interest on city warrants, the principal and part of the interest on which had been paid, held insufficient to establish an accord and satisfaction. *Alabama City, etc., R. Co. v. Gadsden*, 185 Ala. 263, 64 So. 91.

Evidence under a plea of accord and satisfaction held not sufficient to show a sum admitted by the buyer to be due

under the contract and paid by him was paid on condition that it be accepted as full satisfaction or had been accepted as such. *Borden & Co. v. Vinegar Bend Lumber Co.*, 7 Ala. App. 335, 62 So. 245.

§ 27. Questions for Jury.

Where the sole dispute is whether plaintiff accepted a check in full settlement of his claim or only as a credit thereon, or whether there was adequate consideration for the settlement, and the evidence was in conflict on this, it was not error to refuse defendant's request for the general affirmative charge. *American Workmen v. James*, 14 Ala. App. 477, 70 So. 976.

ACCOUNT.

I. Right of Action and Defenses.

§ 6. Complicated Transactions or Circumstances.

II. Proceedings and Relief.

§ 12. Equitable Jurisdiction.

§ 13. Equitable Actions.

§ 14. — Nature and Scope of Remedy.

§ 17. — Pleading.

§ 17 (1) Bill, Complaint or Petition.

§ 17 (3) Cross Bill.

§ 20. — Taking and Stating Account, and Reference Therefor.

Cross References.

See the title ACCOUNT, vol. 1, p. 54, and references there given.

In addition, see post, ACCOUNT, ACTION ON; ACCOUNT STATED; EVIDENCE.

I. RIGHT OF ACTION AND DEFENSES.

§ 6. Complicated Transactions or Circumstances.

See post, "Bill, Complaint or Petition,"

§ 17 (1).

Where defendants had received \$3,000 in cash, and 90 shares of stock in the plaintiff corporation, together with dividends on corporate stock which had been sold to plaintiff, and there was other indebtedness growing out of the sale, a fit case for accounting was presented. *Smith & Sons v. Securities Co. (Ala.)*, 73 So. 892.

Numerous items of debits and credits extending over a period of years do not

constitute a complicated mutual account, conferring jurisdiction in an equitable action for accounting between debtor and creditor. *Reilly v. Woolbert*, 196 Ala. 191, 72 So. 10.

What States a Cause of Action on Theory of Complicated Account.—*Chrichton v. Hayles*, 176 Ala. 223, 57 So. 696. See the title ACCOUNT, § 6, vol. 1, p. 57.

II. PROCEEDINGS AND RELIEF.

§ 12. Equitable Jurisdiction.

See post, "Nature and Scope of Remedy," § 14; "Bill, Complaint, or Petition," § 17 (1).

Incident to Other Relief.—An account-

ing is always ordered in a court of equity, where it is an incident to some other relief. *Kelly v. Wollner* (Ala.), 78 So. 823.

Complicated or Impossible Accounting at Law.—*Compton v. Gilder*, 176 Ala. 309, 58 So. 271. See the title ACCOUNT, § 12, vol. 1, p. 60.

Adequate Remedy at Law.—Where there is no fiduciary relation devolving the duty to render an account, and the accounts are not mutual or so complex that a jury can not state them with necessary accuracy, equity has no independent jurisdiction in the matter of accounts. *Gayle v. Pennington*, 185 Ala. 53, 64 So. 572.

Where complainant executed mortgages on personalty to secure advances with which to make crops on land rented from defendants, the mortgagees, and defendants furnished him goods and provisions, but made false and excessive charges against him, and charged him interest largely in excess of 8 per cent per annum, equity had no jurisdiction of complainant's suit to recover the balance of what the mortgaged property sold for at foreclosure sale over what was actually due on the mortgages, there being no dispute as to items of credit, since his remedy at law was adequate and complete. *Lee v. Houston*, 197 Ala. 652, 73 So. 327.

§ 13. Equitable Actions.

§ 14. — Nature and Scope of Remedy.

See ante, "Equitable Jurisdiction," § 12.

Where there are mutual accounts between parties, either may resort to equity for a statement of the accounts and the ascertainment and recovery of any balance due, without regard to the question of confusion or complication in the accounts and whether or not complainant

claims a balance in his favor. *Phalin v. Dearman*, 181 Ala. 320, 61 So. 941.

§ 17. — Pleading.

§ 17 (1) Bill, Complaint or Petition.

A bill against G. for an accounting as to the profits under an agreement to buy and sell land and divide the profits, which alleged as against G.'s wife only that certain land sold at foreclosure was bid off by her and subsequently sold at a profit, and that G. represented her in the transactions, failed to show any equity as against her, as there was a complete and adequate remedy at law if she was liable at all unless barred by limitations; the bill not showing that complainant had any interest in, or claim or demand against, the particular funds received by her, or that she was a trustee in invitum. *Gayle v. Pennington*, 185 Ala. 53, 64 So. 572.

In a bill for accounting between debtor and creditor, allegations that respondent's indebtedness to complainant is by a complicated account, consisting of numerous items of debit and credit each month for many years, does not sufficiently allege a complicated account, and is bad on demurrer. *Reilly v. Woolbert*, 196 Ala. 191, 72 So. 10.

§ 17 (3) Cross Bill.

A defendant, in a suit in equity for an accounting, may have affirmative relief without filing a cross bill, or counterclaim therein, this being an exception to the general rule. *O'Kelley v. Clark*, 184 Ala. 391, 63 So. 948.

§ 20. — Taking and Stating Account, and Reference Therefor.

On a bill for an accounting, the chancellor had a right to restate the account in his own way in order to arrive at a correct conclusion. *Compton v. Collins*, 197 Ala. 642, 73 So. 334.

ACCOUNT, ACTION ON.

- § 1. Open Accounts in General.
- § 2. — Nature and Grounds of Action.
- § 6. — Pleading.
 - § 6 (1) Declaration, Complaint or Petition.
 - § 6 (2) Plea, Answer or Affidavit of Defense.
 - § 6 (5) Issues, Proof and Variance.
- § 7. — Evidence.
- § 9. Verified Accounts.
- § 11. — Requisites of Affidavit.
- § 12. — Conclusiveness of Verification and Defenses.
- § 14. — Evidence.

Cross References.

See the title ACCOUNT, ACTION ON, vol. 1, p. 65, and references there given.

In addition, see ante, ACCOUNT; post, ACCOUNT STATED.

§ 1. Open Accounts in General.

§ 2. — Nature and Grounds of Action.

Arrangement with Bank to Honor Checks for Price of Cotton.—Where defendant wrote its agent, engaged to purchase cotton, to arrange with his bank to honor checks for the purchase price of cotton, which would be taken up with drafts on defendant, and the plaintiff bank agreed to the arrangement, it may recover on account for the amount of checks honored but not taken up; an "account" including every item of indebtedness by contract express and implied. *Harris, etc., Co. v. Oneonta Trust, etc., Co.*, 186 Ala. 484, 65 So. 68.

§ 6. — Pleading.

§ 6 (1) Declaration, Complaint or Petition.

A count purporting to declare on an account should allege that the account is unpaid. *Perry v. Gallagher (Ala.)*, 75 So. 396.

§ 6 (2) Plea, Answer or Affidavit of Defense.

Filing Affidavit of Defense.—After the overruling of a demurrer to a complaint in an action upon an account and entry on the trial, it is too late to file an affidavit denying the correctness of the account sued upon. *Ewart Lumber Co. v. American Cement Plaster Co.*, 9 Ala. App. 152, 62 So. 560.

§ 6 (5) Issues, Proof and Variance.

Where a complaint demanded a sum due by account from defendant to a third person, and alleged that plaintiff was the owner of the account, and defendant pleaded the general issue, the statutes of frauds and limitations, and accord and satisfaction, proof of a special contract and its breach, such as guaranty of payment of a note, was inadmissible. *Hedden v. Wefel*, 13 Ala. App. 485, 69 So. 225.

§ 7. — Evidence.

Admissibility.—Where defendant introduced a letter written to plaintiff enclosing a check to be applied to his old account, promising to pay the balance, and asking that a note be sent to close up the invoices of certain purchases, and plaintiff introduced a letter in reply stating that the check had been placed to defendant's credit, that a note was enclosed as requested, and that another note for the balance of the old account with interest to date was also enclosed, it was competent to introduce evidence as to the authenticity of this last letter, and that it was properly directed, mailed, etc., such letter making a sufficient predicate for proof as to the amount due on the account at the date of the letters. *Baker v. Britt-Carson Shoe Co.*, 188 Ala. 225, 66 So. 475.

In an action for a balance due on an account, defendant introduced a letter written plaintiff, enclosing a check to be

applied to his old account, promising to pay the balance, and asking that a note be sent to close up the invoices of certain purchases. Plaintiff introduced a letter written in reply, stating that the check had been placed to defendant's credit, that a note was inclosed as requested, and that another note for the balance of the old account, with interest to date, was also inclosed. Held, that evidence as to the authenticity of this last letter, and that it was properly directed, mailed, etc., was properly admitted. *Baker v. Britt-Carson Shoe Co.*, 188 Ala. 225, 66 So. 475.

§ 9. Verified Accounts.

§ 11. — Requisites of Affidavit.

In *assumpsit*, an affidavit verifying the account alleging that defendant is justly indebted to plaintiff in a sum certain which is due, taken by a notary public in the city of St. Louis and duly certified under his seal, is sufficient under Code 1907, § 3965, stating the requisites of such affidavits. *Empire Clothing Co. v. Roberts, etc., Shoe Co.* (Ala. App.), 75 So. 634.

§ 12. — Conclusiveness of Verification and Defenses.

Acts 1915, p. 609, amending Code 1907, § 3970, providing that in all suits upon accounts an itemized statement of the account verified by affidavit of a competent witness is competent evidence of its correctness, unless defendant, within the time allowed for pleading files an affidavit denying on information and belief its correctness, does not undertake to describe a cause of action nor prescribe a defense, but merely provides a rule of evidence for the proof and denial of the correctness of an account which is cumulative and does not preclude the claim from being otherwise proven nor its correctness from being otherwise attacked. Hence, failure of a defendant to file an affidavit denying the correctness of the account sued on did not preclude him from introducing evidence showing payment. *Duck Brand Co. v. Douglass* (Ala.), 78 So. 635.

§ 14. — Evidence.

See ante, "Conclusiveness of Verification and Defenses," § 12.

Accounting.

See ante, ACCOUNTS; ACCOUNT, ACTION ON; post, ACCOUNT STATED.

ACCOUNT STATED.

- § 1. Nature and Subject Matter in General.
- § 4. Mode of Stating and Settling.
- § 5. Assent of Parties in General.
- § 8. Conclusiveness.
- § 19. Evidence.
 - § 19 (1) Presumptions and Burden of Proof.
 - § 19 (2) Admissibility.
 - § 19 (3) Weight and Sufficiency.
- § 20. Trial and Judgment.

Cross References.

See the title ACCOUNT STATED, vol. 1, p. 72, and references there given.
In addition, see ante, ACCOUNT; ACCOUNT, ACTION ON.

§ 1. Nature and Subject Matter in General.

See post, "Assent of Parties in General," § 5.

Where a debtor agreed with the creditor as to the amount due and promised to pay it, it became, in the absence of mistake or fraud, an account stated, notwithstanding a subsequent change of mind on the part of the debtor. *Wise v. Fuller*, 11 Ala. App. 427, 66 So. 827.

§ 4. Mode of Stating and Settling.

If the parties went over each item of an account and agreed to all the items, it was immaterial whether the items were ever totaled. *Nance v. Countess* (Ala. App.), 78 So. 464.

§ 5. Assent of Parties in General.

To make an "account stated," there must be a mutual agreement between the parties, as to the allowance of their respective claims. Hence, where the complaint solely relied on an account stated, no recovery can be had in the absence of evidence that defendant in any way assented to the charges in the account. *Walker v. Trotter Bros.*, 192 Ala. 19, 68 So. 345.

Admission Operating as Stated Account.—*Cook, etc., Contracting Co. v. Bell*, 177 Ala. 618, 59 So. 273, 274. See the title ACCOUNT STATED, § 5, vol. 1, p. 74.

What Must Be Shown to Entitle a Recovery upon an Account Stated. — *Cook, etc., Contracting Co. v. Bell*, 177 Ala. 618, 59 So. 273, 274. See the title ACCOUNT STATED, § 5, vol. 1, p. 75.

§ 8. Conclusiveness.

In an action on account alleged to have been stated to deceased, it was immaterial whether the wife of plaintiff in making entries in a book offered in evidence knew they were correct, when she testified that deceased, having read them, agreed that they were correct. *Nance v. Countess* (Ala. App.), 78 So. 464.

§ 19. Evidence.

§ 19 (1) Presumptions and Burden of Proof.

The presumption of the correctness of a statement of the secured account furnished a chattel mortgagor by the mortgagee arising from his failure to controvert it promptly was rebuttable, and the mortgagor could prove that any admission implied from his silence was not supported by any consideration in that no balance was owing on the account. *Hodges v. Kyle*, 9 Ala. App. 449, 63 So. 761.

§ 19 (2) Admissibility.

In detinue and trover by a chattel mortgagor against a purchaser from the chattel mortgagee in which it was claimed that the secured debt had been paid before the sale by the mortgagee, plaintiff testified on cross-examination that the mortgagee at his request furnished him a statement of the secured account. On redirect examination, after it had been introduced in evidence and after he had testified that the payments by him shown therein were correct, he was permitted to testify that certain charges against

him were incorrect. Held, that this was not error, since the rule that, where an account includes debits and credits, the debtor can not claim the credits without submitting to the debits, does not prevent the debtor from proving that charges against him are incorrect, where there is evidence of the payments by him other than that furnished by the creditor's admissions contained in his statement, and defendant's momentary impression that plaintiff by introducing the statement in evidence affirmed its correctness, could not form the basis of an estoppel, as defendant did not rely thereon to his prejudice. *Hodges v. Kyle*, 9 Ala. App. 449, 63 So. 761.

§ 19 (3) Weight and Sufficiency.

Evidence in an action on an account growing out of defendant's advances of money to plaintiff, and plaintiff's sale and delivery of lumber to defendants, held to

show an express agreement that the amounts held back were to cover differences in the quantity as well as in the quality of the lumber delivered. *Minge & Co. v. Barrett Bros. Shipping Co.*, 14 Ala. App. 468, 70 So. 962.

The giving by a bank of notices of overdrafts by a depositor does not establish a stated account against the depositor, especially where the witness testifying to the giving of the notices had no independent recollection, but relied on the way he knew he transacted business for the bank and kept its books. *Smith v. Allen*, 7 Ala. App. 397, 62 So. 296.

§ 20. Trial and Judgment.

Questions for Court or Jury.—Evidence held to present a question for the jury whether an account for nursing was stated. *Nance v. Countess* (Ala. App.), 78 So. 464.

Accretion.

See post, NAVIGABLE WATERS; WATERS AND WATERCOURSES.

Accrual.

See post, ACTIONS, BILLS AND NOTES; LIMITATION OF ACTIONS.

Accusation.

See post, CRIMINAL LAW; INDICTMENT AND INFORMATION; LIBEL AND SLANDER.

ACKNOWLEDGMENT.

I. Nature and Necessity.

- § 7. Filling Blanks or Altering Instrument without Acknowledgment.

II. Taking and Certificate.

- § 14. Authority to Take.
§ 20. — Disqualification of Officer.
 § 20 (1) In General.
 § 20 (3) Agent, Officer or Stockholder of Party in Interest.
§ 23. Mode of Taking Acknowledgment.
§ 24. — In General.
§ 25. — Of Married Woman.
§ 28. Making and Requisites of Certificate.
§ 29. — Making and Form in General.
§ 35. Contents of Certificate.
§ 37. — Acknowledgments of Married Women.
§ 38. — Acknowledgments of Particular Persons or Officers.
§ 43. Curing Defects.
§ 44. — Subsequent Acknowledgment.

III. Operation and Effect.

- § 49. Construction and Operation of Certificate in General.
§ 51. Unnecessary Acknowledgments.
§ 52. Authenticity of Instrument in General.
§ 55. Conclusiveness of Certificate.
 § 55 (1) In General.
 § 55 (2) Certificates of Acknowledgment by Married Women.
§ 56. Grounds of Impeaching or Contradicting Certificate.

IV. Pleading and Evidence.

- § 62. Evidence to Impeach or Contradict Certificate.
 § 62 (1) Admissibility in General.
 § 62 (2) Weight and Sufficiency in General.
 § 62 (3) Impeaching Testimony by Officer Taking Acknowledgment.

Cross References.

See the title ACKNOWLEDGMENT, vol. 1, p. 80, and references there given.

I. NATURE AND NECESSITY.

§ 7. Filling Blanks or Altering Instrument without Acknowledgment.

Acknowledgment and delivery of a deed having been perfected, the correction of the description by the grantor, though with the grantee's consent, had no effect; the instrument not having been again acknowledged or attested. *Hess v. Hodges* (Ala.). 78 So. 85.

II. TAKING AND CERTIFICATE.

§ 14. Authority to Take.

§ 20. — Disqualification of Officer.

§ 20 (1) In General.

One interested in a conveyance may not take and certify the acknowledgment of one of the grantors. *Swindall v. Ford*, 184 Ala. 137, 63 So. 651.

Cousin of Grantee.—Notwithstanding

the character and quality of an officer's act in taking an acknowledgment is judicial in nature, a first cousin of a grantee in a deed is not disqualified to take and certify the acknowledgment of the grantors in executing the conveyance; Code 1907, § 4626, as to the disqualification of certain judicial officers having no application to the taking of acknowledgments by officers. *McKenzie v. Hixon* (Ala.), 78 So. 791.

§ 20 (3) Agent, Officer or Stockholder of Party in Interest.

Where an attorney, who was also a notary public, was employed to purchase standing timber for C., being paid a specified price per acre for his services, he was interested in the transaction, but not in the conveyance of timber by complainants to C., and hence was not disqualified to take complainants' acknowledgment to the deed. *Vizard v. Robinson*, 181 Ala. 349, 61 So. 959.

A mortgage on the homestead to a bank, the wife's separate acknowledgment of which was taken by an officer and stockholder of the bank, is invalid against direct attack. *Walker v. Baker* (Ala.), 74 So. 368.

§ 23. Mode of Taking Acknowledgment.

§ 24. — In General.

Before an officer is authorized to certify the acknowledgment of a purported deed, there must be in fact an acknowledgment by the grantor of the instrument signed. *Sulzby v. Palmer*, 194 Ala. 524, 70 So. 1.

To give acknowledging officer jurisdiction of grantor, mere casual presence of reputed grantor and possession of instrument purporting to have been signed are not sufficient, but there must be an acknowledgment in some form. *Qualls v. Qualls*, 196 Ala. 524, 72 So. 76.

§ 25. — Of Married Woman.

A wife's separate examination and acknowledgment is necessary only when the title to a homestead is in the husband. *Spink v. Guarantee, etc., Co.*, 181 Ala. 272, 61 So. 302.

§ 28. Making and Requisites of Certificate.

§ 29. — Making and Form in General.
Only substantial compliance with the

form of acknowledgment provided is required. *Bowles v. Lowery*, 181 Ala. 603, 62 So. 107.

If, without resort to mere inference or conjecture, what was intended to be expressed can be clearly seen, errors of a purely clerical or grammatical nature will not avoid a certificate of acknowledgment. *Bowles v. Lowery*, 181 Ala. 603, 62 So. 107.

It is the policy of the law to uphold a certificate of acknowledgment of a conveyance of land where from the certificate and the conveyance a substantial, though not a literal, compliance with the statutes has been observed; consequently, though the certificate of acknowledgment signed by the mortgagor was not an exact copy of the form prescribed by Code 1907, § 3361, in that it omitted to state the style of the officer receiving the certificate, though it appeared from the notation by his signature that he was a justice of the peace, and substituted the words "did execute" for the statutory words "he executed" with reference to the execution by the mortgagor, the certificate is sufficient. *Rosebrook v. Martin* (Ala.), 76 So. 950.

§ 35. Contents of Certificate.

§ 37. — Acknowledgments of Married Women.

Where the separate acknowledgment of a deed by a wife was not questioned, and it was legally attested both as to her and her husband by subscribing witnesses, its validity was not affected by the omission of the word "they" from the joint acknowledgment of herself and her husband. *Wright v. Bentley Lumber Co.*, 186 Ala. 616, 65 So. 353.

§ 38. — Acknowledgments of Particular Persons or Officers.

Under Code 1907, § 3361, prescribing the form of acknowledgment to be used on conveyances by a corporation of every description admitted to record, an acknowledgment for a corporation, made subsequent to the adoption of the Code 1907, must, to be valid, comply substantially, though not literally, with the form prescribed in § 3361. *Steverson v. Agee & Co.*, 9 Ala. App. 389, 63 So. 794.

§ 43. Curing Defects.**§ 44. — Subsequent Acknowledgment.**

Under Code 1907, § 3374, providing that conveyances of property which are acknowledged according to law and recorded may be received in evidence without further proof, where the certificate of acknowledgment to a deed was not in proper form, a new certificate, subsequently made in proper form, did not make the deed self-proving, where the deed was not again recorded after the new certificate was placed upon it. *Steverson v. Agee & Co.*, 9 Ala. App. 389, 63 So. 794.

Where the certificate of acknowledgment was not in proper form, an additional certificate in proper form, subsequently made, was invalid unless there was a reappearance and a reacknowledgment of the grantor before the certifying officer. *Steverson v. Agee & Co.*, 9 Ala. App. 389, 63 So. 794.

III. OPERATION AND EFFECT.**§ 49. Construction and Operation of Certificate in General.**

In construing an acknowledgment it and the deed are to be read together. *Bowles v. Lowery*, 181 Ala. 603, 62 So. 107, cited in note in 49 Ann. Cas. 1918C, 347.

A certificate of acknowledgment that "B. her heirs whose names is signed to the foregoing conveyance, and who is known to me," acknowledge, in connection with the evidence that the other signers were all of the children of B., except the grantee, is to be read with "and" between "B." and "her heirs," and "are" in place of "is," and construed as a certificate of acknowledgment by all the grantors, who are B. and all of her children, except the grantee. *Bowles v. Lowery*, 181 Ala. 603, 62 So. 107.

Though the first initial of a grantor's subscription to a deed looked more like a J. than a T., the variance, if any, between the grantor's subscription and the recital in the body of the deed, and the conveyance was by T. H. Watson was cured by the notary's certificate that the grantor T. H. Watson, was known to him, etc. *Musgrove v. Cordova Coal, etc.*, 191 Ala. 419, 67 So. 582.

§ 51. Unnecessary Acknowledgments.

While an acknowledgment is, when efficacious, a part of a conveyance, where the conveyance, apart from the acknowledgment, is not affected with any element of invalidity, and can stand as valid and efficacious to pass the title or right it purports to transmit without an acknowledgment, the conveyance can and will stand, notwithstanding the absence of jurisdiction on the part of the officer taking the acknowledgment or fraud or duress avoiding the act and certification of such officer. *Butler v. Hill*, 190 Ala. 576, 67 So. 280.

§ 52. Authenticity of Instrument in General.

An efficacious acknowledgment of a deed not only renders it self-proving, if seasonably recorded, but imports verity against which none can complain, except for duress or fraud. *Vizard v. Robinson*, 181 Ala. 349, 61 So. 959.

The certificate of acknowledgment of a deed is conclusive as to the fact and circumstances of the acknowledgment, and, as to a bona fide purchaser for value, as to the voluntary execution of the deed, but as to others the voluntary nature of the deed may be denied. *Gilley v. Denman*, 185 Ala. 561, 64 So. 97.

§ 55. Conclusiveness of Certificate.**§ 55 (1) In General.**

The act of taking an acknowledgment of a conveyance being judicial in nature, a certificate of acknowledgment in the form prescribed by law is conclusive of the facts and acts recited, unless the officer is shown not to have acquired jurisdiction of the person or persons making the acknowledgment, or unless the act of giving the acknowledgment was characterized by or affected with fraud or duress. *McKenzie v. Hixon (Ala.)*, 78 So. 791.

Where the officer taking acknowledgment of instrument is without jurisdiction, there being no examination of the reputed jurisdiction, there being no examination of the reputed grantor and no acknowledgment before the officer, his certificate is void, and may be attacked collaterally. *Qualls v. Qualls*, 196 Ala. 524, 72 So. 76.

The question of validity *vel non* of an instrument as respects the competency of the officer taking acknowledgment must be raised in a direct, and not collateral, proceeding. *Qualls v. Qualls*, 196 Ala. 524, 72 So. 76.

§ 55 (2) Certificates of Acknowledgment by Married Women.

Where an alleged grantor, a married woman, was present before a justice of the peace on the occasion when a certificate of acknowledgment recited her voluntary execution of a deed and the deed was written by the justice at that time, if she went there for the purpose of perfecting the execution and acknowledgment of a conveyance to the grantee or came to entertain that purpose while in the presence of the justice, and thereupon submitted to the justice's exercise of his power to take her acknowledgment, his jurisdiction was complete and conclusive of the facts certified by him, which certification comprehended her execution of the instrument and rendered it valid, unless vitiating fraud induced her execution of the instrument. *Butler v. Hill*, 190 Ala. 576, 67 So. 260.

§ 56. Grounds of Impeaching or Contradicting Certificate.

Fraud or Duress.—The taking of acknowledgments of conveyances by an officer authorized to do so is not a "ministerial act," but an "act judicial" in character, and when such an officer acquires jurisdiction in a particular case, and certifies the facts and acts taking place in the form and as the law prescribes, his certification can only be contradicted or impeached for fraud or duress; and hence parol evidence is only admissible to show an absence of jurisdiction or fraud or duress affecting the process of giving and taking the acknowledgment. *Butler v. Hill*, 190 Ala. 576, 67 So. 260.

Participation in Fraud by Certifying Officer.—It is not essential to the impeachment of a certified acknowledgment that the certifying officer should have

participated in the fraud or duress practiced upon the grantor. *Gilley v. Denman*, 185 Ala. 561, 64 So. 97; *Qualls v. Qualls*, 196 Ala. 524, 72 So. 76.

Disqualification of Officer.—An attack on a deed for alleged disqualification of the officer to take the acknowledgment of the parties is direct and not collateral. *Vizard v. Robinson*, 181 Ala. 349, 61 So. 959.

A mortgage is not subject to collateral attack, in a prosecution for obtaining the signature thereto by false pretense, on the ground that the notary who took the acknowledgment was personally interested in the mortgage. *Addington v. State* (Ala. App.), 74 So. 846.

IV. PLEADING AND EVIDENCE.

§ 62. Evidence to Impeach or Contradict Certificate.

§ 62 (1) Admissibility in General.

See ante, "Grounds of Impeaching or Contradicting Certificate," § 56.

§ 62 (2) Weight and Sufficiency in General.

In a suit to foreclose a mortgage, where its execution is denied affirmative testimony of interested witnesses as to the falsity of the officer's certificate of acknowledgment will be scrutinized carefully, in the light of their interest, but if full and direct, is entitled to the weight given that of any other interested witness. *Sulzby v. Palmer*, 194 Ala. 526, 70 So. 1.

§ 62 (3) Impeaching Testimony by Officer Taking Acknowledgment.

Where the defense to ejectment was a deed from plaintiff claimed by plaintiff to be forged, no right of a bona fide purchaser for value being involved, the testimony of the acknowledging officer was admissible to impeach the acknowledgment, where he affixed his seal and certificate in the absence of the reputed grantor. *Qualls v. Qualls*, 196 Ala. 524, 72 So. 76.

Acquiescence.

See post, ESTOPPEL; LACHES; SALES; and other appropriate titles.

Acquittal.

See post, CRIMINAL LAW.

ACTION.

I. Grounds and Conditions Precedent.

- § 1. Nature and Elements of Cause of Action.
- § 4. Illegal or Immoral Transactions.
- § 5. Criminal Acts.
- § 6. Actions for Declarations of Rights without Other Relief.
- § 12. Defenses in General.

II. Nature and Form.

- § 21. Legal or Equitable.
- § 22. — Nature of Action.
- § 26. Contract or Tort.
- § 27. — Nature of Action.
 - § 27 (1) In General.
 - § 27 (3) Carrier and Shipper of Goods or Live Stock.
 - § 27 (4) Carrier and Passenger.
- § 28. — Waiver of Tort.
- § 29. Forms of Action at Common Law.
- § 30. — Distinctions as to Form.
- § 33. Statutory Remedies.
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III. Joinder, Splitting, Consolidation and Severance.

- § 38. Single and Entire Cause of Action in General.
 - § 38 (1) In General.
 - § 38 (3) Different Kinds of Injury from Same Act.
 - § 38 (4) Separate Torts or Wrongful Acts and Words of Characterization.
 - § 38 (5) Separate Contracts or Instruments.
- § 39. Joinder of Causes of Action at Common Law.
- § 40. — In General.
- § 41. — Forms of Action.
- § 43. Joinder of Causes of Action under Codes and Practice Acts.
- § 44. — Forms of Action.
- § 45. — Nature and Grounds of Action in General.
 - § 45 (1) In General.
 - § 45 (2) Action to Recover Property.
 - § 45 (3) Injuries to Person, Property or Reputation.
 - § 45 (4) Causes of Action Arising Out of Contract.
- § 47. — Contract and Tort.
- § 48. — Claims Arising Out of Same Transaction or Transactions Connected with Same Subject of Action.
 - § 48 (1) In General.
 - § 48 (2) Claims Arising from Wrongful or Tortious Acts.
 - § 48 (3) Claims Arising from Contract.
- § 50. — Parties and Interests Involved.
- § 51½. Joinder of Causes of Action under State and Federal Laws.

§ 53. Splitting Causes of Action.

§ 53 (2) Actions ex Delicto.

§ 53 (3) Actions ex Contractu.

§ 54. Consolidation of Actions.

§ 57. — Actions Which May Be Consolidated.

IV. Commencement, Prosecution and Termination.

§ 67. Stay of Proceedings.

§ 69. — Another Action Pending.

Cross References.

See the title ACTION, vol. 1, p. 100, and references there given.

I. GROUNDS AND CONDITIONS PRECEDENT.

§ 1. Nature and Elements of Cause of Action.

A cause of action is made up of a duty and a breach thereof. *Birmingham R., etc., Co. v. Littleton (Ala.)*, 77 So. 565.

There must be parties to a cause of action; they being jurisdictional. *Gill v. More (Ala.)*, 76 So. 453.

§ 4. Illegal or Immoral Transactions.

Where the enjoyment of a right reserved in a deed to use a balcony and stairway obstructing street involved violation of law, no right to damages could arise from their removal by the owner of the building. *Hausman v. Brown (Ala.)*, 77 So. 993.

§ 5. Criminal Acts.

Every criminal act which injures the person or property of another is also a civil tort redressable by the courts and preventable in proper cases by injunctive process. *Hardie-Tynes Mfg. Co. v. Cruise*, 189 Ala. 66, 66 So. 657.

§ 6. Actions for Declarations of Rights without Other Relief.

A moot case is one which seeks to determine an abstract question not resting upon existing facts or rights, and such a case will not be determined by the courts. *Postal Tel. Cable Co. v. Montgomery*, 193 Ala. 234, 69 So. 428, cited in note in *Ann. Cas.* 1918B, 559.

§ 12. Defenses in General.

Where plaintiff alleged city's contract to pay for road-making material taken from his land, the defense that such material was a mineral and owned by a

third person was not available to the city, which did not connect itself with the mineral owner, as a defense to the action, which was personal and transitory, when plaintiff was in undisputed possession of the land. *De Kalb County v. McClain (Ala.)*, 78 So. 961.

II. NATURE AND FORM.

§ 21. Legal or Equitable.

§ 22. — Nature of Action.

Right to Timber.—Where defendants are in adverse possession of certain standing timber claimed by complainant, complainant's right to the timber should be determined in an action at law. *Smith Lumber Co. v. Jernigan*, 185 Ala. 125, 64 So. 300.

Recovery of Money Paid for Stock.—*King v. Livingston Mfg. Co.*, 180 Ala. 118, 60 So. 143. See the title ACTION, § 22, vol. 1, p. 100.

§ 26. Contract or Tort.

§ 27. — Nature of Action.

§ 27 (1) In General.

If it is clear from the complaint that it declares as for breach of contract, that negligence is alleged does not change character of action. *Western Union Tel. Co. v. Bowen (Ala. App.)*, 76 So. 985.

§ 27 (3) Carrier and Shipper of Goods or Live Stock.

See post, "Carrier and Passenger," § 27 (4).

A count in trover for the value of trunks transported by a carrier, but not delivered, was ex delicto. *Southern R. Co. v. Brown*, 192 Ala. 389, 68 So. 321.

In an action for the value of trunks

transported by a carrier and not delivered, a count in Code form as upon a bill of lading, but having no allegation that the transportation was for a reward, was *ex delicto*. *Southern R. Co. v. Brown*, 192 Ala. 389, 68 So. 321.

§ 27 (4) Carrier and Passenger.

The owners of hunting dogs, paying for transportation and excess baggage, could sue the railroad company, either *ex contractu* or *ex delicto*, for loss, by death from poisoning of hunting dogs checked by them as baggage, the contract, so far as the railroads' liability for the dogs was concerned, being for the sole benefit of the owners. *Louisville, etc., R. Co. v. Dickson (Ala.)*, 73 So. 750.

§ 28. — Waiver of Tort.

Conversion.—Plaintiff may waive conversion and sue for money had and received. *Hudson v. Barrett (Ala. App.)*, 77 So. 428; *Albany Warehouse Co. v. Fisk Cotton Co.*, 12 Ala. App. 527, 67 So. 728.

A person who paid the owner of land the purchase price for the timber rights thereon and was placed in such possession thereof as the property in its then condition was capable or susceptible of, had such an equitable title to the timber as would support an action of case for its conversion, or, if the tort was waived, for money had and received, even though he had received no deed to the timber. *Stevenson v. Agee & Co.*, 9 Ala. App. 389, 63 So. 794.

Same—Resale Where Title Had Been Retained by Manufacturer.—The sale of an automobile to which the manufacturer retained title was conversion by party who sold it, for which the manufacturer could maintain trover or could waive tort action and recover upon common counts after disposition of the car for money or other property. *Finney v. Studebaker Corp.*, 196 Ala. 422, 72 So. 54.

Same — Sale of Interest of Other Owner.—Assumpsit may be maintained for money received by one co-owner from the sale of the interest of another co-owner in the common property, though such sale was a conversion. *Howton v. Mathias*, 197 Ala. 457, 73 So. 92.

Refusal of Bailor to Deliver.—Where

a sheriff, after levying upon property, delivers it to a bailee, he may maintain assumpsit or trover for the bailee's breach of duty in refusing to deliver. *Higdon v. Warrant Warehouse Co.*, 10 Ala. App. 496, 63 So. 938.

§ 29. Forms of Action at Common Law.

§ 30. — Distinctions as to Form.

Where defendant had the legal title to lumber purchased by plaintiff from a third person, he could sue for its value in trover, while if he had only an equitable lien or title, his right of action would be in trespass on the case. *Stevenson v. Agee & Co.*, 9 Ala. App. 389, 63 So. 794.

§ 33. Statutory Remedies.

§ 35. — Cumulative or Exclusive Remedies.

Special Statutory Remedy Is Generally Cumulative.—*Jaffe v. Fidelity, etc., Co.*, 7 Ala. App. 206, 60 So. 966. See the title ACTION, § 35, vol. 1, p. 100.

New Right Created and Special Remedy Provided.—Where by a statute a new right is given and a special remedy provided, the remedy can be applied in no other way than that prescribed by the statute. *Singer Sewing Mach. Co. v. Teasley (Ala.)*, 73 So. 969.

III. JOINDER, SPLITTING, CONSOLIDATION AND SEVERANCE.

§ 38. Single and Entire Cause of Action in General.

§ 38 (1) In General.

One may recover in one action all damages from breach of duty growing out of a contract. *Birmingham Transfer, etc., Co. v. Still*, 7 Ala. App. 556, 61 So. 611.

§ 38 (3) Different Kinds of Injury from Same Act.

In an administrator's action under the federal Employer's Liability Act April 22, 1908, c. 149, 35 Stat. 65, amended by Act April 5, 1910, c. 143, 36 Stat. 291 (U. S. Comp. St. 1913, §§ 8657-8665), for death of a servant, where one count of the complaint sought to recover for pecuniary loss of the surviving father and mother by the death while the other

sought to recover damages suffered by the deceased, such counts sought to enforce two distinct and independent liabilities. *Louisville, etc., R. Co. v. Fleming*, 194 Ala. 51, 69 So. 125.

§ 38 (4) Separate Torts or Wrongful Acts and Words of Characterization.

In an action against a harbor master and a towing company for negligently berthing a vessel, it was no objection to the complaint that it ascribed the injury suffered to concurring breaches of duty by different persons having the effect to produce but a single cause of action, as such concurring negligence might be charged in one and the same count of the complaint. *American Bonding Co. v. New York, etc., Whiting Co.*, 11 Ala. App. 578, 66 So. 847.

§ 38 (5) Separate Contracts or Instruments.

Where plaintiff sold goods to defendant, and all were charged to defendant, though under separate heads, so as to show that particular enterprise the goods were purchased for, there was but one account, and the dividing of the items under different heads did not constitute them separate causes of action. *White v. Bean & Co.* (Ala. App.), 77 So. 924.

§ 39. Joinder of Causes of Action at Common Law.

§ 40. — In General.

Where the several tracts of land sued for in ejectment might have been embraced in one count, the fact that they were claimed in several counts could not result in a misjoinder. *Smith v. Bachus*, 195 Ala. 8, 70 So. 261.

§ 41. — Forms of Action.

Where, in an action for death of plaintiffs' intestate by contact with a heavily charged electric wire, permitted by defendant's servants to remain hanging in the street, a count of the complaint alleged that decedent's death was caused by the wanton or willful conduct of defendant, its agents or servants, "as aforesaid," such allegation did not change the count to one in trespass, charging actual participation by defendant in the act complained of; it not being an independent charge, but merely ascribing such act to

have been done "as aforesaid," referring the allegation to the facts particularized in the former part of the count. *Birmingham R., etc., Co. v. Jackson*, 9 Ala. App. 588, 63 So. 782.

Where the complaint, in an action *ex contractu*, claimed a sum due from the "defendant as the value of tram cars, etc., belonging to plaintiff, placed upon defendant's property in carrying out a certain contract, which property defendant wrongfully appropriated to its own use, without the consent of the plaintiff, and kept and retained the benefit thereof without paying plaintiff for the same, which sum is now due and unpaid," the complaint was demurrable, such count attempting to join a claim in *assumpsit* and for conversion, while such a joinder is bad although such causes of action might be joined in one complaint in separate counts. *Sloss-Sheffield Steel, etc., Co. v. Payne*, 191 Ala. 69, 68 So. 359.

A count, alleging that defendant's servants, acting within the scope of their duty, took and carried away or consumed the personalty described, and also took charge of and injured three oxen belonging to plaintiff by knocking their eyes out and crippling them, and took charge of three wagons belonging to plaintiff and damaged two of them, was bad for improperly joining counts in trespass and case. *Interstate Lumber Co. v. Duke*, 183 Ala. 484, 62 So. 845.

§ 43. Joinder of Causes of Action under Codes and Practice Acts.

§ 44. — Forms of Action.

Plaintiff brought suit against defendant, his banker, alleging in counts 1 and 2 a cause of action in *assumpsit* to recover a deposit, charging defendant's failure and refusal on demand to pay the same, and in counts 3 and 4 a cause of action for damages for tort for defendant's alleged wrongful failure and refusal to pay plaintiff's check as a depositor. Held, that such counts were all based on alleged breaches of duty "arising out of the same transaction, or relating to the same subject matter," and were therefore properly joined as authorized by Code 1907, § 5329. *Hooper v. Herring*, 9 Ala. App. 292, 63 So. 785.

§ 45. — Nature and Grounds of Action in General.

§ 45 (1) In General.

While it is not permissible to join several distinct causes of action in the same count, a complaint containing several counts, and stating different causes of action in each of the several counts, is not demurrable for a misjoinder of causes of action or "misjoinder of actions." *Tennessee, etc., R. Co. v. Cavin* (Ala. App.), 77 So. 80.

§ 45 (2) Actions to Recover Property.

Under Code 1907, § 5329, providing for the joinder of actions *ex delicto* and *ex contractu*, and § 5367, relating to the allowance of amendments, the court properly allowed a complaint in detinue to be amended by adding a count in trover. *Wilson v. Ratcliff*, 197 Ala. 548, 73 So. 84.

§ 45 (3) Injuries to Person, Property or Reputation.

A joinder of two causes of action is not a misjoinder, where the injury complained of is the result of a concurrence of separate acts of negligence, though each be separately actionable under the Employer's Liability Statute (Code 1907, § 3910 et seq.). *Alabama, etc., R. Co. v. Neal*, 8 Ala. App. 591, 62 So. 554.

§ 45 (4) Causes of Action Arising Out of Contract.

Although Code 1907, § 5328, provides that all actions on contract may be joined and separate verdicts rendered, where plaintiff, under a count for breach of warranty in sale of a mule, under which the measure of damages would be the difference between the value of the property at the time of sale and its value had it been as warranted, introduced evidence tending to support such count, he could not concurrently pursue the inconsistent remedy of rescission, under a count for money had and received, under which the measure of recovery would be the amount paid with interest. *Abraham Bros. v. Means* (Ala. App.), 75 So. 187.

§ 47. — Contract and Tort.

Under Code 1907, § 5329, providing that actions for tort may be joined with

actions in contract arising out of the same transaction, a bailor suing for loss of or injury to goods occasioned by failure of the bailee for hire to use ordinary care may join his causes of action in case for negligence and in *assumpsit* for breach of the bailment. *Bricken v. Sikes*, 14 Ala. App. 187, 68 So. 801.

§ 48. — Claims Arising Out of Same Transaction or Transactions Connected with Same Subject of Action.

§ 48 (1) In General.

Under the direct provisions of Code 1907, § 5329, actions *ex delicto* arising out of the same transaction may be joined with actions *ex contractu*. *Western Union Tel. Co. v. Farmers', etc., Bank*, 7 Ala. App. 637, 62 So. 250.

By direct provision of Code 1907, § 5329, a complaint may contain a count *ex contractu* and one *ex delicto*, provided the actions arise out of the same transaction, or relate to the same subject matter. *Nashville, etc., Railway v. Farrell*, 14 Ala. App. 380, 70 So. 986.

§ 48 (2) Claims Arising from Wrongful or Tortious Acts.

In his action for injuries, a servant's joinder of two separate causes of action based on the same accident was not erroneous. *Pensacola St., etc., Co. v. Brooks*, 14 Ala. App. 364, 70 So. 968.

A count to recover a statutory penalty under Code 1907, § 6435, for cutting trees or saplings, and a count for trespass for injury to the land by cutting trees, may be joined in one action. *Rudolph v. Holmes* (Ala.), 78 So. 839.

Violation of Federal and State Employers' Liability Acts. — As the jurisprudence of the state and of the federal government form together one system constituting the law of the land for the state, and the state courts have concurrent jurisdiction with the federal courts in actions under the federal Employers' Liability Act, it is permissible to join in one action causes based on a violation of the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]) with those based on the state liability act. *Atlantic, etc., R. Co. v. Jones*, 9 Ala. App. 499, 63 So. 693.

§ 48 (3) Claims Arising from Contract.

Under Code 1907, §§ 5328, 5329, providing that all actions on contracts for the payment of money may be united in the same action, and that all actions ex delicto may be joined in the same suit, and may be joined with actions ex contractu arising out of the same transaction, where a seller of goods sued the buyer for his breach of contract in countermanding the order, joining the common counts and a count charging the breach of a special executory contract of sale, there was no misjoinder, since counts requiring the same judgment may be joined. *Crandall-Pettee Co. v. Jebbles, etc., Conf. Co.*, 195 Ala. 152, 69 So. 964.

Where counts 2 and 3 of the complaint, on which cause was tried, claimed for breach of warranty and money had and received, there being nothing to indicate the claims as set out were for inconsistent remedies growing out of the same transaction, the complaint was not subject to demurrer on that ground, in view of Code 1907, § 5328, providing that all actions on contract, express or implied, for the payment of money, may be united in the same action. *Abraham Bros. v. Means* (Ala. App.), 78 So. 459.

Under Code 1907, §§ 5328, 5329, providing that all actions on contracts may be joined, and that actions ex delicto may be joined with actions ex contractu arising out of the same transactions, the beneficiary of a fire policy, who has suffered a loss, may in the same complaint join actions on the policy with those on an award made in arbitration. *Union Marine Ins. Co. v. Charlie's Transfer Co.*, 186 Ala. 443, 65 So. 78.

§ 50. — Parties and Interests Involved.

Joint or Common Liability of Defendants.—In an action for a servant's death, a cause of action against the master, founded on the Employers' Liability Act (Code 1907, § 3910), under which the damages recoverable are compensatory, and a cause of action against the alleged negligent superintendent, founded on Code 1907, § 2486, under which the damages recoverable are punitive, can not be joined in the same count; such causes of action being "separate and distinct

causes of action." *Gulf States Steel Co. v. Fail* (Ala.), 78 So. 878.

Complainant sold land, taking the purchaser's notes in payment. Thereafter the purchaser conveyed the land to two different persons and defaulted in payment. Held, that both of the purchaser's grantees were proper parties to a suit by the complainant to foreclose his vendor's lien, for they were both interested; it being sufficient to avoid the rule against multifariousness that each one of the defendants have an interest in some of the matters involved and are connected with others. *Hunter v. Briggs*, 184 Ala. 327, 63 So. 1004.

§ 51½. Joinder of Causes of Action under State and Federal Laws.

As the jurisprudence of the state and of the federal government form together one system constituting the law of the land for the state, and the state courts having concurrent jurisdiction with the federal courts in actions under the federal Employers' Liability Act, it is permissible to join in one action causes based on a violation of the federal Employers' Liability Act with those based on the state liability act. *Atlantic, etc., R. Co. v. Jones*, 9 Ala. App. 499, 63 So. 693.

§ 53. Splitting Causes of Action.

§ 53 (2) Actions ex Delicto.

Under Code 1907, § 2082, subd. 7e, fixing a special tax on mortgages filed in the probate office and requiring the probate judge to collect the same and pay over part to the state and a part to the county, and under §§ 2473, 5415, authorizing a suit by the party aggrieved on the bond of a judge of probate, a suit by the county alone on the bond of the probate judge, for his failure to pay the county its share of the taxes, was maintainable and was not splitting a single and indivisible cause of action. *Hudgins v. Pickens County*, 10 Ala. App. 377, 64 So. 472.

Where the channel of a stream is so obstructed by a permanent dam or fill as to cause a constant overflow upon another's land, the damages are regarded as original and must be recovered in one action; but where a culvert is provided, sufficient to carry off the water in its

usual volume, thus causing only occasional recurrent overflows, the damage is continuing and each overflow constitutes a separate and distinct cause of action. *Sloss-Sheffield Steel, etc., Co. v. Mitchell*, 181 Ala. 576, 61 So. 934.

§ 53 (3) Actions ex Contractu.

Under Code 1907, § 2082, subd. 7e, and §§ 2473, 5415, a suit by the county alone on the bond of the probate judge for his failure to pay the county its one-third share of the taxes collected was maintainable and was not splitting a single and indivisible cause of action. *Hudgins v. Pickens County*, 10 Ala. App. 377, 64 So. 472, certiorari denied in 188 Ala. 141, 65 So. 959.

§ 54. Consolidation of Actions.

§ 57. — Actions Which May Be Consolidated.

Where an applicant, condemning a right of way over separate tracts of the same owner described the tracts in separate paragraphs, and separate commis-

sioners were appointed in the probate court, the action of the circuit court, in consolidating the issues, avoided any injury resulting from the appointment of separate commissioners. *Alabama Power Co. v. Adams (Ala.)*, 67 So. 838.

IV. COMMENCEMENT, PROSECUTION AND TERMINATION.

§ 67. Stay of Proceedings.

§ 69. — Another Action Pending.

To stay of a personal injury action on account of the pendency of an action for the same cause in the United States District Court in another state is addressed to the sound discretion of the trial court, since Code, § 6115, providing that all actions under the Employers' Liability Law (Code, § 3910) must be brought in a court of competent jurisdiction within the state of Alabama, and not elsewhere, is an invalid restriction. *Western Union Tel. Co. v. Howington (Ala.)*, 73 So. 550.

Actionable Words.

See post, LIBEL AND SLANDER.

ACTION ON THE CASE.

§ 1. Nature and Grounds of Action.

Cross References.

See the title ACTION ON THE CASE, vol. 1, p. 124, and references there given.

§ 1. Nature and Grounds of Action.

When Maintainable — Conversion. — Where property delivered to chattel mortgagee before maturity of mortgage was taken by defendant and converted, action in case held to lie, if not trover. *Johnson v. McFry*, 14 Ala. App. 170, 68 So. 716.

Breach of Duty Growing Out of Contract.—Action on the case will lie for breach of duty growing out of contract, although contract does not relate to a business affected with a public interest. *Western Union Tel. Co. v. Bowen (Ala. App.)*, 76 So. 985.

Act of God.

See post, CARRIERS; CONTRACTS.

Acts of Legislature.

See post, STATUTES. And see the particular appropriate titles.

Acts of Ownership.

See post, ADVERSE POSSESSION.

Actual Controversy.

See post, APPEAL AND ERROR.

Actual Damage.

See post, DAMAGES.

Actual Notice.

See post, NOTICE; VENDOR AND PURCHASER.

Actual Possession.

See post, ADVERSE POSSESSION.

Adequate Remedy at Law.

See post, CANCELLATION OF INSTRUMENTS; INJUNCTION; RECEIVERS;
REFORMATION OF INSTRUMENTS; SPECIFIC PERFORMANCE.

ADJOINING LANDOWNERS.

§ 8. Use of Premises Affecting Adjoining Land.

§ 10. Right to and Obstruction of Light, Air and View.

Cross References.

See the title ADJOINING LANDOWNERS, vol. 1, p. 130, and references there given.

In addition, see post, MINES AND MINERALS.

§ 8. Use of Premises Affecting Adjoining Land.

Injuries by Blasting.—For the ordinary discomforts and injurious effects of lawful blasting operations on the defendant's own premises, not constituting a nuisance, there is no liability to adjoining owners except for negligence in the manner of such operations. Ex parte Birmingham Realty Co., 183 Ala. 444, 63 So. 67.

Where blasting operations throw debris on the adjoining premises, it amounts to a trespass for which the one blasting

is responsible, regardless of any negligence, unless he has acquired an easement against the other premises; in which event he is liable for negligence. Ex parte Birmingham Realty Co., 183 Ala. 444, 63 So. 67.

§ 10. Right to and Obstruction of Light, Air and View.

Sufficiency of Complaint for Obstruction.—Norton v. Randolph, 176 Ala. 381, 58 So. 283. See also the title ADJOINING LANDOWNERS, § 10, vol. 1, p. 132.

Adjudication.

See post, JUDGMENT.

Administration.

See post, EXECUTORS AND ADMINISTRATORS; GUARDIAN AND WARD; RECEIVERS; TRUSTS, and other appropriate titles.

Administrators.

See post, EXECUTORS AND ADMINISTRATORS.

Admiralty.

See the title ADMIRALTY, vol. 1, p. 134, and references there given.

Admissions.

See post, CRIMINAL LAW; EQUITY; EVIDENCE; PLEADING.

ADOPTION.

- § 6. Agreements to Adopt.
- § 8. Deed or Declaration.
- § 16. Setting Aside or Revoking Adoption.

Cross References.

See the title ADOPTION, vol. 1, p. 140, and references there given.

§ 6. Agreements to Adopt.

As to specific performance of agreement to adopt, see post, SPECIFIC PERFORMANCE.

Defective Adoption Paper — Competency as Evidence.—An adoptive paper, though not proven or recorded, so as to constitute a legal adoption, is competent evidence of a contract relation between the quasi adoptive parent and child. *Prince v. Prince*, 194 Ala. 455, 69 So. 906.

§ 8. Deed or Declaration.

Validity—Statutory Provisions.—Where an instrument of adoption of a child under Code 1907, § 5202, does not show an acknowledgment by the adopting parent before the probate judge as required by the statute, the adoption is without effect, unless there is evidence that the adopting parent actually acknowledged the instrument before the probate judge, and the mere fact that the adopting parent and child exercised the rights and performed the duties of the relation of parent and child for about 30 years until the death of the adopting parent does not relieve the child of the necessity of such proof. *Prince v. Prince*, 188 Ala.

559, 66 So. 27, cited in notes in Ann. Cas. 1916D, 1111, 1113.

Nature of Declaration.—Under Code 1907, § 5202, an adoption declaration is in no sense a judicial act and has about it no elements of a judicial decree. *Murphree v. Hanson*, 197 Ala. 246, 72 So. 437.

Effect of Declaration. — Under the adoption statute (Code 1907, § 5202), providing that any person, desiring to adopt a child so as to make it capable of inheriting his estate, may make a declaration in writing, attested by two witnesses, setting forth the name, age and sex of the child and the name he wishes it known by, which, being acknowledged before the county probate judge and duly filed and recorded, shall have the effect to make such child capable of such inheritance and changing its name as stated in the declaration, a declaration of adoption, being purely an ex parte proceeding requiring no notice or order of court, is in no way binding upon a court of equity once acquiring jurisdiction of the person of a child, as to its proper custody. *Murphree v. Hanson*, 197 Ala. 246, 72 So. 437.

§ 16. Setting Aside or Revoking Adoption.

Restoration of Adopted Child—Discretion of Court.—In bill to restore adopted child to its natural parents, court is clothed with a sound discretion to grant such relief as best interests of child may demand. *McClure v. Williams* (Ala.), 78 So. 853.

Although a child has been adopted by

proceedings in probate court under Code 1907, § 5202, a court of equity, its jurisdiction being properly invoked, exercises a free discretion in disposing of the child for its own benefit and welfare. *McClure v. Williams* (Ala.), 78 So. 853.

Consent of Parents.—A bill for restoration of a child in its natural parents, adoption proceeding had by consent and request of parents is not without weight. *McClure v. Williams* (Ala.), 78 So. 853.

Adulteration.

See post, FOOD.

ADULTERY.

Cross References.

See the title ADULTERY, vol. 1, p. 142, and references there given.

As to living in a state of adultery, see post, LEWDNESS.

Admissibility of Evidence.—On a trial for adultery, proof of statements of endearing terms used by accused in speaking of the woman with whom the offense was committed was admissible. *Fortner v. State*, 12 Ala. App. 179, 67 So. 720.

Advancements.

See post, DESCENT AND DISTRIBUTION; PARENT AND CHILD.

Adverse Interest.

See post, APPEAL AND ERROR; PARTIES.

ADVERSE POSSESSION.

I Nature and Requisites.

(A) Acquisition of Rights by Prescription in General.

- § 1. Nature and Grounds of Prescription.
- § 3. Constitutional and Statutory Provisions in General.
- § 4. Against Whom Prescription May Be Claimed.
- § 5. Property Subject to Prescription.
- § 7. — Public Property in General.
 - § 7 (1) In General.
 - § 7 (2) Public Lands in General.
 - § 7 (3) Public Lands Granted to Individuals.
- § 8. — Property Dedicated to or Acquired for Public Use.
 - § 8 (1) Highways and Turnpikes.
 - § 8 (2) School Lands.
 - § 8 (3) Railroad Property.
- § 11. Intent to Acquire Title or Right.
- § 12. Necessity of Claim or Color of Title.
- § 13. Character and Elements of Adverse Possession in General.

(B) Actual Possession.

- § 14. Necessity.
- § 16. Acts of Ownership in General.
 - § 16 (1) In General.
 - § 16 (2) Marking Boundaries and Entry to Make Survey.
 - § 16 (3) Wild Lands.
- § 17. Use and Occupation.
- § 19. Inclosure.
- § 20. Improvements.
- § 21. Cultivation.
- § 23. Cutting Timber.
- § 24. Occasional or Temporary Use or Occupation.
- § 25. Possession of Agent, Tenant or Vendee.
- § 27. Evidence.

(C) Visible and Notorious Possession.

- § 28. Necessity.
- § 29. Open and Visible Character of Possession.
- § 30. Notoriety of Possession.
- § 31. Knowledge of or Notice to Former Owner.
- § 32. Filing or Recording Notice.
- § 33. Evidence.

(D) Distinct and Exclusive Possession.

- § 34. Necessity.
- § 38. Evidence.

(E) Duration and Continuity of Possession.

- § 39. Time Requisite for Acquisition of Rights.
- § 40. — In General.
- § 42. Beginning of Adverse Possession.

- § 43. Tacking Successive Possessions.
 - § 43 (2) When Possessions May Be Tacked in General.
 - § 43 (6) Decedent and Heirs and Representatives.
 - § 43 (8) Character of Former Possession.
- § 44. Continuity in General.
- § 46. Interruption of Possession.
- § 51. Adjudication as to Title or Right.
- § 55. Disability or Death of Former Owner.
- § 57. Evidence.
- (F) Hostile Character of Possession.
 - § 58. Necessity.
 - § 59. Possession Consistent with that of Another, and Possession Becoming Adverse after Amicable Entry.
 - § 60. — In General.
 - § 60 (1) In General.
 - § 60 (2) Permissive Entry and Occupation, and License.
 - § 60 (3) Recognition of Better or Other Title or Claim.
 - § 60 (5) Of Railroad Right of Way.
 - § 62. — By or against Heirs, Devisees or Surviving Husband or Wife or Their Grantees.
 - § 62 (1) By Heirs, Legatees and Their Privies against Co-heirs, Colegatees, and Their Privies.
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 - § 63. — By Vendor or Purchaser.
 - § 63 (2) By Vendor or Grantor in General.
 - § 63 (4) Possession of Grantor Becoming Adverse to Grantee.
 - § 63 (5) By Purchaser and His Privies in General.
 - § 63 (7) Possession of Purchaser Becoming Adverse to Vendor.
 - § 65. Entry and Possession by Mistake.
 - § 66. Extension of Possession to Boundaries or Fences.
 - § 66 (1) In General.
 - § 66 (2) Mistake as to Boundaries.
 - § 68. Necessity of Claim or Color of Title.
 - § 69. Validity and Sufficiency of Title or Claim.
 - § 70. — In General.
 - § 71. — Validity and Sufficiency of Instruments in General.
 - § 71 (1) In General.
 - § 71 (2) Void, Irregular or Defective Deeds or Grants.
 - § 72. — Bonds and Contracts to Convey.
 - § 79. — Tax Sales and Tax Deeds.
 - § 80. — Description of Property.
 - § 80 (1) In General.
 - § 80 (2) Sufficiency of Description.
 - § 82. — Record of Instruments.
 - § 85. Evidence.

§ 85 (1) Presumptions and Burden of Proof.

§ 85 (2) Admissibility.

(G) Payment of Taxes.

§ 86. Necessity in General.

§ 88. Act of Ownership.

§ 89. Color of Title.

II. Operation and Effect.

(A) Extent of Possession.

§ 97. Possession without Claim of Right or Color of Title.

§ 99. Possession under Color of Title.

§ 100. — Constructive Possession in General.

§ 100 (1) In General.

§ 100 (2) Entry under Conveyance from One without Title,
or under Void Deed.

§ 101. — Relation to Each Other of Different Premises or Parts
of Same Premises.

§ 103. — Mixed Possession under Hostile Titles, or Conflicting
Grants or Surveys.

(B) Title or Right Acquired.

§ 104. Presumption of Grant.

§ 105. Rights and Liabilities of Occupants.

§ 106. Nature and Extent of Title or Right.

§ 106 (1) In General.

§ 106 (2) Limitation as Bar to Action for Recovery.

§ 106 (3) Extinction of Title in Original Holder.

III. Pleading, Evidence, Trial and Review.

§ 110. Pleading Possession.

§ 111. Pleading Title or Right.

§ 112. Presumptions and Burden of Proof.

§ 113. Admissibility of Evidence.

§ 114. Weight and Sufficiency of Evidence.

§ 114 (1) In General.

§ 114 (2) Boundaries and Extent of Possession.

§ 114 (3) Effect of Color of Title.

§ 115. Questions for Jury.

§ 115 (1) In General.

§ 115 (2) Actual Possession.

§ 115 (3) Open and Exclusive Possession.

§ 115 (4) Duration and Continuity of Possession.

§ 115 (5) Hostile Character of Possession.

§ 115 (6) Color of Title and Good Faith.

§ 116. Instructions.

§ 116 (1) In General.

§ 116 (3) Visible and Notorious and Distinct and Exclusive Possession.

- § 116 (4) Duration and Continuity of Possession.
- § 116 (5) Hostile Character of Possession.
- § 116 (7) Extent of Possession.

Cross References.

See the title ADVERSE POSSESSION, vol. 1, p. 143, and references there given.

In addition, see ante, APPEAL AND ERROR; BROKERS; CHAMPERTY AND MAINTENANCE; EASEMENTS; EJECTMENT; EVIDENCE; EXECUTORS AND ADMINISTRATORS; HUSBAND AND WIFE; INFANTS; JOINT TENANCY; LANDLORD AND TENANT; LIFE ESTATES; LIMITATION OF ACTIONS; REMAINDERS; TENANCY IN COMMON; TRESPASS TO TRY TITLE.

As to validity of conveyance of land held adversely, see post, CHAMPERTY AND MAINTENANCE. As to whether adverse possession was an issue, where an ejectment suit was tried solely on the general issue, see post, EJECTMENT. As to adverse possession of tenant, see post, LANDLORD AND TENANT. As to right of owner of land to maintain trespass for damages for cutting timber by one in possession under an adverse title, see post, TRESPASS.

I. NATURE AND REQUISITES.

(A) ACQUISITION OF RIGHTS BY PRESCRIPTION IN GENERAL.

§ 1. Nature and Grounds of Prescription.

Prescription, and the presumptions incidental thereto, are based upon a continuous adverse use of real estate. *Snow v. Bray* (Ala.), 73 So. 542.

Where there has been no default in duty nor any delay in the assertion of rights, there can be no prescription. *Winters v. Powell*, 180 Ala. 425, 61 So. 96.

Recovery is not allowed upon actual prior possession per se, but on the title which such prior possession evidences, and is a basis of recovery against a trespasser, not because of plaintiff's previous possession of the land, but because of the presumption of plaintiff's title from his possession, which is sufficient proof of title as against a bare trespasser. *Vidmer v. Lloyd*, 193 Ala. 386, 69 So. 480.

Duty of True Owner.—So long as there is no adverse holding, the true owner owes no one the duty of a visible or audible assertion of ownership, and no unfavorable inferences can be drawn from his inactivity. *Rucker v. Jackson*, 180 Ala. 109, 60 S. E. 139.

§ 2. Constitutional and Statutory Provisions in General.

See post, "Filing or Recording Notice," § 32; "In General," § 114 (1).

The claim of ownership by adverse

holders prior to 1908 can not be affected by the new provisions of Code 1907, § 2830, which went into effect that year. *Childs v. Floyd*, 194 Ala. 651, 70 So. 121.

Where the adverse possession of the disputed strip by defendant and his privies in title could not have ripened into hostile title before the passage of the act of 1893 (Code 1896, § 1546), and they filed no declaration of adverse claim as provided by the act, and had not annually listed the land for taxation for 10 years prior to the commencement of this ejectment suit, as required by Code 1907, § 2830, they could not acquire title by adverse possession since 1893. *Livingston v. Nelson* (Ala.), 76 So. 449.

§ 4. Against Whom Prescription May Be Claimed.

Where the trustee and the cestui que trust are both out of possession for the time limit fixed by the statute, a third party or stranger in possession acquires a good title as against both the trustee and the cestui que trust. *Cruse v. Kidd*, 195 Ala. 22, 70 So. 166.

§ 5. Property Subject to Prescription.

§ 7. — Public Property in General.

§ 7 (1) In General.

See post, "Public Lands Granted to Individuals," § 7 (3); "School Lands," § 8 (2).

Act Cong. May 26, 1824, c. 193, § 6 Stat.

315, vested in the town of Tuscaloosa all the government's right to a tract called the "River Margin" on condition that the corporation should not sell or lease any part of it, and should set it apart for the benefit of the inhabitants and of those resorting to it, with a provision for reverter, if applied to other uses. Held, that as to such trust property, a disseisor as against the public could not acquire title thereto by adverse possession. *Hughes v. Tuscaloosa*, 197 Ala. 592, 73 So. 90.

§ 7 (2) Public Lands in General.

See ante, "In General," § 7 (1); post, "Public Lands Granted to Individuals," § 7 (3); "School Lands," § 8 (2).

§ 7 (3) Public Lands Granted to Individuals.

Where Title Remained in Government.—Where title to land was in the government while plaintiff had possession under color of title, and never passed out of it until the issuance of defendant's patent, plaintiff had no paper title, and did not acquire title by adverse possession. *Nance v. Walker* (Ala.), 74 So. 339.

Where the title appears to have been in the government during the period of prescription, such prescription does not run against the government or one who claims the land through a government grant. *Nelson v. Weakley*, 195 Ala. 1, 70 So. 661.

Where All Conditions Complied with but Patent Not Issued.—After all the conditions prescribed by Congress for alienation of public lands had been complied with and before issue of patent, the title is capable of being held adversely to the original entryman, or others claiming through him. *Boone v. Gulf, etc., R. Co.* (Ala.), 78 So. 956, distinguishing *Price v. Dennis*, 159 Ala. 625, 49 So. 248; *Nelson v. Weakley*, 177 Ala. 130, 59 So. 157; *S. C.*, 195 Ala. 1, 70 So. 661.

§ 8. — Property Dedicated to or Acquired for Public Use.

§ 8 (1) Highways and Turnpikes.

No adverse possession of land devoted to the use of the public for a street

or road can ever ripen into or give rise to a title thereto; every such use being necessarily an obstruction to the highway and a public nuisance which no lapse of time can legalize. *Alexander City, etc., Co. v. Central, etc., R. Co.*, 182 Ala. 516, 62 So. 745.

§ 8 (2) School Lands.

Under Act Cong. March 2, 1819, admitting Alabama as a state, and provisions of Ala. Const. 1819 and succeeding constitutions, relating to the sixteenth section in townships, granted for the use of schools, held, that Code 1896, § 2794, providing a 20-year limitation for actions by the state for the recovery of real property, was not made inapplicable; and that adverse possession of such land vested title in the holder, under color of title as against the state. *State v. Schmidt*, 180 Ala. 374, 61 So. 293.

§ 8 (3) Railroad Property.

A railroad right of way, although a public highway, is not devoted to a public use in such a sense that title thereto can not be acquired by adverse possession. *Alexander-City, etc., Co. v. Central, etc., R. Co.*, 182 Ala. 516, 62 So. 516, 745, cited in note in *L. R. A.* 1916B, 657, 662, 745; *Ann. Cas.* 1916D, 1187.

§ 11. Intent to Acquire Title or Right.

See post, "Mistake as to Boundaries," § 66 (2).

Possession, to be adverse, must be held under claim of right, and there can be no adverse possession without an intention to claim title; and one occupying land up to a certain fence because he believes that to be the line of his land, but without intention to claim up to it if it should be beyond the line, has no intention to claim title coincident with his possession, and the possession to the fence is therefore not adverse; but where coterminous owners agree upon a line as the dividing line and occupy up to it, or where one of them builds a fence as the dividing line and occupies and claims to it with knowledge of such claim by the other, the claim is hostile and the possession adverse. *McLester Bldg. Co. v. Upchurch*, 180 Ala. 23, 60 So. 173.

The intention of the possessor fixes the character of the possession as adverse or otherwise, and possession can not be adverse if in any contingency it is intended to be subservient to the true title. *Alexander-City, etc., Co. v. Central, etc., R. Co.*, 182 Ala. 516, 62 So. 745.

§ 12. Necessity of Claim or Color of Title.

See post, "Character and Elements of Adverse Possession in General," § 13; "Necessity," § 14.

§ 13. Character and Elements of Adverse Possession in General.

Adverse possession must be hostile, under a claim of right, actual, open, notorious, exclusive, and continued for ten years, and, if any of these elements are wanting, it will not bar the legal title. *Alexander-City, etc., Co. v. Central, etc., R. Co.*, 182 Ala. 516, 62 So. 742.

The elements of adverse possession are such possession as land reasonably admits of, openness, notoriety, and exclusiveness, hostility towards everybody else in respect to the possession, claim of right, or claim or color of title, and continuity for 10 years, as prescribed by the statute. *Kidd v. Browne (Ala.)*, 76 So. 65.

Adverse possession to ripen into title to support ejectment must have been open, peaceable, notorious, and continuous for 10 consecutive years before commencement of suit. *Warten v. Weatherford*, 191 Ala. 31, 67 So. 667.

Ten years' open, notorious, and actual possession, without reference to such possession being continuous, exclusive, and under claim of ownership, is not enough to give title. *Swindall v. Ford*, 184 Ala. 137, 63 So. 651.

Plaintiffs is ejectment could not recover against defendants who had the continuous, open, exclusive and adverse possession of the land for 21 years next before the action under claim of ownership, and under color of title, though not from plaintiffs. *Cruse v. Kidd*, 195 Ala. 22, 70 So. 166.

The actual possession of land sued for by one, claiming it as his own, for about 40 years, without recognition of any

claim, right, or title of another, operated as an absolute repose under the doctrine of prescription. *Vidmer v. Lloyd*, 193 Ala. 386, 69 So. 380; *S. C.*, 184 Ala. 153, 63 So. 943.

Claiming under Deed.—Where a mother conveyed land to her daughter by a genuine deed, whether sufficiently attested or not, and the daughter remained in possession, claiming under the deed adversely to the world, using the land for all purposes for which it was adapted, selling the timber, and mortgaging the land as her own, also paying taxes, from the execution of the deed in 1874 to her death in 1915, without recognition of any right in her brother, the daughter acquired title to the land under the doctrine of prescription and repose. *Health v. Lewis (Ala.)*, 76 So. 451.

(B) ACTUAL POSSESSION.

§ 14. Necessity.

See ante, "Character and Elements of Adverse Possession in General," § 13; post, "In General," § 100 (1).

Color of title without actual possession for the statutory period is insufficient to establish title by adverse possession. *Snow v. Bray (Ala.)*, 73 So. 542.

In the absence of color of title, one claiming property by adverse possession must show actual possession, since a mere trespasser can acquire title to only that portion of realty which he actually occupies. *Perolio v. Woodward Iron Co.*, 197 Ala. 560, 73 So. 197.

The mere claim of right or title to land, not accompanied by actual possession, no matter how long continued such claim may be, and no matter how publicly the claim is made, is not sufficient to confer title as against the true owner. *Veitch v. Hard (Ala.)*, 75 So. 405.

Where complainant's residence had for many years been established on a lot to which defendants laid no claim, and on the line between the lots there had been a fence which had fallen into decay, there being no evidence that complainant had ever been in actual possession of any part of the adjoining lot beyond the fence, or extending over onto that lot, he, having no color of title thereto, ac-

quired no interest therein by adverse possession. *Gerson v. Palmore*, 189 Ala. 64, 66 So. 597.

§ 16. Acts of Ownership in General.

§ 16 (1) In General.

See post, "By Surviving Spouse and Privies against Heirs and Their Privies," § 62 (2).

The mere recording of a deed to a tract of land is not adverse possession thereof and the true owner is not required to take notice of any deed purporting to convey his title which another may have recorded. *Veitch v. Hard* (Ala.), 75 So. 405.

Defendant's act in mining coal underneath land claimed by plaintiff did not give defendant such actual adverse possession as would defeat plaintiff's constructive possession under legal title, if he had title. *Pearce v. Aldrich Min. Co.*, 184 Ala. 610, 64 So. 321.

A claim of ownership or an intention to assert title against the true owner is of no consequence, in the absence of demonstration by acts done upon the property leaving there indicia of a continued possession. *Rucker v. Jackson*, 180 Ala. 109, 60 So. 139.

§ 16 (2) Marking Boundaries and Entry to Make Survey.

See post, "Occasional or Temporary Use or Occupation," § 24.

§ 16 (3) Wild Lands.

The fact that prior to 1882, at which time defendant took a deed, complainant's husband consented to the cutting of two trees from wild woodland, and at another time to the cutting of dead trees for firewood, and that at another time, while on the land, he offered to sell it to a stranger, although indicating an intention to claim title and assert dominion, can not be regarded as anything more than acts of trespass, not making out title by adverse possession and the statute of limitations. *Rucker v. Jackson*, 180 Ala. 109, 60 So. 139.

§ 17. Use and Occupation.

See ante, "Character and Elements of Adverse Possession in General," § 13; post, "Interruption of Possession," § 46.

§ 19. Inclosure.

It is not necessary that land be inclosed, because capable of being so done, to constitute adverse possession. *Kidd v. Browne* (Ala.), 76 So. 65.

§ 20. Improvements.

See post, "Occasional or Temporary Use or Occupation," § 24.

§ 21. Cultivation.

It is not necessary that land be cultivated, because capable of being so used, to constitute adverse possession. *Kidd v. Browne* (Ala.), 76 So. 65.

§ 23. Cutting Timber.

See post, "Occasional or Temporary Use or Occupation," § 24.

Cutting timber on rare occasions is insufficient to establish adverse possession. *Snow v. Bray* (Ala.), 73 So. 542.

§ 24. Occasional or Temporary Use or Occupation.

See post, "Effect of Color of Title," § 114 (3).

That the purchaser of land at an attempted tax sale rode over it for three hours at a time about six times a year for a few years after the attempted sale was not of itself evidence of actual adverse possession so as to establish title by adverse possession; no improvements having been made, and nothing having been done to mark claimants' physical dominion. *Standifer v. Styles*, 185 Ala. 550, 64 So. 345.

An occasional securing of firewood and removing a fence from a tract does not establish adverse possession of it. *Snow v. Bray* (Ala.), 73 So. 542.

Evidence of mere occasional trespasses upon wild, unoccupied land for the purpose of removing timber is insufficient to show adverse possession. *Williams v. Lyon*, 181 Ala. 531, 61 So. 299.

§ 25. Possession of Agent, Tenant or Vendee.

Where a land company sold a lot to its agents who supervised the remaining tract for it, the agent's possession of his lot was of no avail to the land company as to the remaining lands. *Snow v. Bray* (Ala.), 73 So. 542.

§ 27. Evidence.

The evidence which will authorize a recovery, in the absence of bona fide claim under color of title, inheritance or purchase, must afford data from which actual possession of a definite particular area may be ascertained; it can not be left to speculation or conjecture. *Bowles v. Lowery*, 181 Ala. 603, 62 So. 107.

Indicia of actual possession of a part or parts of a 40-acre tract, or of 3 acres thereof about a spring, in the absence of evidence of possession of any particular part, or of the particular form of the 3 acres, is insufficient. *Bowles v. Lowery*, 181 Ala. 603, 62 So. 107.

(C) VISIBLE AND NOTORIOUS POSSESSION.

§ 28. Necessity.

See ante, "Character and Elements of Adverse Possession in General," § 13.

§ 29. Open and Visible Character of Possession.

See ante, "Character and Elements of Adverse Possession in General," § 13.

§ 30. Notoriety of Possession.

See ante, "Character and Elements of Adverse Possession in General," § 13.

Where a tenant of an uninclosed lot built and used a smokehouse near to his own adjoining lot, the act was not so notorious as to impress anyone that he did it to make the ground a part of his own lot. *Kilpatrick v. Trotter*, 185 Ala. 546, 64 So. 589.

§ 31. Knowledge of or Notice to Former Owner.

Customary acts of ownership by one in possession under a deed purporting to convey the fee are sufficient to impute notice to all not claiming in privity with the possessor. *Kidd v. Borum*, 181 Ala. 144, 61 So. 100.

§ 32. Filing or Recording Notice.

See ante, "Constitutional and Statutory Provisions in General," § 3.

Code 1907, § 2830, requiring the filing of a declaration of a claim to land as a condition on which title by adverse possession may be acquired, does not apply to a rightful possession, nor to possession under color of title or a bona fide

claim of inheritance or purchase. *Stewart Bros. v. Ransom* (Ala.), 76 So. 70.

Code 1907, § 2830, requiring the filing of a written declaration of a claim to land in order to set up adverse possession thereto, does not apply to a grantee in a deed conveying described property, who enters into and remains in possession thereof for many years. *Mobile, etc., R. Co. v. Rutherford*, 184 Ala. 204, 63 So. 1003.

After Code 1896, § 1541, went into effect, one could not acquire title by adverse possession, his entry not having been under one of the executed conditions, color of title or bona fide claim of inheritance or of purchase, unless he filed the required notice. *Bowles v. Lowery*, 181 Ala. 603, 62 So. 107.

Defendants held possession of land from 1895 to 1913 under a bona fide claim of inheritance, asserting that their ancestor, who preceded them in possession, was the owner. As a matter of fact, their ancestor had only an estate by the curtesy. Held, that Code 1896, § 1541, dispensing with the necessity of filing notice of an adverse claim in case of a bona fide claim of inheritance, having been in force until 1908, defendants' holding ripened into an adverse title, though they filed no notice of adverse claim. *Childs v. Floyd*, 188 Ala. 556, 66 So. 473.

The statute requiring the filing of a written declaration of claim does not apply where defendant claimed both under color of title and as a bona fide purchaser. *Martin v. Howard*, 193 Ala. 477, 68 So. 982; *S. C.*, 181 Ala. 613, 62 So. 99.

§ 33. Evidence.

Proof that land was known and spoken of in the community as belonging to claimant would be evidence of the notoriety of his claim of ownership. *Kidd v. Browne* (Ala.), 76 So. 65.

(D) DISTINCT AND EXCLUSIVE POSSESSION.

§ 34. Necessity.

See post, "Evidence," § 38.

That there may be "adverse possession," there must, in addition to other elements, be "exclusive" possession. *Bowles v. Lowery*, 181 Ala. 603, 62 So. 107.

§ 38. Evidence.

See ante, "Character and Elements of Adverse Possession in General," § 13.

Where adverse possession is in issue, evidence that one in possession was claiming the land is admissible. *First Nat. Bank v. Johnson*, 190 Ala. 566, 67 So. 234.

(E) DURATION AND CONTINUITY OF POSSESSION.**§ 39. Time Requisite for Acquisition of Rights.****§ 40. — In General.**

See post, "Tax Sales and Tax Deeds," § 79.

One claiming by adverse possession not under color of title must show an actual possession of the land for the statutory period. *First Nat. Bank v. Johnson*, 190 Ala. 566, 67 So. 234.

§ 42. Beginning of Adverse Possession.

Neither limitations nor the prescription of 20 years runs against a remainderman until he has a right to sue upon the termination of the life estate. *Vidmer v. Lloyd*, 184 Ala. 153, 63 So. 943.

§ 43. Tacking Successive Possessions.**§ 43 (2) When Possessions May Be Tacked in General.**

See post, "Character of Former Possession," § 43 (8).

Possession that was adverse under the 1896 Code may be tacked to a possession adverse under the 1907 Code. *Lee v. Lee*, 196 Ala. 522, 72 So. 24.

Where adverse possession without color of title had not ripened into a title before the adoption of Code 1907, § 2830, requiring the claimant to list the land for taxation, which he did not do, the time of his possession before the adoption of the Code can not be tacked to the time between its adoption and the bringing of suit. *Kilpatrick v. Trotter*, 185 Ala. 546, 64 So. 589.

§ 43 (6) Decedent and Heirs and Representatives.

When an administrator has the legal right by statute to take possession and control of his intestate's real estate, and actually does so, the possession of the administrator may be tacked onto the

possession of the intestate for the purpose of completing the bar of the statute of limitations. *Cannon v. Prude*, 181 Ala. 629, 62 So. 24, cited in note in *L. R. A.* 1917C, 147.

Since a bankrupt is *civilter mortuus*, and the trustee of his estate is, in fact, his administrators, the possession of the trustee may be tacked onto the possession of the bankrupt for the purpose of completing the bar of the statute of limitations. *Cannon v. Prude*, 181 Ala. 629, 62 So. 24.

§ 43 (8) Character of Former Possession.

See post, "In General," § 114 (1).

Where plaintiff took possession of the land in controversy as soon as he received his deed thereto, defendant, who received the deed under which he claimed the premises thereafter and ousted plaintiff, can not rely upon the adverse possession of his predecessor in title, where his deed was not color of title to the land in controversy. *Southern Iron, etc., Co. v. Stowers*, 189 Ala. 314, 66 So. 677.

Although defendant's possession was adverse during and under the 1907 Code, yet a period of possession covered by the 1896 Code and not adverse under its provisions can not be tacked to the holding under the 1907 Code. *Lee v. Lee*, 196 Ala. 522, 72 So. 24.

§ 44. Continuity in General.

See ante, "Nature and Grounds of Prescription," § 1; "Character and Elements of Adverse Possession in General," § 13; "In General," § 16 (1); "Tax Sales and Tax Deeds," § 79; "In General," § 115 (1).

Continuity of possession is an essential element of adverse possession. *Snow v. Bray (Ala.)*, 73 So. 542.

§ 46. Interruption of Possession.

Adverse possession of land under color of title is not alone predicable of residence thereon or of cultivation thereof, and the mere fact that the adverse holder did not at all times put them to the uses for which they were fit does not show a break. *Aldrich Min. Co. v. Pearce*, 192 Ala. 195, 68 So. 900.

§ 51. Adjudication as to Title or Right.

Continuity of adverse possession is

broken as against a grantee by a sale under execution on a judgment against the grantor and the taking of possession by another under the sheriff's deed, although the latter afterwards obtains a deed de-raigned from the grantee. *Little v. Vice* (Ala.), 76 So. 942.

§ 55. Disability or Death of Former Owner.

Where possession was adverse against testator at his death, it did not cease to be so as against his devisees, regardless of their age or condition, since after the statute of limitations begins to run it continues, although subsequent disabilities may arise. *Kidd v. Browne* (Ala.), 76 So. 65.

§ 57. Evidence.

Evidence held insufficient to support a finding of continuous adverse possession for 10 years. *Little v. Vice* (Ala.), 76 So. 942.

(F) HOSTILE CHARACTER OF POSSESSION.

§ 58. Necessity.

See ante, "Character and Elements of Adverse Possession in General," § 13; "Character of Former Possession," § 43 (8); post, "Presumptions and Burden of Proof," § 85 (1); "Hostile Character of Possession," § 116 (5).

Where adverse possession is in issue, evidence that one in possession was claiming the land, is admissible, as that is an essential element of adverse possession. *First Nat. Bank v. Johnson*, 190 Ala. 566, 67 So. 234.

§ 59. Possession Consistent with that of Another, and Possession Becoming Adverse after Amicable Entry.

§ 60. — In General.

§ 61 (1) In General.

See post, "Recognition of Better or Other Title or Claim," § 60 (3).

Occupation of land in subordination, not in hostility, to the title and right of grantees will not divest title by adverse possession. *McKenzie v. Hixon* (Ala.), 78 So. 791.

§ 60 (2) Permissive Entry and Occupation, and License.

See post, "Of Railroad Right of Way,"

§ 60 (5); "Possession of Purchaser Becoming Adverse to Vendor," § 63 (7).

The doctrine of prescription does not apply to cases where the possession is permissive, since such possession is not adverse, but is that of the holder of the title. *Kidd v. Browne* (Ala.), 76 So. 65.

§ 60 (3) Recognition of Better or Other Title or Claim.

The doctrine of prescription does not apply to cases where the possession is in recognition of title, since such possession is not adverse, but is that of the holder of the title. *Kidd v. Browne* (Ala.), 76 So. 65.

One who asserts possession in subordination to a mortgagee's rights can not acquire title by adverse possession so as to defeat the title of the mortgagee. *Ballard v. Bank*, 187 Ala. 335, 65 So. 356.

§ 60 (5) Of Railroad Right of Way.

The construction of buildings on a railroad right of way, not interfering with the use of the right of way by the railroad or the use of portions thereof by adjoining landowners, does not constitute adverse possession as against the railroad company but is considered as being subservient to its rights. *Alexander-City, etc., Co. v. Central, etc., R. Co.*, 182 Ala. 516, 62 So. 745.

Where the possession of part of a railroad right of way by a warehouse company was not adverse but permissive, and no notice of a change of the character of the possession was ever brought home to the railroad company or its predecessors in title, the company's legal title was not divested. *Alexander-City, etc., R. Co. v. Central, etc., R. Co.*, 182 Ala. 516, 62 So. 745.

§ 62. — By or against Heirs, Devisees or Surviving Husband or Wife or Their Grantees.

§ 62 (1) By Heirs, Legatees and Their Privies against Coheirs, Colegatees, and Their Privies.

Possession by the son of a deceased owner is presumably for the benefit of the estate and his coheirs, and is not adverse as to them until some hostile act occurs. *Lee v. Lee*, 196 Ala. 522, 72 So. 24.

§ 62 (2) By Surviving Spouse and Privies against Heirs and Their Privies.

Where a widow to whom dower was assigned in described land took and continued in possession of the described land and other land, her possession of the other land was not within Code 1907, § 3406, providing that no estate can be defeated by the act of any third person having a possessory interest, except as provided by the Code, and her exercise of authority and possession over the other land could only be attributed, if not adverse, to the sufferance of the heirs. *Tulley v. Snow*, 190 Ala. 556, 68 So. 301.

One in possession of real estate by virtue of dower interest can not, by bare assertion of ownership, nor by executing deeds or wills, destroy rights of remaindemen. *Martin v. Long* (Ala.), 75 So. 968.

§ 63. — By Vendor or Purchaser.

§ 63 (2) By Vendor or Grantor in General.

A grantor who remains in possession after delivery of his deed is regarded as holding the premises in subservience to his grantee, or as the grantee's tenant by sufferance, and nothing short of his explicit disclaimer of such relation and an assertion of right in himself is sufficient to render his possession adverse to the grantee. *Daniels v. Williams*, 177 Ala. 140, 58 So. 419.

§ 63 (4) Possession of Grantor Becoming Adverse to Grantee.

See ante, "By Vendor or Grantor in General," § 63 (2).

§ 63 (5) By Purchaser and His Privies in General.

The occupancy of a purchaser in possession of property, who has fully paid to the vendor the purchase money, is a possession adverse to the vendor. *Canon v. Prude*, 181 Ala. 629, 62 So. 24.

§ 63 (7) Possession of Purchaser Becoming Adverse to Vendor.

Title to wild lands by adverse possession for 10 years under agreement of the owner to convey to the claimant can not be aided by prescription, converting an equitable title into a legal title, since that presumption arises only in support of a peaceable possession under claim of

title for 20 years. *Franklin v. Snow*, 195 Ala. 569, 71 So. 93.

§ 65. Entry and Possession by Mistake.

An owner who goes over his line, intending only to claim to the true line, is not an adverse claimant and may not acquire title beyond the line by adverse possession. *Mobile, etc., R. Co. v. Ruth-erford*, 184 Ala. 204, 63 So. 1003.

§ 66. Extension of Possession to Boundaries or Fences.

§ 66 (1) In General.

See post, "Mistake as to Boundaries,"

§ 66 (2).

If adjoining landowners held possession to a hedgerow as the true line, the possession of each to the hedgerow was adverse to the other. *Smith v. Bachus*, 195 Ala. 8, 70 So. 261.

Where adjoining owners agree on a division line, and each claims up to it as such, with knowledge of the claim by the other coterminous owner, the claim becomes hostile and adverse. *Ashford v. McKee*, 183 Ala. 620, 62 So. 879.

Possession by adjoining landowners to the dividing line, which was not the true line, is not adverse where they intended to hold only to the true line, but is adverse if they intended to hold to that line, regardless of whether it was the true line. *Gibson v. Gaines* (Ala.), 73 So. 929.

It can not be presumed, as a matter of law, from mere possession that defendant and his grantors intended to claim to a certain line, regardless of right, the mere fact that they held up to an old line for many years will not warrant a finding of adverse possession. *Hornsby v. Tucker*, 180 Ala. 418, 61 So. 928.

Evidence, in an action to quiet title involving a boundary line, held to show that complainant's stable was not west of the line as formerly fixed by an iron pin, and that it was not the intention of complainant's predecessors to claim title beyond such line. *McLester Bldg. Co. v. Upchurch*, 180 Ala. 23, 60 So. 173.

§ 66 (2) Mistake as to Boundaries.

See ante, "In General," § 66 (1).

Intention to Claim Only to True Line.

—Occupancy of land to a fence because the party believes the fence to be the

line, but has no intention to claim beyond the true line, does not constitute adverse possession, for want of intent to claim land not included in his paper title. *Ashford v. McKee*, 183 Ala. 620, 62 So. 879.

Where adjoining landowners, though claiming to a hedgerow, believing it to be the true line, did not intend to claim further than the true line, the holding of one such owner was not adverse to the other. *Smith v. Bachus*, 195 Ala. 8, 70 So. 261; S. C., 78 So. 888.

Where adjoining landowners claimed and held the land to a line which they believed to be the true line without intending to hold beyond the true line, such claim and possession is not adverse to the right of the other if the line was not in fact the true line. *Gibson v. Gaines* (Ala.), 73 So. 929.

Intention to Claim to Fixed Boundary Line.—Title acquired by possession of a disputed strip of land for the continuous period of ten years, under belief that the line claimed was the true line, is good, even though the belief as to the correct location of the line originated in a mistake, and is not affected by what the claimant or his predecessors might or might not have claimed had they known they were mistaken. *Smith v. Bachus* (Ala.), 78 So. 888.

§ 68. Necessity of Claim or Color of Title.

See ante, "Character and Elements of Adverse Possession in General," § 13.

That defendant in ejectment, relying on adverse possession, failed to make formal claim by inheritance did not deprive him of the advantage conferred by Code 1907, § 2830, which dispenses with the necessity of record of color of title by one who derives by descent, where defendant proved possession by his ancestor under claim of right followed by his own possession after the ancestor's death, such proof constituting prima facie evidence of defendant's claim by inheritance, and it not being essential that he make formal claim. *Jordan v. Smith*, 185 Ala. 591, 64 So. 317.

Where P. deeded certain land to M., who never took possession, or shortly thereafter abandoned it, returning the deed to P., P.'s subsequent possession

was adverse and co-extensive with the boundaries of his original title, without any claim or declaration of adverse possession, under Acts 1893, p. 478. *Kretzer v. Jackson*, 183 Ala. 642, 62 So. 811.

It was immaterial that the first holder by adverse possession had no color of title, where those who claimed under him had color of title through the first holder's will, since the first holder having acquired title adversely, it passed by his will. *Kidd v. Browne* (Ala.), 76 So. 65.

§ 69. Validity and Sufficiency of Title or Claim.

§ 70. — In General.

Adverse possession does not depend upon original or documentary title, but concedes that the possession in its inception was wrong and not right. *Kidd v. Browne* (Ala.), 76 So. 65.

§ 71. — Validity and Sufficiency of Instruments in General.

§ 71 (1) In General.

See post, "Void, Irregular or Defective Deeds or Grants," § 71 (2); "Tax Sales and Tax Deeds," § 79.

Color of title is a writing which, in appearance, purports to, but in reality does not, transmit title or the right of possession. *Bowles v. Lowery*, 181 Ala. 603, 62 So. 107.

Exclusion from evidence of deeds not purporting to convey the land sought to be recovered by plaintiff in ejectment held proper since they could not be regarded as color of title. *Warten v. Weatherford*, 191 Ala. 31, 67 So. 667.

Where in ejectment defendant claimed under color of title as grantee of the purchaser at a tax sale, the tax records and tax deed to defendant's grantor were admissible as showing color of title. *Riley v. Fletcher*, 185 Ala. 570, 64 So. 85.

§ 71 (2) Void, Irregular or Defective Deeds or Grants.

See post, "Sufficiency of Description," § 80 (2).

That the acknowledgment of a deed is void does not prevent the deed being color of title. *Swindall v. Ford*, 184 Ala. 137, 63 So. 651.

A document to show color of title need not be executed and proved with

the same formality as one which conveys title. *Big Sandy Iron, etc., Co. v. Williams*, 184 Ala. 184, 63 So. 1011.

Homestead—Deed Not Signed by Wife.—Where a homestead was continuously occupied by the husband, wife and children until within a year or so from the commencement of an action involving the title, a deed executed by the husband to the wife and children, which was not signed and acknowledged by the wife, was not admissible in support of a claim of adverse possession made by the children as against the mortgagee of the husband and wife. *Wallace v. Feibelman*, 179 Ala. 589, 60 So. 290.

Fee—Deed by Tenant for Life.—Where a grantee in a deed purporting to convey the fee, executed by a tenant in common for life, went into possession, and he and one claiming under him remained in the adverse, continuous and notorious possession for many years, their possession ripened into title after 10 years as against strangers. *Kidd v. Borum*, 181 Ala. 144, 61 So. 100.

§ 72. — Bonds and Contracts to Convey.

In an action to quiet title against defendant, claiming under actual prior possession of one R. under color of title, complainant, who while in possession of the property knew that R. only had a deed from one claiming a life estate and could not convey good title, and who entered into a contract with R.'s husband, while his wife was alive, whereby he was to acquire a clear title and convey it to complainant, and who paid the full purchase price prior to R.'s death and received a deed from the surviving husband, had a perfect equity under such contract of purchase, and his possession began to run against R. in her lifetime. *Vidmer v. Lloyd*, 193 Ala. 386, 69 So. 480.

§ 79. — Tax Sales and Tax Deeds.

See ante, "In General," § 71 (1).

Tax Deeds.—A tax deed, a mortgage by the grantee therein, and a deed on foreclosure thereof, and a deed by the grantee in the foreclosure deed to defendant, are each admissible as color of title. *Big Sandy Iron, etc., Co. v. Williams*, 184 Ala. 184, 63 So. 1011.

Where, through lack of proper averments, a tax deed must, upon demurrer, be considered void as a muniment of title, it will support adverse possession under color of title. *Boone v. Gulf, etc., R. Co. (Ala.)*, 78 So. 956.

Adverse possession under a void tax deed is gained only by actual possession uninterruptedly continued, either by the party setting up such possession or those through whom he or she claims, during a continuous period of 3 consecutive years. *Veitch v. Hard (Ala.)*, 75 So. 405.

Whether all the preliminary requirements of the statute governing the sale of land for taxes were complied with or not, occupancy of the land for five years under a tax deed executed and delivered in conformity to Acts 1868, p. 327, § 92, is a good defense to a suit to compel payment for the land or enjoin its use. *Boone v. Gulf, etc., R. Co. (Ala.)*, 78 So. 956.

A tax deed was not color of title, where the holder did not go into possession under such deed. *Singleton v. Smith*, 184 Ala. 199, 63 So. 949.

§ 80. — Description of Property.

§ 80 (1) In General.

An instrument otherwise ineffectual can afford color of title only to lands described therein. *Hale v. Tennessee Coal, etc., R. Co.*, 183 Ala. 507, 62 So. 783.

Where the land sued for in ejectment is in a different quarter section than that described in the deed under which defendant claimed, defendant can not claim by adverse possession under color of title. *Wyman v. Walker*, 177 Ala. 72, 58 So. 403.

A conveyance of land described is not color of title in the grantee of other land taken possession of by him as part of the described land. *Tulley v. Snow*, 190 Ala. 556, 68 So. 301.

§ 80 (2) Sufficiency of Description.

To constitute "color of title," which will enable a grantee to rely upon the adverse possession of his grantor, the description must be sufficiently certain to enable a surveyor on search, or inquiry as to attendant circumstances, to locate the land without reliance upon

the claims of the grantee. *Southern Iron, etc., Co. v. Stowers*, 189 Ala. 314, 66 So. 677.

Deeds to the plaintiff held admissible as color of title on the question of adverse possession, even though defective for uncertainty in describing the property. *Mulder v. Stokes*, 184 Ala. 195, 63 So. 563.

Deeds under which the evidence showed that actual possession of the land was taken by the grantee, but in which the description is too uncertain to constitute a conveyance or color of title, are admissible in ejectment to show that the possession of the grantee thereunder was in good faith. *Noble v. Safford*, 181 Ala. 636, 62 So. 515.

§ 82. — Record of Instruments.

If plaintiffs have title by adverse possession, their failure to record a deed, the existence of which was not necessary to perfect their title, would not defeat their title by adverse possession. *Nolen v. Powell (Ala.)*, 64 So. 566.

§ 85. Evidence.

§ 85 (1) Presumptions and Burden of Proof.

The presumptions attending possession favor the idea of subserviency to the true title until title by adverse possession is complete. *Reynolds v. Trawick (Ala.)*, 78 So. 827.

In ejectment it devolves on one attempting to set up adverse possession to show the hostility of his possession to the title and right of possession of the true owner. *Stewart Bros. v. Ransom (Ala.)*, 76 So. 70.

Possession of land by a widow from 1874, the date of the death of her husband, who owned the land, until 1899 is presumed to have been subordinate, and not hostile or adverse, to the title vested in their children as decedent's heirs; dower not having been assigned to her, and the pecuniary status of the estate not having been judicially ascertained. *Sloss-Sheffield Steel, etc., Co. v. Taff*, 178 Ala. 382, 59 So. 658.

Where a widow in possession of land assigned to her as dower was in possession of other land of the estate within the inclosure of the land assigned, at the

time of her remarriage, the burden of proving that the occupancy by the second husband of the other land, under the mistaken belief that the assignment of dower included the other land, and that a deed to him of the reversion included the other land, was changed into possession hostile to the heirs rested on him or his heirs claiming title by adverse possession. *Tulley v. Snow*, 190 Ala. 556, 68 So. 301.

§ 85 (2) Admissibility.

See ante, "Occasional or Temporary Use or Occupation," § 24; "Evidence," § 38; "In General," § 71 (1); "Tax Sales and Tax Deeds," § 79; "Sufficiency of Description," § 80 (2); post, "Color of Title," § 89.

Evidence of a boundary line agreement relied on by the ancestor, through whom defendant in ejectment claimed by inheritance, was admissible to show the character of the ancestor's possession and claim, and consequently the bona fides of defendant's claim, as the basis for title by adverse possession, though such agreement could not bind the grantees in a prior deed, under which plaintiff claimed. *Jordan v. Smith*, 185 Ala. 591, 64 So. 317.

A deed, in terms to the heirs of I., competent to show color of title in them, is admissible, with the testimony of W., that he was one of such heirs, and under the deed took possession to show color of title in him. *Swindall v. Ford*, 184 Ala. 137, 63 So. 651.

A document offered as color of title is admissible in evidence for that purpose only in connection with evidence of actual possession and claim thereunder by the grantee therein, and deeds to others than the actual adverse possession are inadmissible to show color of title in him. *Veitch v. Hard (Ala.)*, 75 So. 405.

Letters Giving Permission to Occupy.

—In an ejectment action an adverse possession claimant can not introduce letters from the owner merely giving permission to occupy the land when there had been no disavowal of the owner's title. *Lee v. Lee*, 196 Ala. 522, 72 So. 24.

Rights of Predecessor.—Upon the issue as to whether the possession of defendant's predecessor was adverse or

merely permissive, it being claimed through the occupancy of the house upon the strip in controversy, evidence of the value of the respective shares taken under a parol partition by those under whom plaintiff and defendants claim, and that the house was on the share of one, was admissible, although the parol partition may have been insufficient to vest title. *Watters v. Brown*, 177 Ala. 78, 58 So. 291.

It was competent to show that while the person under whom the defendant claimed was in the possession of the land in controversy, it was known as his land, as bearing upon the question of whether the possession was adverse or merely permissive. *Watters v. Brown*, 177 Ala. 78, 58 So. 291.

(G) PAYMENT OF TAXES.

§ 86. Necessity in General.

See ante, "Constitutional and Statutory Provisions in General," § 3.

§ 88. Act of Ownership.

See ante, "Character and Elements of Adverse Possession in General," § 13.

§ 89. Color of Title.

Defendants in ejectment, claiming by adverse possession under color of title, may show they had paid the taxes on the land. *Big Sandy Iron, etc., Co. v. Williams*, 184 Ala. 184, 63 So. 1011.

II. OPERATION AND EFFECT.

(A) EXTENT OF POSSESSION.

§ 97. Possession without Claim of Right or Color of Title.

Title by adverse possession, in the absence of color of title, can be acquired only to the area actually occupied by the adverse claimant, or those through whom he claims. *Bowles v. Lowery*, 181 Ala. 603, 62 So. 107.

§ 99. Possession under Color of Title.

§ 100. — Constructive Possession in General.

§ 100 (1) In General.

Except as limited by other adverse possession, the possession of one who holds under a bona fide color of title will be extended to the limits described in his color, and such possession as so ex-

tended is actual, and not constructive, possession. *McMillan v. Aiken*, 182 Ala. 303, 62 So. 519.

The doctrine of extension of possession to the confines of that described in the color of title can only be predicated on an actual possession of a part, at least, of the land described. *Hale v. Tennessee Coal, etc., R. Co.*, 183 Ala. 507, 62 So. 783.

§ 100 (2) Entry under Conveyance from One without Title, or under Void Deed.

An unrecorded deed, invalid to convey title, because attested by only one witness, who signed by mark, may be used as color of title of a whole tract, a large portion of which was woodland, only a part being in actual cultivation, in connection with evidence of adverse possession. *Heath v. Lewis (Ala.)*, 76 So. 451.

§ 101. — Relation to Each Other of Different Premises or Parts of Same Premises.

A deed operative to give color of title to the land described in it draws to the party to whom it is given possession of the whole tract, on his taking possession of a part, unless the remainder is in the actual adverse possession of another. *Swindall v. Ford*, 184 Ala. 137, 63 So. 651.

Where plaintiff and defendant owned adjoining parcels of land and defendant held under a claim of right, its possession was hostile only up to the true division line. *Aldrich Min. Co. v. Pearce*, 192 Ala. 195, 68 So. 900.

§ 103. — Mixed Possession under Hostile Titles, or Conflicting Grants or Surveys.

See ante, "Relation to Each Other of Different Premises or Parts of Same Premises," § 101.

Where defendants for 20 years had been in such possession, as the character of the land reasonable admitted, of land as to which both they and complainants had color of title under overlapping grants, complainants' actual possession of a part of their grant was not extended by their color of title to the land in question, although such actual possession commenced before defendants' posses-

sion of the land in controversy; and hence it was error to enjoin defendants from trespassing on such land until they established their title by an action at law, and the injunction should be modified so as to place the burden of suing on the complainants. *McMillan v. Aiken*, 182 Ala. 303, 62 So. 519.

(B) TITLE OR RIGHT ACQUIRED.

§ 104. Presumption of Grant.

Possession entitling one to the presumption of a grant would, without its aid, suffice to vest title under the statute of limitation. *Boone v. Gulf, etc., R. Co. (Ala.)*, 78 So. 956.

Presumption of grant arising from prescription will not be defeated by infancy, coverture or other personal disabilities, nor its operation suspended by causes which have been legally adjudged to suspend the running of limitations. *Kidd v. Browne (Ala.)*, 76 So. 65.

Against United States.—Though neither limitation nor prescription runs against the United States to the impairment of its title, a grant will be presumed on proof of adverse, exclusive and uninterrupted possession for 20 years; whenever by possibility a right may be acquired in any manner known to the law; the presumption being rebuttable, however, in favor of the government or its grantees. *Carter v. Walker*, 186 Ala. 140, 65 So. 170.

§ 105. Rights and Liabilities of Occupants.

A special plea in abatement in an action by a mortgagor to recover defendant's excess of the bid at foreclosure sale over the mortgage debt, seeking recovery for conversion of crops by mortgagor and alleging that the mortgagor held the land by adverse possession, is demurrable on the ground that a personal action by the owner of land not in possession will not lie against the adversary possessor, under claim of ownership, for conversion of crops. *McRight v. Farned*, 14 Ala. App. 445, 70 So. 297.

§ 106. Nature and Extent of Title or Right.

§ 106 (1) In General.

The lapse of 20 years without recog-

nition of right, or admission of liability, operates an absolute rule of repose or prescription.. *Kidd v. Browne (Ala.)*, 76 So. 65.

§ 106 (2) Limitation as Bar to Action for Recovery.

See ante, "In General," § 106 (1).

§ 106 (3) Extinction of Title in Original Holder.

Where defendants, after the death of their ancestor in possession, held the land adversely under a bona fide claim of inheritance, for the period of limitations, they acquired a fee, regardless of the fact that their ancestor had only a life estate. *Childs v. Floyd*, 194 Ala. 651, 70 So. 121.

III. PLEADING, EVIDENCE, TRIAL AND REVIEW.

§ 110. Pleading Possession.

Issues and Proof.—Where defendant in ejectment claimed by adverse possession, and the possession of the land was in issue, evidence was admissible that plaintiff's grantor was not in possession when he conveyed to plaintiff in 1911. *Jordan v. Smith*, 185 Ala. 591, 64 So. 317.

§ 111. Pleading Title or Right.

A party who claims a government subdivision by deed and a part of an adjacent subdivision by adverse possession must include the part claimed by adverse possession by an appropriate description in his complaint in ejectment. *Oliver v. Oliver*, 187 Ala. 340, 65 So. 373.

§ 112. Presumptions and Burden of Proof.

See ante, "In General," § 66 (1).

In the absence of proof to the contrary, it is presumed that the grantor of a lot, by exercising acts of dominion over a strip adjoining it, did not intend to claim it adversely, if it was not covered by his deed. *Kilpatrick v. Trotter*, 185 Ala. 546, 64 So. 589.

One claiming land by adverse possession has the burden of proving that he has held the land adversely for the statutory period necessary to perfect his title. *Norsworthy v. Willoughby*, 176 Ala. 145, 57 So. 717.

The burden is on one seeking to show title by adverse possession to prove not

only the fact of possession but also that such possession was adverse and contained or carried with it all the elements requisite or necessary to make the possession adverse. *Alexander-City, etc., Co. v. Central, etc., R. Co.*, 182 Ala. 516, 62 So. 745.

Where defendant established ownership of a lot and that plaintiff's building encroached upon it, the plaintiff had the burden of establishing the changed line, or, in other words, of showing title to the strip by adverse possession and definitely fixing the extent and boundaries of the land so claimed. *McLester Bldg. Co. v. Upchurch*, 180 Ala. 23, 60 So. 173.

§ 113. Admissibility of Evidence.

See ante, "Void, Irregular or Defective Deeds or Grants," § 71 (2).

Plaintiff in ejectment having introduced evidence of claim to, and acts of possession of the land, on the part of his grantor, defendant, claiming by adverse possession, may, in rebuttal, show such grantor disclaimed ownership, and declined to pay taxes on the land, about the time defendant acquired a tax deed for the land. *Big Sandy Iron, etc., Co. v. Williams*, 184 Ala. 184, 63 So. 1011.

Where a question asked in ejectment and bearing upon the defendant's claim of adverse possession, was not confined to the period of time covered by the claim, an objection to it was properly sustained. *Watters v. Brown*, 177 Ala. 78, 58 So. 291, cited in note in *Ann. Cas.* 1914D, 243.

§ 114. Weight and Sufficiency of Evidence.

§ 114 (1) In General.

Acquisition of Title.—Evidence held sufficient to show that complainant's predecessor had acquired title to lands by adverse possession, and had treated the land in every respect as the owner thereof. *Kidd v. Browne* (Ala.), 76 So. 65.

Widow's Possession of Home Place.—In suit to quiet title by the administrator of a widow against her deceased husband's son by a former marriage, evidence held to show that the agreement for the division of the husband's estate made between the widow and the son contemplated that each become the absolute owner of that part of the estate

referred to in the agreement as allotted to each of them, that pursuant to such agreement the son executed a deed conveying without limitations his interest in the property in question to the widow, and that she continued for a period of 20 years in the open, notorious and adverse possession of the property under claim of absolute ownership. *Dement v. French* (Ala.), 76 So. 960.

Sufficiency of Proof of Title by Adverse Possession.—Evidence held insufficient to establish title by adverse possession. *Palmer Terrace Realty Co. v. Scurlock* (Ala.), 76 So. 297.

Same—Elements of Possession.—Evidence held insufficient to show open, notorious, exclusive, hostile or continuous possession of land for ten years. *Perolio v. Woodward Iron Co.*, 197 Ala. 560, 73 So. 197.

Same—Land of Cotenants.—D. conveyed to plaintiff and C. each an undivided one-half interest in certain land. Later C. conveyed his interest to D. These conveyances were filed for record July 6, 1897. On July 9th following, a judgment was entered against C. and his interest was sold and purchased by the creditor who conveyed an undivided one-half interest to plaintiff. In 1912, defendant, a bona fide purchaser for value, received conveyances from D. to an undivided one-half interest in the land. Code 1886, § 1810, provides that conveyances of unconditional estates to secure any debt created at the date thereof are void as to purchasers for value without notice, unless recorded within 30 days from their date. Plaintiff sued to quiet title to the land contending among other things, that the conveyances from C. to D. were fraudulent as to creditors of C. Held, that the title of defendant was superior to that acquired by plaintiff, there being insufficient evidence to show title in plaintiff by adverse possession. *Russell v. Bohlin* (Ala.), 76 So. 851.

Same—Nature of Predecessor's Claim.—Plaintiffs in ejectment must rest their right of recovery on adverse possession under the statute, rather than on any of the exceptions contained in Code 1907, § 2830, as to the conditions on which title by adverse possession may be required, where the evidence shows that

one through whom they traced title claimed it by purchase, and that he exhibited a deed to the property, but the deed is not in evidence and the name of the grantor, the date and terms of the deed, and the fact of acknowledgment is not shown, other than that it was a warranty deed. *Stewart Bros. v. Ransom* (Ala.), 76 So. 70.

Same—Mixed Possession.—In a suit to recover the value of logs cut on land, title to which was in dispute between the parties, plaintiff's proof of title by adverse possession held insufficient for submission to the jury, in view of the principle that in case of mixed possession color of title is available to the holder of the true title only. *Aiken v. McMillan* (Ala.), 78 So. 56.

§ 114 (2) Boundaries and Extent of Possession.

See ante, "In General," § 66 (1).

§ 114 (3) Effect of Color of Title.

Although acts of ownership on wild land under color of title need not be frequent or extensive, mere removal of sawlogs and rails, in the absence of a showing of frequency or time of removal, is insufficient to establish title by adverse possession, though coupled with testimony of two witnesses that, so far as they knew, claimant had sole possession. *Franklin v. Snow*, 195 Ala. 569, 71 So. 93.

§ 115. Questions for Jury.

§ 115 (1) In General.

See post, "Hostile Character of Possession," § 115 (5).

In a suit to recover possession of property, evidence held sufficient to take to the jury the question of adverse possession of defendant and his predecessors in title. *Cannon v. Prude*, 181 Ala. 629, 62 So. 24.

Evidence held sufficient to take to the jury the question whether defendant's predecessor had been in actual possession of the land for the statutory period, though he did not live thereon and cultivated it only during 5 scattered years out of 15. *First National Bank v. Johnson*, 190 Ala. 566, 67 So. 234.

§ 115 (2) Actual Possession.

See ante, "In General," § 115 (1).

§ 115 (3) Open and Exclusive Possession.

Adverse Possession of Tenant—Landlord's Knowledge.—In an action of ejectment, where plaintiff proved a prima facie case by a deed to his grantor and from such grantor to plaintiff and previous possession of grantor, and where defendant who admitted prior possession and ownership of plaintiff's grantor attempted to defeat plaintiff's right by showing adverse possession of the grantor's tenant, the affirmative charge was properly given for plaintiff, where defendant failed to show any knowledge by plaintiff's grantor of any hostile or adverse claim of the tenant, while plaintiff proved a want of such knowledge by his grantor. *Powell v. Folmar* (Ala.), 78 So. 47.

§ 115 (4) Duration and Continuity of Possession.

See ante, "In General," § 115 (1).

On the issue of plaintiff's adverse possession to certain land in controversy, the evidence was held to require submission of the continuity of plaintiff's possession to the jury. *Pearce v. Aldrich Min. Co.*, 184 Ala. 610, 64 So. 321.

In ejectment, where defendant claimed under purchase and adverse possession for ten years, conflicting evidence as to the continuity of defendant's adverse possession made the question one for the jury. *Eiland v. Frost, etc., Co.* (Ala.), 75 So. 293.

§ 115 (5) Hostile Character of Possession.

Ordinary adverse possession is usually a question for the jury. *Bedsole v. Davis*, 189 Ala. 325, 66 So. 491.

Direction of Verdict.—Where, in ejectment, defendant's evidence of adverse possession, though conflicting, was such that the jury might have found the entire issue in his favor, plaintiff's request for general affirmative instructions was properly refused. *Jordan v. Smith*, 185 Ala. 591, 64 So. 317.

In ejectment, where both parties claimed adversely under color of title, but there was evidence that plaintiff's possession was not such as legally amounted to adverse possession she was not entitled to an affirmative charge.

Riley v. Fletcher, 185 Ala. 570, 64 So. 85.

Claim of Ownership to Certain Line.

—Where the evidence on the question whether defendant and his grantors intended to claim the land up to a certain line was conflicting, the question was for the jury. *Hornsby v. Tucker*, 180 Ala. 418, 61 So. 928.

Claim of Ownership to True Line.

In ejectment for a narrow strip of land, evidence held to require the submission to the jury of the question whether the defendant's possession was adverse or merely under a claim of ownership up to the true boundary line, which was uncertain. *Noble v. Saffold*, 181 Ala. 636, 62 So. 515.

Claim of Ownership Regardless of Boundary of Railroad Right of Way.

Where a grantee in a deed of a storehouse and lot, bounded by a railroad right of way, entered into and remained in possession thereof for many years, whether he intended to claim the storehouse and lot, regardless of the boundary of the right of way, held for the jury. *Mobile, etc., R. Co. v. Rutherford*, 184 Ala. 204, 63 So. 1003, cited in notes in *L. R. A.* 1916B, 657; *Ann. Cas.* 1916D, 1187.

Where a land company exercised general supervision over land, showing purchasers over it, etc., its adverse possession thereof was a jury question. *Snow v. Bray* (Ala.), 73 So. 542.

§ 115 (6) Color of Title and Good Faith.

Alteration of Deed before or after Delivery.

—Where the evidence conflicted whether a deed to defendant's predecessor had been altered before or after delivery, such predecessor's color of title was a jury question. *Snow v. Bray* (Ala.), 73 So. 542.

§ 116. Instructions.

§ 116 (1) In General.

See ante, "Hostile Character of Possession," § 115 (5).

Where there was evidence that the ancestor of defendants believed in good faith that he had purchased the land in dispute, that he exercised actual possession thereof, claiming the land as his own until his death, and that the possession was continued thereafter by his widow and heirs for the statutory pe-

riod to invest title, a charge that the deed under which the ancestor claimed was not color of title to the land involved, and the verdict must be for the plaintiff, if the jury believed the evidence, took from the jury the issue of title by adverse possession, and was consequently erroneous. *Tulley v. Snow*, 190 Ala. 556, 68 So. 301.

Where, in statutory ejectment, defendant relied on adverse possession of ten years under color of title, a requested charge which did not hypothesize an adverse possession by defendant at the time of the execution of a mortgage relied on by plaintiff was properly refused. *Ballard v. Bank*, 187 Ala. 335, 65 So. 356.

§ 116 (3) Visible and Notorious and Distinct and Exclusive Possession.

An instruction that if plaintiff acquired actual possession of the land at a certain time, and kept continuous possession, doing certain things, for 25 years, this adverse possession would ripen into title, did not, by hypothesizing "actual" possession, so minimize the misleading character of the charge, from the omission to hypothesize that the possession was "exclusive," as to avoid affirmative error, and put the defendant to an explanatory instruction. *Bowles v. Lowery*, 181 Ala. 603, 62 So. 107.

§ 116 (4) Duration and Continuity of Possession.

Where an instruction requires that adverse possession must be "continuous" for ten years, it is not necessary also to say that the 10 years must be "consecutive." *Veitch v. Hard* (Ala.), 75 So. 405.

In ejectment, where the evidence shows adverse possession by the defendants from a time 10 years prior to the trial, but not quite 10 years prior to the commencement of the suit a charge as to the 10-year statute of limitations which does not require the possession to have been for the specified time prior to the commencement of the suit, is erroneous. *Gay v. Fleming*, 182 Ala. 511, 62 So. 523.

§ 116 (5) Hostile Character of Possession.

In ejectment, where the court refused the defendant's requested charge that if the defendant had had possession of the land in controversy for a period exceed-

ing 10 years, then the verdict should be for him, such refusal was proper; the charge being faulty in that its conclusion was predicated on bare possession, not on adverse possession. *Salter v. Fox*, 191 Ala. 34, 67 So. 1006.

Where in instructions defining adverse possession by a statement of its various elements the term "hostile" is omitted, but the possession itself is required to be "adverse," the omission is not per se erroneous, but should be corrected by an explanatory charge, further explaining the meaning of the term "adverse." *Veitch v. Hard* (Ala.), 75 So. 405.

Where defendant in ejectment, claiming by adverse possession under inheritance from his father, relied in part upon a period antedating Code 1907, § 2830, amending Code 1896, §§ 1541-1546, which dispenses with the necessity for record of color of title by one who derives title by descent from a predecessor in pos-

session, it was error to instruct predicating a verdict for defendant merely upon an adverse possession by him, without regard to the bona fides of his claim by inheritance. *Jordan v. Smith*, 185 Ala. 591, 64 So. 317.

§ 116 (7) Extent of Possession.

Where defendant in ejectment claimed title by adverse possession under color of title from his father by inheritance, and it appeared that the father claimed under a boundary line agreement executed in 1882, and that, though defendant was in possession continuously thereafter, he was a mere remainderman until the termination of the life estate in 1896, an instruction submitting to the jury whether his possession under the agreement made in 1882 was "thereafter" of such a character as to give him the title was misleading. *Jordan v. Smith*, 185 Ala. 591, 64 So. 317.

AFFIDAVITS.

Cross References.

See the title AFFIDAVITS, vol. 1, p. 205, and references there given.

As to affidavits in criminal cases, see post, CRIMINAL LAW; INDICTMENTS AND INFORMATIONS; LARCENY.

Nature and Functions in General.

Affidavits are of two kinds; those which serve as evidence to advise the court in determining some preliminary

issue or substantial right, and those which merely serve to invoke the judicial power. *Worthen v. State*, 189 Ala. 395, 66 So. 686.

Affirmance.

See post, APPEAL AND ERROR; CRIMINAL LAW.

AFFRAY.

Cross References.

See the title AFFRAY, vol. 1, p. 208, and references there given.

Nature and Elements of Offenses.

Where accused, after being evicted from a public entertainment and warned to stay out, sought to return, and in so

doing attacks one in charge, he was guilty of an assault or an affray. *Winder v. State* (Ala. App.), 78 So. 416.

Age.

See the particular appropriate titles.

Agency.

See post, PRINCIPAL AND AGENT.

Aggrevation of Damages.

See post, DAMAGES.

Agreed Case.

See post, APPEAL AND ERROR.

AGRICULTURE.

§ 1. Statutory Provisions.

§ 7. Fertilizer.

§ 7 (1) License and Regulation.

§ 7 (2) Inspection, Stamping and Certifying.

§ 7 (5) Criminal Liability.

§ 10. Agricultural Liens.

§ 11. — Right to Lien.

Cross References.

See the title AGRICULTURE, vol. 1, p. 210, and references there given.

In addition, see post, CROPS; LANDLORD AND TENANT.

§ 1. Statutory Provisions.

Acts 1909, p. 272, § 9, relating to the sale of feedstuffs, and providing that the commissioner of agriculture and industries and his bondsman shall be liable for certain defaults of his clerks, was repealed by Acts 1911, p. 104, covering the same subject matter, and intended to be complete in itself, but containing no similar provision. *State v. Kolb* (Ala.), 78 So. 817.

§ 7. Fertilizer.

§ 7 (1) License and Regulation.

Statutory Provisions.—*State v. Lamar*, 178 Ala. 77, 59 So. 473. See the title AGRICULTURE, § 7 (1), vol. 1, p. 211.

Sufficiency of Request to Register.—*Gadsden Fertilizer Co. v. Wiles*, 178 Ala. 459, 59 So. 582, cited in note in 43 L. R. A., N. S., 1110. See the title AGRICULTURE, § 7 (1), vol. 1, p. 211.

§ 7 (2) Inspection, Stamping and Certifying.

Evidence as to Failure to Tag.—In an action on a note given for fertilizer, it

was error to admit evidence that the fertilizer was not tagged long after the seller had lost control of it, where there was no evidence that it was not tagged when sold. *Planters' Chemical, etc., Co. v. Stearnes*, 189 Ala. 503, 66 So. 699.

§ 7 (5) Criminal Liability.

Construction of Statute—Sale of Cotton Seed Meal.—*Imperial Cotton Seed Oil Co. v. Shanks*, 177 Ala. 522, 58 So. 390. See the title AGRICULTURE, § 7 (2), vol. 1, p. 212.

Sale of Cotton Seed Meal as Fertilizer.—*State v. Lamar*, 178 Ala. 77, 59 So. 473. See the title AGRICULTURE, § 7 (5), vol. 1, p. 214.

§ 10. Agricultural Liens.

§ 11. — Right to Lien.

Agreement Held Not "Contract of Hire"—"Team."—A contract which provides that a party is to have the use of mules, wagon and corn for a year and cultivate a tract on halves, and that the adverse party shall receive a half of the crops for the use of the land and stock,

which stock shall remain his property, is not a "contract of hire" within Code 1907, § 4743, declaring that when one party furnishes the land and the "team" to cultivate it, and another party furnishes the labor, with stipulations to divide the crop between them in certain proportion, the contract of hire shall exist, and the laborers shall have a lien on the crop for the value of his portion of the crop; for the word "team," as used in the statute, has reference not alone to the live stock used in making the crop, but also includes plows, harness, gears, etc., necessary for use in connection with the stock in producing the crop. *Tate v. Cody-Henderson Co.*, 11 Ala. App. 350, 66 So. 837.

Alias.

See post, INDICTMENT AND INFORMATION. As to alias writs, see post, EXECUTION; PROCESS.

Alibi.

See post, CRIMINAL LAW.

Alienation.

See post, DEEDS; PUBLIC LANDS. As to alienation of affections, see post, HUSBAND AND WIFE.

Aliens.

See the title ALIENS, vol. 1, p. 222, and references there given.

Alimony.

See post, DIVORCE; HUSBAND AND WIFE.

Allotment.

See post, DOWER; HOMESTEAD.

Allowance.

See post, COSTS; DIVORCE; EXECUTORS AND ADMINISTRATORS; TRUSTS. As to allowance of appeal, see post, APPEAL AND ERROR; CRIMINAL LAW.

ALTERATION OF INSTRUMENTS.

- § 1. Materiality.
- § 7. — Filling Blanks.
- § 9. — Marginal Matter and Annexed Writings.
- § 15. Effect upon Rights of Parties.
- § 20. — Negotiable Instruments.
- § 24. Admissibility of Instrument in Evidence.
- § 25. Pleading.
- § 26. Evidence.
- § 27. — Presumptions and Burden of Proof.
 - § 27 (1) Presumptions.
 - § 27 (3) Burden of Explaining Alterations.
- § 28. — Admissibility in General.
- § 29. — Weight and Sufficiency.

Cross References.

See the title ALTERATION OF INSTRUMENTS, vol. 1, p. 227, and references there given.

In addition, see post, CANCELLATION OF INSTRUMENTS; REFORMATION OF INSTRUMENTS.

§ 1. Materiality.

§ 7. — Filling Blanks.

Where a Missouri note made no provision as to interest, the blank may be filled in at the legal rate in that state, such act not constituting a material alteration. *Haas v. Commerce Trust Co.*, 194 Ala. 672, 69 So. 894.

§ 9. — Marginal Matter and Annexed Writings.

Where a guaranty by a third person that plaintiff would carry out the contract sued on, indorsed on the instrument containing the contract, was a mere gratuity, neither the alteration nor cancellation of the guaranty affected the rights or liability of defendant. *Baker v. Lehman, etc., Co.*, 186 Ala. 493, 65 So. 321.

Where one party to a written contract procures a third person to become a joint obligor therein, or makes any change on the face of the paper varying its legal operation, the alteration invalidates the contract in toto, but the indorsement of a contract of guaranty by one of the parties without the consent of the other does not invalidate the contract. *Baker v. Lehman, etc., Co.*, 186 Ala. 493, 65 So. 321.

§ 15. Effect upon Rights of Parties.

§ 20. — Negotiable Instruments.

Where defendants executed the note in suit as part of an agreement to which it was attached, it was no defense that without defendants' consent the note was detached from such agreement, unless material alteration was made in the contract as executed. *Weinstein v. Citizens Bank*, 13 Ala. App. 552, 69 So. 972.

§ 24. Admissibility of Instrument in Evidence.

Necessity of Explanation.—An instrument containing alteration is admissible in evidence with or without explanation. *Yarbrough Turpentine Co. v. Taylor* (Ala.), 73 So. 458.

§ 25. Pleading.

Proof.—Where, in detinue, plaintiff claimed under chattel mortgage, defendant was entitled to show, under a plea of non est factum, that the property sued for was not covered by the mortgage at the time it was executed. *Hoobler v. International Harvester Co.*, 185 Ala. 533, 64 So. 567.

§ 26. Evidence.**§ 27. — Presumption and Burden of Proof.****§ 27 (1) Presumptions.**

General presumption of innocence is to be considered in determining whether a lease was altered after execution by party to whose advantage alteration operates. *Yarbrough Turpentine Co. v. Taylor* (Ala.), 73 So. 458.

§ 27 (3) Burden of Explaining Alterations.

Where alteration of an instrument and its effect upon instrument are apparent, burden of explanation upon party to whose advantage it operates results as an inference of fact, weight of which is affected by appearance of document and probable motive for or against alteration, advantage, or disadvantage to party claiming under it, with ultimate issue to be determined as a question of fact upon whole

evidence. *Yarbrough Turpentine Co. v. Taylor* (Ala.), 73 So. 458.

§ 28. — Admissibility in General.

Previous Parol Agreement.—A previous parol understanding that a lease, which was beneficial to the lessee, would be given for four years would be conclusive that an instrument altered from three to four years and from four years to 3 years and 7 months expressed intent of parties, and would remove occasion for further explanation of the alteration by the lessee. *Yarbrough Turpentine Co. v. Taylor* (Ala.), 73 So. 458.

§ 29. — Weight and Sufficiency.

In a suit to cancel a lease and restrain defendants from acting under it, term of which had been altered from three to four years and from four years to three years and seven months, evidence held to show that alterations were made before execution of lease and expressed intent of parties. *Yarbrough Turpentine Co. v. Taylor* (Ala.), 73 So. 458.

Alternative Judgment.

See post, JUDGMENT; REPLEVIN.

Alternative Pleadings.

See post, PLEADING.

Ambiguities.

See post, EQUITY; EVIDENCE; PLEADING; STATUTES; WILLS.

Amendments.

See post, PLEADING. And see the particular appropriate titles.

Amicus Curiae.

See the title AMICUS CURIAE, vol. 1, p. 243, and references there given.

Amount in Controversy.

See post, APPEAL AND ERROR; COURTS.

Ancient Documents.

See post, EVIDENCE.

Ancillary.

See post, APPEAL AND ERROR; BANKRUPTCY; COURTS; EQUITY; EXECUTORS AND ADMINISTRATORS; INJUNCTION; RECEIVERS.

Anguish.

See post, DAMAGES.

ANIMALS.

- §§ 1, 2. Nature of Property—Animals Subject to Ownership.
- § 27. Hire and Use.
- § 28. Contagious and Infectious Diseases.
- § 29. — Statutory Regulations in General.
- § 30. — Quarantine.
- § 36. — Criminal Prosecutions.
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- § 43. Injuring or Killing Animals in General.
- § 44. — Civil Liability.
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- § 50. — Stock Laws.
 - § 50 (1) In General.
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 - § 50 (2a) In General.
 - § 50 (2b) Election in General.
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- § 57. — Criminal Prosecutions.
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- § 61. — Impounding or Taking up.
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- § 73. — Killing Vicious Animals.
- § 77. Injuries to Other Animals.
- § 82. — Knowledge or Notice of Vicious Propensities.
- § 84. — Killing Vicious Animals.
- § 89. Trespassing.
- § 95. — Impounding or Distraining Trespassing Animals.
- § 97. — Liabilities for Trespasses in General.

Cross References.

See the title ANIMALS, vol. 1, p. 244, and references there given.

As to judicial notice of rules and regulations of live stock board, see post, CRIMINAL LAW; EVIDENCE. As to liability of seller for damages to live stock by improper medicine, see post, DRUGGISTS. As to injunction against enforcement of tick eradication law, see post, INJUNCTION. As to killing, or injury to animals by railroads or street railroads, see post, RAILROADS; STREET RAILROADS.

§§ 1, 2. Nature of Property—Animals Subject to Ownership.

Dogs.—"We are aware that dogs have not been regarded in the eyes of the law as occupying the same status as other domestic animals; but the tendency of modern legislation and judicial thought, especially in this state, has been to ele-

vate that status above what it was at common law, and to assimilate it at least to that occupied by other domestic animals, though not to make it in all respects the same. Even at common law the property right in a dog was recognized; but it was there regarded (and is in our jurisprudence yet so regarded to

a modified extent) as a kind of base property, and as not under all circumstances entitled to as much consideration and protection as property in other classes of domestic animals, and this because of the inherent difference between the natural tendencies of dogs and other animals, and in the purposes for which they are severally kept. Other animals, such as horses, cattle, sheep and hogs, may be thoroughly tamed, and are used for burden, husbandry and food. But dogs, even in a state of domestication, never wholly lose their wild natures and destructive instincts, and are kept as a rule for the mere whim and pleasure of the owner, which often depends upon retaining and calling into action those very natures and instincts. Thompson on the Law of the Farm, *supra*. At common law the property in a dog was regarded as so base that he was not the subject of larceny. *Ward v. State*, 48 Ala. 163, 17 Am. Rep. 31; *Johnston v. State*, 100 Ala. 32, 14 So. 629. This rule has been expressly changed by statute in this state (Code, § 7235); and it is now also a penal offense, which was not true at common law, to maliciously kill, disable, disfigure, or injure any dog, the property of another, 'without good excuse.' Code, § 6234." *Kershaw v. McKown*, 12 Ala. App. 485, 68 So. 559, 561, affirmed in 196 Ala. 123, 72 So. 47.

The negligent killing of a dog by a street car invests the owner of the dog with a right to be compensated therefor. *Alabama City, etc., R. Co. v. Lumpkin (Ala.)*, 70 So. 162.

"In the case of *Selma St., etc., R. Co. v. Martin*, 2 Ala. App. 537, 56 So. 601, an action for injuries inflicted on plaintiff's dog by defendant's car while being operated on its track along a street in the city of Selma, it was held by the Court of Appeals that a dog is 'property' within the meaning and application of that term as used in § 5476 of the Code, and that the provisions of that section are applicable to street railroad companies; the particular conclusion being that, upon plaintiff's proving that defendant's agents ran its car over the dog, the statute imposed on defendant the burden of acquitting itself of the implication of negligence proximately productive of the re-

sult complained of." *Ex parte Selma St., etc., Railway*, 177 Ala. 473, 474, 59 So. 169, cited in note in *L. R. A.* 1917F, 435.

§ 27. Hire and Use.

Unauthorized Use by Bailee—Ratification.—Where one lets an animal for a definite service, its use in a different, unauthorized service, renders the bailee liable in trover for conversion, the liability being absolute, and not dependent upon negligence, any injury not being an element of the conversion, but going only to the measure of damages; but, where the bailor, with knowledge of the facts, accepts compensation for the unauthorized use, the original contract of letting is thereby enlarged to comprehend it, and the only remedy of the bailor is an action on the case for negligence. *Hitt Lumber Co. v. Ambrester*, 192 Ala. 467, 68 So. 338, cited in notes in *L. R. A.* 1916F, 1042; *Ann. Cas.* 1918C, 950.

Injury—Act of Agent.—Where plaintiff engaged to drive defendants halfway to a railroad, at which point they were to be met by another wagon, and upon the sickness of his wife, sent third person along with them, riding plaintiff's mule, which died from the effects of the parties' passing beyond the originally contemplated stopping place upon failure of the wagon to appear, the sole purpose of sending such rider being to have someone to bring back the team, he was agent of the plaintiff, and not of the defendants, to render them liable for the injuries to the mule. *Hitt Lumber Co. v. Ambrester*, 192 Ala. 467, 68 So. 338, cited in note in *L. R. A.* 1916F, 1042.

Remedies—Case or Trover.—Case, and not trover, was the appropriate remedy where plaintiff contended that the defendant, a bailee, had so misused the bailor's ox that it died. *Lisenby v. Capps (Ala.)*, 75 So. 332.

§ 28. Contagious and Infectious Diseases.

§ 29. — Statutory Regulations in General.

Act March 5, 1915 (Acts 1915, p. 123), providing for the submission to the qualified voters of each county of the question whether or not the work of cattle tick eradication shall be taken up in the

county under the state live stock sanitary board, and expressly repealing laws in conflict therewith, supersedes Code 1907, § 765, leaving the state live stock sanitary board to determine when the work of tick eradication should be taken up in any county. *Hill v. Cameron*, 194 Ala. 376, 69 So. 636; *Bossham v. Cameron*, 194 Ala. 692, 69 So. 640.

Implied Repeal.—Act March 12, 1907 (Acts 1907, p. 413), providing for the eradication of contagious or communicable diseases of live stock, was amended by Act August 6, 1907 (Acts 1907, p. 583), which added what was denominated § 16, which was subsequently incorporated into the Code of 1907 as § 770, declaring that none of the provisions of the article should apply to or be put in force in a county where the majority of its area is not under a stock law, or a law prohibiting cattle from running at large. By Act Aug. 20, 1909 (Acts Sp. Sess. 1909, p. 187), Act March 12, 1907, was amended by reference to § 770 of the Code so as to provide that none of the provisions of the article "relating to the work of cattle tick eradication" shall be in force in a county where the majority in area is not under a stock law or a law prohibiting cattle from running at large, and subsequently Act Aug. 6, 1907, was passed purporting to amend the original act by adding thereto § 16, providing that whenever the county commissioners or board of revenue in any county of this state shall enter an order providing that the provisions of this act be put in force in the county in which they shall hold office, the county shall be placed under the provisions of the act. Held, that while Act Aug. 20, 1909, is an amendment to Code, § 770, it is, so far as legislative intention is concerned, to be considered as the amending act of August 6, 1907, and hence the act of August 6th should be considered as repealing by implication the prior amendments. *Ferguson v. Commissioners Court*, 187 Ala. 645, 65 So. 1028.

County Not Shown to Be Excepted from Operation of Statute.—On motion to dissolve an injunction restraining state live stock inspectors from quarantining complainant's cattle to eradicate ticks, evidence held insufficient to show

that the state live stock sanitary board had, under Code 1907, § 765, providing that such board shall determine when the work of cattle tick eradication shall be taken up in any county, determined upon and put in force such work in the county where complainant's cattle were located prior to the passage of Act March 5, 1915, providing for submitting to the electors of each county the question whether or not the work of tick eradication should be taken up, and hence such county was not excepted from the operation of the latter act. *Hill v. Cameron*, 194 Ala. 376, 69 So. 636; *Bossham v. Cameron*, 194 Ala. 692, 69 So. 640.

§ 30. — Quarantine.

See ante, "Statutory Regulations in General," § 29; post, "Criminal Prosecutions," § 36.

Authority of Officers Not Legally Appointed.—State live stock inspector and county quarantine officer, and his assistants, if not lawfully appointed, have no authority to enter cattle owner's premises for inspection or enforcement of tick eradication laws, as authorized by Code 1907, § 764. *Warren v. Cameron (Ala.)*, 74 So. 949.

§ 36. — Criminal Prosecutions.

Affidavit—Sufficiency.—Where the affidavit on which defendant was tried and convicted of violating the quarantine laws of the State Live Stock Sanitary Board followed the form prescribed by the Code 1907, § 6703, for proceedings in the county court, without undertaking to set out the constituents of the offense, it was sufficient to sustain the judgment. *Ward v. State (Ala.)*, 74 So. 727.

Proof.—In prosecution under Code 1907, § 7083, as amended by Acts 1911, p. 613, state must prove that defendant, within period covered by indictment, drove live stock or caused it to be driven, or moved it or allowed it to be moved, from quarantined to nonquarantined district, or moved it or allowed it to be moved from one place to another in quarantined district, in violation of rules of state live stock sanitary board. *Pierson v. State (Ala. App.)*, 76 So. 487.

§ 37. Cruelty.

Code 1907, § 6232, does not prohibit

merely "killing" an animal, but "cruelly killing" an animal. *Abercrombie v. State*, 8 Ala. App. 326, 62 So. 966.

§ 43. Injuring or Killing Animals in General.

§ 44. — Civil Liability.

See post, "Killing Vicious Animals," §§ 73, 84.

Complaint.—A complaint alleging the wrongful shooting and killing of plaintiff's dog, of the alleged value of \$100, stated a good cause of action. *Kershaw v. McKown*, 12 Ala. App. 485, 68 So. 559, affirmed in 196 Ala. 123, 72 So. 47.

In an action for damages for killing a dog, an allegation that defendant willfully and intentionally shot and killed the dog was not demurrable for failure to aver that the killing was wrongful, since the phrase "willfully and intentionally" imports that the act was wrongful. *Minor v. Coleman* (Ala. App.), 74 So. 841.

Damages.—In an action for killing plaintiff's dog while chained up on his premises, damage occasioned by his wife's becoming hysterical and excited upon learning the news some hours later, she not having been present at the killing, were not recoverable, as too remote. *Allen v. Camp*, 14 Ala. App. 341, 70 So. 290.

§ 45. — Criminal Responsibility.

Evidence—Admissibility.—Where on a trial for the malicious killing of a hog there was evidence that the hog was found dead in accused's field, and that he furnished a gun to a third person, and told him to kill the hog, and that the third person had done so, evidence that accused shook down some peaches in the field where the hog was killed about the time he sent the third person with the gun was admissible to show wantonness and accused's connection with the killing. *Inglis v. State*, 13 Ala. App. 184, 68 So. 583.

§ 47. Running at Large.

§ 50. — Stock Laws.

§ 50 (1) In General.

Stock laws established by election in precincts under the general stock law (Code 1907, § 5881 et seq.) may or may not prohibit all live stock from running at large. *Madison v. State*, 11 Ala. App.

225, 65 So. 848.

Effect of Stock Law upon Local Laws.

—*Almon v. Court*, 179 Ala. 662, 60 So. 895. See the title ANIMALS, § 50 (1), vol. 1, p. 251.

§ 50 (2) Adoption of Stock Laws.

§ 50 (2a) In General.

Conformity to Statutory Procedure.—

The jurisdiction granted by Code 1907, § 3312, to the court of county commissioners to establish stock law districts, requires conformity with the procedure of § 5882, as amended by Act Aug. 25, 1909 (Laws 1909, p. 124). *McLaughlin v. Hardwick*, 14 Ala. App. 570, 70 So. 305.

Defective Judgment Establishing Stock-Law District.—*Commissioners Court v. Holland*, 177 Ala. 60, 58 So. 270. See the title ANIMALS, § 50 (2), vol. 1, p. 255.

Const. 1901, § 104.—*Benedict v. Board*, 177 Ala. 52, 58 So. 306. See the title ANIMALS, § 50 (2), vol. 1, p. 255.

Proof of Establishment.—The court can not take judicial knowledge of stock law districts established under Code 1907, § 5881 et seq., but the establishment of them has to be proved like any other fact. *Madison v. State*, 11 Ala. App. 225, 65 So. 848, 849.

Presumption as to Regularity of Proceedings—Collateral Attack.—

The court of county commissioners being, by Code 1907, § 3312, made a court of general jurisdiction as to establishment of stock law districts, its proceedings and judgments in respect thereto are, on collateral attack, presumed regular and valid, and not assailable merely because the record fails to show all the jurisdictional facts. *McLaughlin v. Hardwick*, 14 Ala. App. 570, 70 So. 305.

§ 50 (2b) Election in General.

Constitutionality of Statute. —

Code 1907, §§ 5881, 5882, conferring upon courts of county commissioners, or courts of like jurisdiction, authority to direct and supervise the holding of elections to establish stock law districts, and to declare the results of such elections, and providing that a proceeding to establish a stock law district shall be commenced by petition, are a valid exercise of the police power, and not a violation of the due process of law clause of the fourteenth

amendment to the United States Constitution. *Edwards v. Bibb County Board*, 193 Ala. 554, 69 So. 449.

Canvass of Ballot—Mutilated Ballot.—Where 78 ballots are cast at a stock law election, 39 for, and 38 against, the law and the intention of the voter casting the remaining ballot can not be ascertained, the result, in the absence of other irregularities, should be declared in favor of the stock law. *De Kalb County v. Price*, 188 Ala. 419, 66 So. 12.

Certificate of Result of Election.—Where the county commissioners' court canvassed and counted the votes in an election for the establishment of a stock law district, and declared the result by a formal order and sentence of the court, spread upon its minutes, it was a sufficient certificate of the result of the election. *Edwards v. Bibb County Board*, 193 Ala. 554, 69 So. 449.

Order for Election.—Proceedings of the court of county commissioners, ordering an election to establish a stock law district, will not be quashed on certiorari, because the order does not show that it was made at a regular term, where the judge of probate has certified that the proceedings were had at a regular term of the commissioners' court, and there is nothing to show that the order was made at a special term; Code 1907, § 3312, making such court one of original and unlimited jurisdiction in regard to stock law districts. *Edwards v. Bibb County Board*, 193 Ala. 554, 69 So. 449.

Certiorari — When Proceedings Not Quashed.—The remedy for determining the validity of a stock law election was by certiorari to quash the proceedings. *Browning v. St. Clair County*, 195 Ala. 121, 71 So. 108.

Under Code 1907, § 3312, giving the court of county commissioners original and unlimited jurisdiction in regard to stock law elections, where the record affirmatively shows that the orders entered upon the minutes of the court in respect to the election contained all necessary and jurisdictional averments, and their regularity is not questioned, the proceeding should not be quashed upon a petition for certiorari. *Browning v. St. Clair County*, 195 Ala. 121, 71 So. 108.

§ 50 (2c) Petition for Election.

When Petition Necessary to Give Jurisdiction to Order Stock-Law Election.—*Almon v. Court*, 179 Ala. 662, 60 So. 895. See the title ANIMALS, § 50 (2), vol. 1, p. 253.

Requisites and Sufficiency.—The petition for a stock law district election may consist of several separate sheets, with substantially the same heading, they together having the requisite number of signatures. *McLaughlin v. Hardwick*, 14 Ala. App. 570, 70 So. 305.

Petition for stock law district election, averring petitioners are bona fide freeholders in and own a freehold estate in the district, clearly imports that they reside and own a freehold estate, therein. *McLaughlin v. Hardwick*, 14 Ala. App. 570, 70 So. 305.

The petition for a stock law district election is not bad because not limiting the territory constituting the district to be established by the election to "that part of the precinct which is outside of any incorporated city or town." *McLaughlin v. Hardwick*, 14 Ala. App. 570, 70 So. 305.

Facts Establishing Jurisdiction of Court of County Commissioners.—*Cook v. Court*, 178 Ala. 394, 59 So. 483. See the title ANIMALS, § 50 (2), vol. 1, p. 253.

§ 50 (2d) Notices of Election.

Failure to comply with the provisions of Code 1907, § 5881 et seq., providing, as to the establishing of stock law districts by the commissioners' court, that it shall be the duty of the persons filing the petition to post and publish notices of the election, does not affect the jurisdiction of the commissioners' court to make the order for the election. *Edwards v. Bibb County Board*, 193 Ala. 554, 69 So. 449.

§ 50 (2e) Contest of Election.

Statutory Provisions.—Code 1907, § 5887, provides that a stock law election may be contested on the same grounds, and in the same manner, before the probate judge, as contests of a constable election may be had before such judge, and then declares that any qualified elector of the precinct may contest the elec-

tion by executing a bond with sureties, to be approved by the judge of probate of the county, for the payment of the costs of the contest, and that notice should be served on the circuit solicitor of the county or the county solicitor, if there is one, and, on the execution of the bond, the solicitor shall respond, etc., also that all provisions of the election law pertaining to a contest of an election of constable shall be observed as to such contest, which shall be tried before the probate judge. Held, that the statute makes adequate provision for parties, to that extent at least, rendering the procedure provided by Code 1907, §§ 471-488, providing for a contest of the election of constables assimilable to stock law contests, and hence § 5887 prescribed an intelligible and practicable system of procedure therefor. *Hutto v. Walker Co.*, 185 Ala. 505, 64 So. 313.

Petition—Amendment.—Where the petition in a stock law election contest, under Code 1907, § 5887, providing that the election law pertaining to contest of an election of constable shall be observed in a stock law election contest, and § 455, stated as a ground for the contest the "malconduct, fraud or corruption * * * of officers of said election," and alleged that votes cast for "Stock Law No.," were counted for "Stock Law Yes," and that such votes, if legally counted, would have shown a different result, an amendment, alleging that the election officers substituted ballots for "Stock Law Yes," though marked for "Stock Law No.," and counted them for "Stock Law Yes," and that, 'if such votes had been legally counted, the result would have been different, was not objectionable as setting up a new ground of contest. *Dennis v. Chilton County*, 192 Ala. 146, 68 So. 889.

Bond for Contest.—A bond for a stock law election contest under Code 1907, § 5887, should be made payable to the contestee, but a bond payable to the state for the use of Walker county, in which the contest was instituted, was sufficient. *Hutto v. Walker Co.*, 185 Ala. 505, 64 So. 313.

The filing of a bond for costs by the contestant is a jurisdictional prerequisite to the maintenance of a stock law election contest under Code 1907, § 5887.

Hutto v. Walker Co., 185 Ala. 505, 64 So. 313.

Notice of Contest.—Under Code 1907, § 5887, providing for a contest of a stock law election and service of notice on the circuit solicitor of the county or county solicitor, service on the solicitor of the law and equity court of a county, not having a county solicitor, was sufficient. *Hutto v. Walker Co.*, 185 Ala. 505, 64 So. 313.

Impeaching Acts of Disqualified Judge.—Where a probate judge, who was disqualified to hear a stock law election contest, approved the contest bond, issued notice, and set a day for hearing, when he certified his incompetency, such acts were voidable only and could not be impeached except on a seasonable motion in the tribunal itself or as error on appeal. *Hutto v. Walker Co.*, 185 Ala. 505, 64 So. 313.

Appeal from Order—Suspending Statute.—The statute being put in operation by the election in favor of a stock law district, and not by the order of the court, appeal from the court's order in the election contest, in no way disturbing the election, does not suspend the operation of the statute; the effect of the appeal, by provision of Code 1907, § 477, being merely to suspend execution of the judgment or decree. *McLaughlin v. Hardwick*, 14 Ala. App. 570, 70 So. 305.

Review—Record.—The action of the probate court in a stock law election contest in eliminating a ballot because it failed to disclose whether it was for or against the stock law could not be reviewed, where neither the ballot nor any description of it was before the appellate court. *De Kalb County v. Price*, 188 Ala. 419, 66 So. 12.

Where the record on appeal in a stock law election contest contained a recital of the evidence as to the residence of certain persons whose votes were contested, the presumption was that it contained all the evidence thereon, and hence the findings of the probate court on those matters were reviewable. *De Kalb County v. Price*, 188 Ala. 419, 66 So. 12.

The qualifications of voters whose votes were eliminated by the probate court in a stock law election contest could not be reviewed on appeal, where

the evidence introduced relative thereto was not preserved in the bill of exceptions. *De Kalb County v. Price*, 188 Ala. 419, 66 So. 12.

Same—Matter Determined on Review.

—On appeal from ruling in the contest of a stock law election, the validity of the petition and order for the election prescribed by Code 1907, § 5882, and of the proceedings in the commissioners' court, in view of § 455, are matters not properly presented on the contest; as, if the election was void, there was nothing to contest. *Browning v. St. Clair County*, 195 Ala. 121, 71 So. 108.

§ 57. — Criminal Prosecutions.

Persons Liable—Citizen of Another County.—A citizen of one county is not exempt from punishment for violating the stock laws passed by another county. *Madison v. State*, 11 Ala. App. 225, 65 So. 848.

Indictment.—To, charge the offense prescribed by Code 1907, § 7813, making it an offense to permit stock to go upon the lands of another in a stock law district without the consent of the owner of the lands, the indictment must allege the name of the owner of the lands trespassed upon. *Madison v. State*, 11 Ala. App. 225, 65 So. 848.

An indictment for violation of the stock law in any county that contains any stock law precinct should allege the kind of live stock that accused permitted to trespass, and should not stop with the mere conclusion that the stock were prohibited from running at large. *Madison v. State*, 11 Ala. App. 225, 65 So. 848.

Evidence Held Inadmissible.—In a prosecution for permitting cows to run at large in violation of Acts 1880-81, p. 163, the court erred in admitting minutes of the court of revenue to show the establishment of a district wherein cows were prohibited from running at large, where the record did not state that petitioners for the district were in fact, or were found by the court to be, freeholders. *Williams v. State*, 7 Ala. App. 104, 61 So. 465.

Sufficiency of Evidence.—In a prosecution for allowing stock to run at large in a stock law district, evidence held sufficient to sustain a finding by the jury that

defendant knowingly permitted his stock to be at large in the stock law district. *Blalock v. State*, 8 Ala. App. 349, 63 So. 26.

Instruction.—In a prosecution for permitting stock to be at large in a stock law district, it was not error to refuse defendant's request that, as a person not living in a stock law district has a right to let his stock run at large and not keep a guard for them, defendant would not be guilty unless he had knowledge that his stock were at large in the stock law district at the time charged, because argumentative and misleading. *Blalock v. State*, 8 Ala. App. 349, 63 So. 26.

§ 58. Estrays.

§ 61. — Impounding or Taking up.

Where stock running at large has been taken up under Code 1907, § 5890, relating to estrays, the owner need not be given personal notice of such fact, where he already has knowledge thereof. *Tidwell v. Robinette*, 12 Ala. App. 655, 68 So. 555.

§ 66. Personal Injuries.

§ 73. — Killing Vicious Animals.

Killing in Defense of Self or Family.—

When endangered upon his own premises or the highway by the attack of a dog, one may protect himself or family by killing the animal without liability to the owner. *Allen v. Camp*, 14 Ala. App. 341, 70 So. 290.

Necessity of Killing Question for Jury.

—Apparent necessity of killing animal to protect human beings or property is question for jury. *Kershaw v. McKown*, 196 Ala. 123, 72 So. 47, affirming 12 Ala. App. 485, 68 So. 559.

Killing Supposed Mad Dog Which Had Bitten Daughter.—

Where plaintiff's dog bit defendant's infant daughter, and a few days later, after plaintiff's refusal to sell the dog to defendant so that it might be decapitated and its head examined to ascertain if it was afflicted with rabies, defendant broke into plaintiff's house, where the dog was chained up, killing it, and taking its head for the purpose stated, defendant was liable to the plaintiff for killing the dog. *Allen v. Camp*, 14 Ala. App. 341, 70 So. 290.

Same—Evidence.—In an action for killing plaintiff's dog chained up on his prem-

ises, defendant's evidence that he killed it because it had bitten his child, and he wished to secure its head for examination for rabies, could be considered only in mitigation of punitive damages. *Allen v. Camp*, 14 Ala. App. 341, 70 So. 290.

§ 77. Injuries to Other Animals.

See post, "Liabilities for Trespasses in General," § 97.

§ 82. — Knowledge or Notice of Vicious Propensities.

See post, "Killing Vicious Animals," § 84; "Liabilities for Trespasses in General," § 97.

§ 84. — Killing Vicious Animals.

In an action for killing a dog, a charge that, if the dog was not worth greatly more than the goat it was attacking, and if the dogs were acting in a way that would lead a reasonably prudent man to conclude that it was necessary to kill them to save the life of the goat or to save it from great bodily harm, the verdict should be for defendant, was not error. *Kershaw v. McKown*, 196 Ala. 123, 72 So. 47, affirming 12 Ala. App. 485, 68 So. 559.

In action for killing dogs, instructions that, if goat attacked was of less value than dog, or if their value was not greatly disproportionate, or if defendant could have driven dog away and saved the goat, verdict should be for plaintiff, were properly refused. *Kershaw v. McKown*, 196 Ala. 123, 72 So. 47, affirming 12 Ala. App. 485, 68 So. 559.

Owner's Notice of Vicious Propensities.—Where defendant shot a dog attacking his goat, the fact that the dog's owner had no notice of the dog's vicious propensities had no bearing upon the right of the defendant to kill it, which depended solely upon the circumstances of the case, the probable amount of loss, and the imminence of the danger. *Crow v. McKown*, 192 Ala. 480, 68 So. 341.

Plea of Justification—Requisites.—In an action for killing a dog, a plea of justification alleging that the dog was injuring defendant's goat, and that it was necessary to kill it to protect the goat, was not objectionable for failure to allege that plaintiff knew of the vicious propensities of the dog, or failure to al-

lege that the dog was accustomed to kill goats. *Kershaw v. McKown*, 12 Ala. App. 485, 68 So. 559, affirmed in 196 Ala. 123, 72 So. 47.

Same—Proportionate Values of Animals.—In an action for the wrongful killing and shooting of plaintiff's dog, of the alleged value of \$100, a special plea stating that the dog was worrying defendant's goat, and that it was necessary to kill the dog to protect the goat, was demurrable for failure to allege either that the goat was of a value equal to or greater than that of the dog, or, if less, that its value was not greatly disproportionate to that of the dog; it being essential in view of the statutory provisions changing the common-law rule as to property rights in dogs (Code 1907, §§ 6234, 7235) and a necessary correlative to the statute making the owner of a dog liable for its acts in injuring stock (Code 1907, §§ 2470, 2471, 2832, 6235, 6236) that the animal to which injury is threatened be of a value proportionate to the value of the dog, in order to justify the killing of the dog. *Kershaw v. McKown*, 12 Ala. App. 485, 68 So. 559, affirmed in 196 Ala. 123, 72 So. 47.

Same—Necessity for Killing.—In an action for wrongfully killing of dog, defendant's plea of justification that the dog was worrying his goat and that it was necessary to kill the dog to protect the goat was demurrable for failure to show that it was necessary, or apparently necessary, to kill the dog to keep defendant's goat from being killed or seriously injured. *Kershaw v. McKown*, 12 Ala. App. 485, 68 So. 559.

Admissibility of Evidence.—In an action for damages for killing a dog, destroying defendant's property, evidence showing that the property had been depredated on by dogs before was competent, as illustrating the character of the act of the dog when it was killed. *Minor v. Coleman* (Ala. App.), 74 So. 841.

In action for damages for killing a dog, evidence that, after the killing, defendant's property was no longer molested, was improper. *Minor v. Coleman* (Ala. App.), 74 So. 841.

Misleading Instruction.—In an action for damages for killing a dog, worrying

defendant's guineas, an instruction to find for plaintiff unless the jury believed that at the time the dog was killed the guineas were in further imminent danger from the dog was properly refused, as being misleading. *Minor v. Coleman* (Ala. App.), 74 So. 841.

Question for Jury.—Apparent necessity of killing animal to protect property is question for jury. *Kershaw v. McKown*, 196 Ala. 123, 72 So. 47, affirming 12 Ala. App. 485, 68 So. 559.

§ 89. Trespassing.

§ 95. — Impounding or Distraining Trespassing Animals.

Ordinances—Pleading.—In an action for the conversion of hogs, defendant pleaded an ordinance against their running at large, empowering him as marshal to take them up and confine them, and within 48 hours thereafter to notify the owner, and, where the owner did not appear within 24 hours, to sell them after 5 days' notice, but did not aver any notice to the owner. Held, that under the rule that pleadings asserting a right created by a penal ordinance should allege every fact necessary to show its enforceability, the plea was insufficient. *Gurganus v. Brown*, 184 Ala. 530, 63 So. 537.

§ 97. — Liabilities for Trespassers in General.

"Where a hog or other stock of a person is trespassing in violation of law upon the premises of another and doing dam-

age, the owner is, as a rule, held equally liable for their trespasses as for his own, irrespective of his knowledge of their propensities." *Kershaw v. McKown*, 12 Ala. App. 485, 68 So. 559, 560, affirmed in 196 Ala. 123, 72 So. 47.

"At common law the owner of a dog was never liable for the acts of his dog, even when the dog was trespassing (though such owner was liable, as before pointed out, for trespasses of his other stock), unless such owner had knowledge of the vicious propensities of the dog that resulted in the injury complained of (*Durden v. Burnett*, 7 Ala. 169; *Smith v. Causey*, 22 Ala. 571; *Strouse v. Leipf*, 101 Ala. 433, 14 So. 667, 23 L. R. A. 622, 46 Am. St. Rep. 122; *Gresham v. Taylor*, 51 Ala. 505; 2 Am. & Eng. Ency. Law [2d Ed.] 365; 2 Cyc. 368; Code, § 2470); but by statute the owner of a dog is now made liable for the trespasses of his dog in killing or injuring live stock of another, irrespective of whether the owner knew or not of the vicious propensity of the dog in this direction, and irrespective of whether it was or not the custom or habit of the dog to kill or injure stock (Code, § 2471); and, in the event it is the custom or habit of the dog to worry or kill other live stock, and the owner knows of it, the owner is liable in double damages for the value of all stock killed or injured by such dog (Code, § 2832)." *Kershaw v. McKown*, 12 Ala. App. 485, 68 So. 559, 561, affirmed in 196 Ala. 123, 72 So. 47.

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See the title ANNUITIES, vol. 1, p. 25, and references there given.

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Cross References.

See the title APPEAL AND ERROR, vol. 1, p. 267, and references there given.

In addition, see the particular titles.

As to appeal in criminal proceedings, see generally post, CRIMINAL LAW; EXCEPTIONS, BILL OF; and the particular titles.

I. NATURE AND FORM OF REMEDY.

§ 1. Origin, Nature and Scope of Remedies in General.

Appeals are of statutory creation, and,

while such statutes are remedial and should be liberally construed, yet authority for an appeal must be found in the statute. *Ex parte Jonas*, 186 Ala. 567, 64 So. 960.

Appeal is a remedy of purely statutory

creation, and entirely within legislative control. *Coker v. Fountain* (Ala.), 75 So. 471.

The right to appeal from orders granting or refusing new trials in civil cases is wholly statutory. *Ex parte Colvert*, 188 Ala. 650, 65 So. 964.

The right of appeal is purely statutory, and hence, the statute must be looked to in determining whether the appeal was properly taken. *Upshaw v. State*, 11 Ala. App. 310, 66 So. 821.

"Appeal" Defined.—An "appeal" is the mode of commencing a new and independent suit in the supreme court, the object of which is a revision of the proceedings of the inferior court, and is a mode of initiating a judicial proceeding before a court of competent jurisdiction, the appeal and notice of it standing in the same relation to the revising suit in the supreme court in which the summons and complaint now stand, and in which the *capias ad respondendum* formerly stood, to the suit in the circuit court. *Anders Bros. v. Latimer* (Ala.), 73 So. 925.

Part of Remedy Not Vested Right.—Appeal is part of remedy, and not a vested right. *Coker v. Fountain* (Ala.), 75 So. 471.

§ 2. Statutory Provisions and Remedies.

See ante, "Origin, Nature and Scope of Remedies in General," § 1.

Act March 17, 1915 (Laws 1915, p. 137), amending Code 1907, § 2838, so as to include appeals from decree on demurrer to cross-bill, does not apply to appeals previously submitted. *Bennett v. Hall*, 193 Ala. 273, 69 So. 136.

§ 3. Proper Mode of Review.

§ 4. — Appeal.

Where there has been judgment of dismissal, and costs taxed, in a case where both plaintiff and defendant are before the court, appeal is the plaintiff's proper remedy to secure reinstatement. *Townley v. Burgin*, 14 Ala. App. 557, 69 So. 591.

§ 10. Existence of Other Remedy for Review.

Mandamus.—Order striking complaint, there being no final judgment, held not reviewable on appeal, mandamus being the proper remedy. *Davis v. McColloch*, 191 Ala. 520, 67 So. 701.

Remedy of party aggrieved by order modifying an order awarding custody of children of divorced parties is by mandamus and not by appeal. *Hayes v. Hayes*, 192 Ala. 280, 68 So. 351.

A judgment dismissing a claim to some of the property levied on under an attachment by plaintiff against defendant is not appealable, but the remedy of claimant is by mandamus. *Porter v. Tate Furniture Co.*, 192 Ala. 9, 68 So. 322.

The proper remedy of plaintiff, aggrieved by dismissal for his failure to revive against the administrator of a deceased defendant, is by mandamus, not by appeal. *Townley v. Burgin*, 14 Ala. App. 557, 69 So. 591.

II. NATURE AND GROUNDS OF APPELLATE JURISDICTION.

§ 19. Existence of Actual Controversy.

See post, "Want of Actual Controversy," § 781.

Attorney's Lien—Plaintiff's Release of Judgment.—Under Code 1907, § 3011, subsec. 2, attorneys for plaintiff, who asserted a lien on a judgment in his favor, can not, plaintiff having released all his rights in the judgment, defeat defendant's appeal on the ground that the case had now become moot. *Empire Coal Co. v. Bowen*, 195 Ala. 348, 70 So. 283, cited in note in Ann. Cas. 1918B, 559. See post, ATTORNEY AND CLIENT.

Expiration of Duration of Injunction Order.—Where a telegraph company was enjoined, during the year 1914, from carrying on intrastate business within the state because it had not paid the city license fees, and the city had given the statutory bond to secure the injunction, the case will not, after the expiration of the year, be deemed moot, so as to preclude a review of the question by the court, for a dismissal of the appeal would result in leaving the question of whether the issuance of the injunction was wrongful undetermined, and would not give the telegraph company any rights under the bond; this being true, even though it might be maintained that the city, as an arm of the state, was not required to give bond. *Postal Tel. Cable Co. v. Montgomery*, 193 Ala. 234, 69 So. 428, cited in note in Ann. Cas. 1918B, 559.

§ 21. Consent of Parties.

In circuit court, parties may waive antecedent proceedings entirely and submit themselves to jurisdiction of the court. *Anders Bros. v. Latimer* (Ala.), 73 So. 925.

Under Code 1907, § 2841, giving of affirmative charge on the trial of a plea in abatement that alleged ground for attachment did not exist can be reviewed with the consent of the opposite party or his attorney, which consent is jurisdictional. *Temple v. Dooley*, 196 Ala. 360, 71 So. 683.

§ 22. Waiver of Objections.

Sufficiency of Judgment to Support Appeal.—The question of the sufficiency of the judgment or decree in the lower court to support an appeal is jurisdictional, and can not be waived. *Temple v. Dooley*, 196 Ala. 360, 71 So. 683.

III. DECISIONS REVIEWABLE.

(D) FINALITY OF DETERMINATION.

§ 66. Necessity of Final Determination.

Rulings on Pleadings.—Where a case is not set down for hearing on the pleadings alone, an appeal can not be taken from rulings on the pleadings under Acts Sp. Sess. 1909, p. 356, § 26, applicable to the Marengo law and equity court, prior to the final determination of the cause. *Compton v. Jefferson County Sav. Bank*, 188 Ala. 194, 66 So. 446.

Chancery Orders.—The supreme court has no jurisdiction of an appeal from orders of the court of chancery, unless they are final or are interlocutory, within the statute permitting appeals. *Hayes v. Hayes*, 192 Ala. 280, 68 So. 351.

§ 67. Interlocutory and Intermediate Decisions.

§ 68. — Nature or Form of Action or Proceeding.

See ante, "Necessity of Final Determination," § 66.

Probate Orders.—An order of circuit court overruling appellant's motion to dismiss petition and writ of certiorari granted by judge of probate under Code 1907, § 4714, relating to bonds for appeal or certiorari, was not such an interlocu-

tory judgment as would support an appeal under § 2841. *Osborn v. Robertson Tire, etc., Co.* (Ala. App.), 73 So. 229.

§ 70. — Nature and Scope of Decision.

Decree Dismissing Cross-Bill.—A decree sustaining a demurrer to a cross-bill and dismissing it is not appealable under Code 1907, § 2838, as an interlocutory decree. *Bennett v. Hall*, 193 Ala. 273, 69 So. 136.

§ 71. — Affecting Provisional Remedies.

§ 71 (2) Attachment and Garnishment.

Quashing of Attachment on Special Appearance.—Where appearance of defendant in suit by attachment was special and limited, quashing of attachment puts end to suit, and judgment rendered thereon will support appeal. *Avant v. Adams* (Ala. App.), 75 So. 714.

§ 71 (4) Receiver.

Discharge of Trustee or Receiver.—Under Code 1907, § 6060, providing that if the value of a trust estate to pay debts exceeds \$1,000 the trustee or any creditor may petition the chancery court for administration of the trust, the trustee appointed by a general assignment for the benefit of creditors filed a petition in the chancery court for the administration of the trust, which court took jurisdiction. Section 6102, which is declaratory of the former law, provides that the chancery court may remove any trustee if he is an unsuitable person to execute the trust. The trustee being removed claimed the right to appeal from the order of removal, on the ground that such order was a final decree within § 2837, authorizing an appeal from any final decree on the application of either the party or his personal representative. Held, that the order removing the trustee was not a final decree, for a "final decree" is one on the merits which settles the equities litigated, and the right of the trustee to administer the trust does not affect the substantial equities, which depend on the administration of the trust. *Ex parte Jonas*, 186 Ala. 567, 64 So. 960.

A receiver is but an officer of the court, and his discharge can in no manner affect any of the substantial merits of the cause; hence, there being no statutory provision for appeal by a receiver from an order of

dismissal, none can be maintained, such an order not being a final decree within Code 1907, § 2837. *Ex parte Jonas*, 186 Ala. 567, 64 So. 960.

§ 75. Final Judgments or Decrees.

§ 77. — Nature or Form of Action or Proceeding.

An order of the probate court setting aside a sale of real estate for inadequacy of price and directing resale held interlocutory and not appealable under Code 1907, §§ 2853, 2856. *Reed v. Hughes*, 192 Ala. 162, 68 So. 334.

§ 78. — Nature and Scope of Decision.

§ 78 (1) In General.

An order removing an assignee for the benefit of creditors is a mere incident of the administration of the trust, and is not a final decree within Code 1907, § 2837, and is not appealable. *Pake v. Leinkauf Banking Co.*, 186 Ala. 307, 65 So. 139.

Same—Denial of Petition for Compensation.—On an assignment for the benefit of creditors, administered in court of chancery, denial of assignee's petition to ascertain his compensation after cause had been expressly retained for that purpose, held a final, appealable decree. *De Graffenried v. Breitling*, 192 Ala. 254, 68 So. 265.

§ 78 (3) Rulings on Demurrer or Motion Relating to Pleadings.

Sustaining Demurrer to Complaint.—A judgment sustaining a demurrer to the complaint is not a final judgment from which an appeal will lie. *Wise v. Spears* (Ala.), 76 So. 869.

Sustaining Demurrer before Final Judgment.—The law does not authorize an appeal from a judgment sustaining a demurrer before final judgment. *Gibbs v. Southern Exp. Co.* (Ala.), 78 So. 860.

Dismissal of Cross-Bill.—A decree sustaining a demurrer to a cross-bill and dismissing it is not appealable under Code 1907, § 2837, as a final decree. *Bennett v. Hall*, 193 Ala. 273, 69 So. 136.

The mere announcement of opinion or entry on docket of rulings on demurrer or motions is not a "final judgment," within Code 1907, § 2837. *Edwards v. Davenport*, 11 Ala. App. 423, 66 So. 878.

§ 78 (4) Judgment of Dismissal or Nonsuit.

Voluntary Nonsuit.—While a judgment on voluntary nonsuit is not final in the sense of *res judicata*, it is final in the sense of the statute authorizing appeals from final judgment. *Ex parte Martin*, 180 Ala. 620, 61 So. 905.

Judgment of Discontinuance.—A judgment on an order granting defendant's motion for a discontinuance and awarding costs is a final judgment. *Plunkett v. Dendy*, 197 Ala. 262, 72 So. 525.

§ 78 (6) On Motion for New Trial or in Arrest of Judgment.

Granting New Trial on Chancery Issue.—An order of the chancellor setting aside the verdict of a jury demanded by a party and ordering a new trial is not appealable. *Ex parte Colvert*, 188 Ala. 650, 65 So. 964.

An order of the chancellor setting aside a verdict taken on certification of an issue of fact for trial in the circuit court before a jury is not appealable. *Kilgore v. Tennessee Coal, etc., R. Co.*, 191 Ala. 189, 67 So. 1002.

Granting Motion in Arrest.—An order granting a motion in arrest, is not appealable, for it is not a final judgment, nor it is one of the interlocutory judgments from which an appeal is allowed by statute. *Hershey Chocolate Co. v. Yates*, 196 Ala. 657, 72 So. 260.

§ 84. Decisions of Intermediate Courts.

An order of circuit court overruling appellant's motion to dismiss petition and writ of certiorari granted by judge of probate under Code 1907, § 4714, relating to bonds for appeal or certiorari, was not a final appealable judgment within Code 1907, § 2837. *Osborn v. Robertson Tire, etc., Co.* (Ala. App.), 73 So. 229.

A mere informal memorandum of the court's rulings on appeal from a justice's judgment held not a final judgment from which an appeal will lie, under Code 1907, § 2837. *Edwards v. Davenport*, 11 Ala. App. 423, 66 So. 878.

(E) NATURE, SCOPE AND EFFECT OF DECISION.

§ 86. Discretionary Action.

§ 87. — Matters Resting in Discretion. Setting Aside Default Judgments.—No

appeal lies to the court of appeals from an order of a nisi prius court denying and overruling a motion to set aside a judgment by default and to grant a new trial, and error can not be assigned on such action. Motion to set aside judgments by default is addressed to the sound discretion of the court, and is not subject to revision on appeal, in the absence of statutory provision. *Carmichael v. Jones & Bro.* (Ala. App.), 76 So. 478.

Gen. Acts 1907, p. 562, established the law and equity court of Mobile, and by § 7 provided for one annual term, beginning the first Monday in October and continuing until July 31st next following. Sections 12 and 23 authorized it to set aside judgments by default on affidavit of defense, and provided that final judgments after 30 days from rendition should be beyond its control. Held, that where the court, after plaintiff's recovery on December 18, 1915, of a "judgment nil dicit," on motion set it aside and granted a new trial within 30 days, its discretion was not reviewable by appeal. *Wilkins v. Windham*, 197 Ala. 510, 73 So. 29.

§ 96. Relating to Provisional Remedies.

§ 101. — Receiver.

Order Refusing to Vacate Receiver's Appointment.—In a suit to enjoin the foreclosure of mortgages and for redemption, in which respondent filed a cross-bill on which a receiver was appointed, an order refusing to vacate the appointment of the receiver is not reviewable. *Bowdoin v. People's Bank* (Ala.), 76 So. 866.

§ 103. On Motion Relating to Pleadings.

Motion to Strike Parts of Bill.—*Scott v. First Nat. Bank*, 178 Ala. 272, 59 So. 303. See the title APPEAL AND ERROR, § 103, vol. 1, p. 321.

§ 105. Dismissal or Nonsuit.

Under Code 1907, § 3017.—The necessity contemplated by Code 1907, § 3017, providing that, if it becomes necessary to suffer a nonsuit, the case may be reserved by bill of exceptions or appeal on the record, is shown when it appears that plaintiff became satisfied from the adverse ruling that he could not recover. *Bush v. Russell*, 180 Ala. 590, 61 So. 373.

Nonsuit on Ruling Not Subject to Bill

of Exceptions.—Under Code 1907, § 3017, providing for appeal from rulings, plaintiff, taking a nonsuit on a ruling for which no bill of exceptions lay held to bring up nothing for review. *Davis v. Louisville, etc., R. Co.*, 14 Ala. App. 200, 69 So. 231.

Nonsuit on Evidence Rulings—No Review of Demurrer Ruling.—Under Code 1907, § 3017, relating to appeal by bill of exceptions or by appeal on the record, held, that upon a bill of exceptions stating rulings on the admission of evidence, that defendant's objection to certain evidence was sustained, that plaintiff duly excepted and took a nonsuit with bill of exceptions, the ruling sustaining a demurrer to the complaint, which did not restrict plaintiff's proof, could not be reviewed. *Priebe v. Southern R. Co.*, 189 Ala. 427, 66 So. 573.

Judgment Entry Showing Nonsuit Necessitated by Rulings.—A judgment entry which, after reciting that demurrers to the complaint were sustained, further recited that thereupon plaintiff stated that by such ruling it had become necessary for him to suffer a nonsuit for the purpose of appealing from such ruling, and that thereupon it was considered and was the judgment of the court that plaintiff be nonsuited, and judgment was thereby rendered against him, sufficiently showed that a nonsuit was necessitated by the sustaining of the demurrers, within Code 1906, § 3017, providing that if from any ruling or decision of the court it may become necessary for plaintiff to suffer a nonsuit, the facts, point, rule or decision may be reserved for the decision of the supreme court by bill of exceptions, or appeal on the record as in other cases. *Albany Warehouse Co. v. Fisk Cotton Co.*, 12 Ala. App. 527, 67 So. 728.

Judgment entry upon sustaining of demurrers, necessitating taking of nonsuit, held sufficient, as a judgment of nonsuit, to support an appeal. *Albany Warehouse Co. v. Fisk Cotton Co.*, 12 Ala. App. 527, 67 So. 728.

§ 110. On Motion for New Trial.

Application of Act of 1915.—Acts 1915, p. 722, as to procedure after motion for new trial has been granted or denied, approved September 22, 1915, does not apply to an appeal perfected June 17, 1915.

Montgomery Light, etc., Co. v. Harris, 197 Ala. 358, 72 So. 619.

Laws 1915, p. 722, approved September 22, 1915, relative to appeals from judgments granting or refusing new trials, is inapplicable to a judgment rendered April 16, 1915. *Stokes v. Hinton*, 197 Ala. 230, 72 So. 503.

§ 112. Void Judgment or Order.

The void judgment of the circuit court will not support an appeal. *Porter Co. v. Godfrey*, 14 Ala. App. 566, 70 So. 204.

Vacation Order Modifying Divorce Decree.—An order modifying a decree of divorce as to the custody of a child, rendered in vacation, without consent of the parties, and without any decree pro confesso, is not appealable as a final order under Code 1907, § 2837. *Hayes v. Hayes*, 192 Ala. 280, 68 So. 351.

§ 113. Opening or Vacating Judgment or Order.

§ 113 (1) In General.

Petition for Rehearing.—Under Code 1907, § 2837, as to appeals to the supreme court on all final judgments, to review action of court denying relief asked by petition for rehearing in action at law, appeal must be prosecuted from final judgment disposing of petition. *Tanner v. Bryant* (Ala. App.), 77 So. 431.

§ 113 (4) Judgment or Order of Dismissal or Nonsuit.

Dismissal for Want of Prosecution.—Under Code 1907, § 2846, as amended by Acts 1911, p. 198, an appeal will not lie from an order setting aside a former order of dismissal for want of prosecution. *Marx v. Barbour Plumbing, etc., Co.*, 10 Ala. App. 404, 64 So. 645.

(F) MODE OF RENDITION, FORM AND ENTRY OF JUDGMENT OR ORDER.

§ 123. Necessity of Formal Judgment or Order.

Motion for New Trial—Rules Summarized.—“The rule declared by this court for presenting for review the judgment of the trial court granting or refusing a motion for a new trial is as follows: (1) Where the motion is overruled, no right is disturbed and no formal judgment

on the motion is necessary. In such case, the ruling of the court denying the motion must be shown by the bill of exceptions, together with the fact that exception was reserved thereto. The original judgment, however, must appear as a part of the record proper. *Southern R. Co. v. Nelson*, 148 Ala. 88, 41 So. 1006; *Turner v. Spragins*, 172 Ala. 98, 55 So. 118. (2) Where the motion is granted and the status of the original judgment is disturbed, a formal judgment is necessary on said motion, granting the new trial, which judgment must be shown by the record proper. *Ex parte Doak*, 188 Ala. 406, 413, 66 So. 64; *Irby v. Kaigler*, 6 Ala. App. 91, 95, 60 So. 418. (3) Whether the motion is overruled or granted, the exception taken to such ruling of the court must be presented for review by the bill of exceptions. (4) The motion for a new trial must be presented by the bill of exceptions.” *Stokes v. Hinton*, 197 Ala. 230, 72 So. 503, 504.

Same—Cases Explained and Modified.—“The opinion in *Kreamer v. Jackson Lumber Co.*, 179 Ala. 225, 60 So. 88, would seem to require that both the motion and the judgment thereon be included in the bill of exceptions, in order that the ruling of the court granting a new trial may be reviewed. The statute does not require that such formal judgment be made a part of the bill of exceptions, but only the motion. In the *Kreamer Case*, the question for decision was the establishment of a bill of exceptions, and it was there said that the trial judge is not required to sign the purported bill of exceptions when it does not contain the motion and the judgment thereon. It was not there intended to be decided that such formal judgment on the motion may be presented for review by the bill of exceptions, rather than by its incorporation as a part of the record proper. Similarly, the expression in *Randall v. Worthington*, 141 Ala. 498, 37 So. 594, is an inapt statement of the rule. It was to the effect that, on an appeal from a judgment granting a new trial, ‘the judgment should appear either in the transcript of the record proper or be set out in the bill of exceptions.’ That case is modified to conform to the statement of

the rule as herein contained." *Stokes v. Hinton*, 197 Ala. 230, 72 So. 503, 504.

Notation Insufficient as Order of Court.

—A notation on the motion for a new trial that it was overruled, and plaintiff excepted, is not an order on the motion, and can not be reviewed. *Hampton v. Tant* (Ala. App.), 73 So. 825.

§ 135. Findings and Conclusions of Intermediate Courts.

Decisions of Court of Appeals.—Holding of court of appeals in action on assigned claim that a payment by plaintiff to the assignor was not intended to discharge the demand, but as a purchase of such demand, held, merely a finding of facts or inferences, which could not be reviewed by the supreme court. *Ex parte Western Union Tel. Co.*, 183 Ala. 451, 63 So. 88, denying writ of certiorari, *Jackson Lumber Co. v. Western Union Tel. Co.*, 7 Ala. App. 644, 62 So. 266.

The supreme court will not review or revise a holding of the court of appeals upon a finding or conclusion as to the facts, or in the application of the facts to the law, but only for error as to a question of law. *Ex parte Western Union Tel. Co.*, 183 Ala. 451, 63 So. 88, denying writ of certiorari, *Jackson Lumber Co. v. Western Union Tel. Co.*, 7 Ala. App. 644, 62 So. 266.

IV. RIGHT OF REVIEW.

(A) PERSONS ENTITLED.

§ 148. Persons Other than Parties or Privies.

One not a party to a cause can not prosecute an appeal and the attorneys for an assignee for the benefit of creditors may not, on his removal, appeal from a decree fixing their counsel fees. *Pake v. Leinkauf Banking Co.*, 186 Ala. 307, 65 So. 139.

Where a railroad company was not a party to suit, though it filed a plea of general issue therein, its assignments of error will be stricken from the record. *Lusk v. Britton* (Ala.), 73 So. 492.

§ 150. Interest in Subject Matter.

Administrator Prosecuting Escheat Proceedings.—Under Code 1907, §§ 3918-3926, providing for escheats, and imposing certain duties on the personal repre-

sentative of the intestate, it is the duty and right of the administrator to see that estate property goes to the person entitled thereto, and, though an order of the probate court, dismissing his escheat proceedings and finding that the property descended to certain claimants, would protect him, he may appeal from it. *McKenzie v. Jensen*, 195 Ala. 36, 70 So. 678.

(B) ESTOPPEL, WAIVER OR AGREEMENTS AFFECTING RIGHT.

§ 154. Recognition of or Acquiescence in Decision.

Proceeding with Trial.—In an action for the cancellation of a mortgage, plaintiff's right of appeal from a decree refusing to dissolve a temporary injunction restraining plaintiff from interfering with defendant's possession is not lost by proceeding to an examination of the witnesses on the merits. *Fair v. Cummings*, 197 Ala. 131, 72 So. 389.

§ 160. Acceptance of Benefits.

§ 162. — Payment of or on Judgment.

Where an attorney of plaintiff, obtaining a judgment, orally notified the attorney for defendant that no appeal would be taken, and on request defendant paid to the clerk the amount of the judgment and costs, a subsequent appeal by plaintiff, dissatisfied with the damages awarded, will be dismissed on motion of defendant. *Shannon v. Mower*, 186 Ala. 472, 65 So. 338.

§ 164. — Enforcement of Judgment or Order.

An appeal by a party who has coerced satisfaction of an ordinary judgment at law will be dismissed on motion of appellee. *Shannon v. Mower*, 186 Ala. 472, 65 So. 338.

V. PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.

(A) ISSUES AND QUESTIONS IN LOWER COURT.

§ 170. Nature or Subject Matter of Issues or Questions.

Constitutional Questions.—The supreme court will not search for constitutional objections on a general sugges-

tion of unconstitutionality without more. *State v. Dillard*, 196 Ala. 539, 72 So. 56.

Where the determination by the supreme court of questions involving matters of public concern can not be had without the consideration of the constitutionality of an enactment, when a specific objection to constitutionality is pointed out, and the legislative journal is cited, that court must decide such questions, whether raised below or not. *State v. Dillard*, 196 Ala. 539, 72 So. 56.

§ 171. Nature and Theory of Cause.

§ 171 (1) Adhering to Theory Pursued Below.

General Rule.—The case on appeal will be reviewed on the theory on which it was tried. *Walker v. Gunnels*, 188 Ala. 206, 66 So. 45.

The appellate court must proceed on the same theory as that on which the issues of law and fact were presented and tried in the court below. *Milbra v. Sloss-Sheffield Steel, etc., Co.*, 182 Ala. 622, 62 So. 176.

Illustrative Cases.—Where a cause was tried in the circuit court as one involving title as in ejectment, the court on appeal must adopt the same theory. *Phillips v. Phillips*, 186 Ala. 545, 65 So. 49.

Where an action for conversion of cotton was tried below as if pleas of the general issue and estoppel had been filed, it will be tried on the same theory on review. *Dixie Fertilizer Co. v. Teasley*, 14 Ala. App. 283, 69 So. 988.

Where defendant's appearance in suit by attachment was special and limited, court of appeals will not permit defendant to say on appeal that it was not special and limited. *Avant v. Adams* (Ala. App.), 75 So. 714.

Theory Not Presented by Petition.—*McGraw v. Tillery*, 178 Ala. 253, 59 So. 567. See the title APPEAL AND ERROR, § 171 (1), vol. 1, p. 339.

Issue Made by Replication.—Where an action of assumpsit is tried to its conclusion below on the theory of the issue made by the plaintiff's replication, the supreme court will consider the case on the same theory. *American Sales Book Co. v. Pope & Co.*, 7 Ala. App. 304, 61 So. 45.

§ 171 (3) Adhering to Pleadings as Construed Below.

General Rule.—The appellate court will accept that theory of a pleading adopted by the parties at the trial. *Loy v. Reid*, 11 Ala. App. 231, 65 So. 855.

The appellate court will adopt the theory of the parties, notwithstanding the inefficiency of the pleadings to present such theory. *German-American Nat. Bank v. Lewis*, 9 Ala. App. 352, 63 So. 741.

Illustrative Cases.—Although the defense of contributory negligence should be specially pleaded, the case must be reviewed as if so pleaded, where such issue was submitted to the jury upon evidence admitted under the general issue after a plea of contributory negligence was stricken. *Stewart v. Smith* (Ala. App.), 78 So. 724.

Where record shows that both parties tried a cause as if issue had been joined upon special plea, not disclosed by record, which contains only the general issue, appellate court will review trial court's rulings as if issue had been specially pleaded. *Dillworth v. Holmes Furniture & Vehicle Co.* (Ala. App.), 73 So. 288.

§ 173. Grounds of Defense or Opposition.

Asserting Homestead Exemption.—In suit to subject land to judgment lien, judgment debtor can not first claim upon appeal that land was exempt as homestead property. *Autauga Banking, etc., Co. v. Chambliss* (Ala.), 75 So. 463.

Asserting Invalidity of Unrecorded Mortgage.—In a statutory claim suit under Code 1907, §§ 6039—6053, where no question as to noncompliance with § 3386, relating to the recording of a mortgage and to the effect of failure to record, was raised in the lower court, it could not be raised on appeal. *Jackson v. Wilson Bros.* (Ala.), 78 So. 883.

Injuries to Unlicensed Automobile.—On a railroad's appeal from judgment against it in an action for injuries to an automobile at an overhead crossing obstructed by upright posts or piling, the question relative to plaintiff's failure to register and license his automobile was not presented, under Code 1907, § 5331,

providing that, if defendant does not rely solely upon a denial of plaintiff's cause of action, it must plead specially the matter of defense, where the only matter presented in the record to invite consideration of the defense that plaintiff was operating an unregistered and unlicensed automobile was the statement in the bill of exceptions that plaintiff admitted on cross-examination he had not procured such license, and the refusal of a special charge requested by the railroad predicated on such evidence, embodying the proposition that, if plaintiff had not obtained a license to operate the automobile on the public road, his act was unlawful, and he could not recover. *Atlantic, etc., R. Co. v. Kelly* (Ala. App.), 77 So. 972.

§ 175. Scope of Issues or Questions.

Where the bill of exceptions recited that a plea setting up a prior judgment should be considered as filed, although no plea of *res judicata* was filed, the court on appeal will review the action of the trial court as if the issue actually tried had been made up in due form. *Dunning v. Thomasville* (Ala. App.), 75 So. 276.

(B) OBJECTIONS AND MOTIONS, AND RULINGS THEREON.

§ 181. Necessity of Objections in General.

Where a defendant has failed to object to defects in proceedings before the inferior court, he can not urge them on appeal to the circuit court. *Tidwell v. Robinette*, 12 Ala. App. 655, 68 So. 555.

§ 182. Nature or Form of Remedy.

§ 184. — Remedy at Law or in Equity.

Whether the bill shows a complete and adequate remedy at law is not before the supreme court, where it affirmatively appears that this question was not passed upon or decided by the court below. *Pearce v. Brilliant Coal Co.* (Ala.), 77 So. 4.

§ 187. Parties.

One substituted as defendant over his objection, persistently insisting that it was not a case for interpleader saves right to review of the order. *Schrader Co. v. Bailey Grocery Co.* (Ala. App.), 74 So. 749.

Plaintiff Not Suing in Representative

Capacity.—In a suit to cancel a deed and to recover a money decree, an objection that plaintiff was not suing in a representative capacity, and so was not entitled to recover, should have been made by demurrer in order to be available on appeal. *Rosenau v. Powell*, 184 Ala. 396, 63 So. 1020.

Holders of Legal Title before Court.—

In a suit to set aside a foreclosure sale and to permit the mortgagor or his heirs to redeem, if the holders of the legal title are not before the court, the point will be raised by the supreme court on its own motion. *Fountain v. Pateman*, 189 Ala. 153, 66 So. 75.

Misjoinder of Parties.—Advantage may be taken of improper joinder of parties in action for injuries to person by appeal, whether matters appear in pleading or not. *Brookside-Pratt Mining Co. v. McAlister*, 196 Ala. 110, 72 So. 18.

Where the evidence shows that each of the plaintiffs has a right of action against the defendant, an objection on the ground of misjoinder of plaintiffs can not be raised for the first time on appeal. *Southern R. Co. v. Chambless*, 10 Ala. App. 326, 65 So. 417, certiorari denied in *Ex parte Southern R. Co.*, 187 Ala. 672, 65 So. 1034.

§ 191. Pleading.

§ 192. — Defects in General.

Verification of Answer.—In a suit to foreclose a mortgage securing a note, where defendant's only contention was that the documents had been altered and the amounts increased, complainant, having met that contention, can not complain of such evidence on appeal because the answer was not verified. *Brackin v. Owens Horse, etc., Co.*, 195 Ala. 579, 71 So. 97.

§ 193. — Objections to Declaration, Complaint or Petition.

§ 193 (1) Sufficiency in General.

Objections to the form of a complaint can not be first raised on appeal. *Barfield v. Evans*, 187 Ala. 579, 65 So. 928.

Defects in the form of a bill not pointed out by the demurrer will not be considered. *Sewell v. Peavey*, 187 Ala. 322, 65 So. 803.

Defects in a bill not specified by any assignment of the demurrer can not be questioned on appeal. *Sherrill v. Hutson*, 187 Ala. 189, 65 So. 538.

Objections to the complaint not called to the attention of the lower court by any grounds of demurrer will not be considered on appeal. *Western Union Tel. Co. v. Baker*, 14 Ala. App. 208, 69 So. 246.

Repugnant Allegations.—A contention that the allegations of a bill in a suit to reform a deed are repugnant can not be reviewed in the absence of an objection below. *Hataway v. Carnley (Ala.)*, 73 So. 382.

§ 193 (3) Misjoinder and Splitting of Causes.

In an administrator's action under Federal Employers' Liability Act, where defendant made no objection to the joinder of two counts, the question could not be raised on appeal. *Louisville, etc., R. Co. v. Fleming*, 194 Ala. 51, 69 So. 125.

§ 193 (3) Joining Separate Causes of Action in One Count.

On an appeal from a default judgment, where the complaint states a substantial cause of action and the judgment is responsive thereto, the appellant can not complain of demurrable defects in such complaint, even though the defects be misjoinder of causes of action in the same count. *Hall v. First Bank*, 196 Ala. 627, 72 So. 171.

§ 193 (4) Sufficiency of Particular Allegations.

Bill for Accounting or Discovery.—Objection that bill was insufficient as one for accounting or discovery could not, after answer, be raised for the first time on appeal. *Bruce Coal Co. v. Bibby (Ala.)*, 77 So. 545.

§ 193 (5) Omission of Averments.

Where complaint in an action against a street railway company for refusing to issue a transfer is defective in not alleging duty to issue such transfer, an order overruling a general demurrer which does not distinctly point out such defects will not be reversed. *Birmingham R., etc., Co. v. Cohill*, 196 Ala. 278, 72 So. 126.

§ 193 (6) Certainty, Definiteness and Particularity.

In suit for specific performance, the defendant could not for the first time on appeal complain that the bill was not specific in its averments of tender without having demurred to the bill for such defect under Code 1907, § 3128, and chancery rule 72 (Code 1907, p. 1550). *Rice v. Rice (Ala.)*, 75 So. 21.

§ 193 (9) Failure to State Cause of Action.

A judgment for plaintiff will be reversed where the complaint fails to state any cause of action, though the complaint was not demurred to. *American Tie, etc., Co. v. Naylor Lumber Co.*, 190 Ala. 319, 67 So. 246.

Action or Deceit.—Under Code 1907, § 2469, a judgment in deceit can not be sustained on appeal under Code 1907, § 4143, where the complaint did not allege knowledge of the falsity of the representations, though no objection was taken thereto. *Baker v. Clark*, 14 Ala. App. 152, 68 So. 593.

Action for Cotton as Rent.—In action for value of cotton agreed to be delivered as rent, complaint, not alleging demand, held not to state a substantial cause of action within Code 1907, § 4143, as to matters not objected to before judgment. *Davis v. Douglass*, 12 Ala. App. 581, 63 So. 528.

The complaint of a municipal corporation to recover a license fee, if founded upon an invalid ordinance, affords no legal support for a judgment in favor of the city, although its sufficiency was not questioned in the trial court. *Dunning v. Thomasville (Ala. App.)*, 75 So. 276.

On a motion to annul, arrest or vacate a default judgment, the complaint will be liberally construed; and if, by treating all amendable defects as amended, it appears that a substantial cause of action is pleaded, a judgment will be sustained. *Hall v. First Bank*, 196 Ala. 627, 72 So. 171.

Action for Failure to Promptly Deliver Money Telegraphed.—Plaintiff's complaint alleging that defendant expressly undertook for a consideration paid to use due diligence by telegraphic communica-

tion to promptly pay or cause to be paid a certain sum of money to plaintiff's wife at a certain station, and that it became and was defendant's duty to do so, but, notwithstanding said duty, defendant failed to pay said money for a long time, and as a proximate consequence thereof plaintiff was put to great trouble, inconvenience and expense in or about the continued stay of his wife, daughter and sons, and in and about their continued absence from home, etc., was not subject to the objection that it did not state a substantial cause of action, and would not sustain the judgment, where defendant's demurrer did not reach failure to negative that defendant caused the money to be paid, in view of Code 1907, § 4143, providing that no judgment shall be set aside for any matter not previously objected to if the complaint contains a substantial cause of action. *Western Union Telegraph Co. v. Bowen* (Ala. App.), 76 So. 985.

§ 194. — Objections to Plea or Answer, or to Subsequent Pleadings.

§ 194 (1) In General.

General Rule.—Where not attacked below the sufficiency of a plea can not be raised on appeal. *Bruce v. Citizens' Nat. Bank*, 185 Ala. 221, 64 So. 82.

The sufficiency of a plea will not be determined on appeal where no objection was taken to it below by demurrer, or otherwise. *Doss v. Wadsworth Red Ash Coal Co.*, 185 Ala. 597, 64 So. 341.

Whether a plea is bad in a certain aspect will be left without conclusive answer, where the question was not raised below nor argued on appeal. *Bush v. Russell*, 180 Ala. 590, 61 So. 373.

Plea of Usury.—The sufficiency of a plea of usury can not be questioned for the first time on appeal. *McCall v. Hall*, 182 Ala. 191, 62 So. 68.

§ 194 (5) Replication or Reply.

Where not tested by demurrer, the sufficiency of replications is not presented for review. *Atlas Life Assur. Co. v. Mo-man*, 14 Ala. App. 400, 69 So. 989.

§ 195. — Amendments and Supplemental Pleadings.

Where it did not appear that the de-

fendant objected to an amendment, he can not complain on appeal of the allowance of the amendment. *Southern R. Co. v. Brewster*, 9 Ala. App. 597, 63 So. 790.

Amendment Without Required Notice.

—Where an amendment was without the notice required, the case will be reversed on appeal, even though the chancellor and counsel fail to note the omission at the hearing. *Smith v. Lambert*, 196 Ala. 269, 72 So. 118.

§ 196. — Motions.

Motion to Strike Evidential Averments from Complaint.—

Rulings on motion to strike certain evidential averments from a complaint will not be reviewed, but the questions must be presented by objection to the evidence, or by requesting charges to the jury. *Mitchell v. Bland*, 12 Ala. App. 453, 67 So. 800.

§ 197. — Variance.

A variance curable by amendment does not constitute reversible error under a rule of court, where not brought to the attention of the trial court. *Woodward Iron Co. v. Steel*, 192 Ala. 538, 68 So. 473.

Under Circuit Court Rule 34.—Variance between complaint and proof, not pointed out in the trial court in accordance with circuit court practice rule 34 (175 Ala. xxi), will not be considered. *Birmingham v. Carle*, 191 Ala. 539, 68 So. 22.

Under circuit court rules 34 and 35, a variance between the allegations and proof not brought to the attention of the trial court by proper objection to the evidence or otherwise is not ground for reversal. *Stith Coal Co. v. Harris*, 14 Ala. App. 181, 68 So. 797.

Under circuit court practice rule 34 (175 Ala. xxi), the court can not be put in error as to variance, unless called to its attention by objection to the evidence. *Bickley, etc., Co. v. Porter*, 193 Ala. 607, 69 So. 565.

Same — Illustrations. — Under circuit court rule 34, the admission, in an action for malicious prosecution, of the warrant on which accused was arrested can not, on appeal, be questioned on the ground of variance, where it was not questioned below. *Birmingham Bottling Co. v. Morris*, 193 Ala. 627, 69 So. 85.

Under rule of court 34 (175 Ala. xxi),

requiring proper objection in trial court for variance, in a miner's action for injuries, where the complaint charged that the bank boss ordered plaintiff to work in a room, while the proof was that he was ordered to inspect it, such variance was not ground for reversal, in the absence of proper objection to the evidence. *Woodward Iron Co. v. Lowther*, 194 Ala. 232, 69 So. 877.

In view of new circuit court rule 34 (175 Ala. xxi), as to necessity of specific objection to variance in proof, giving affirmative charge predicated upon evidence varying from the pleading, but not objected to on that ground, is not reversible. *Allen v. Standard Ins. Co. (Ala.)*, 73 So. 897.

Under direct provisions of circuit court rule 34, error to work a reversal could not be predicated upon refusal to give the affirmative charge, because of a variance, in the absence of showing in record that appropriate objection was made to evidence. *Mutual Loan Soc. v. Stowe (Ala. App.)*, 73 So. 202.

If there was a variance the trial court could not be put in error for refusing the general charge on account of such variance, when it was not specially brought to the attention of the trial court, in view of circuit court rule 34 (175 Ala. xxi), providing that the trial court will not be put in error for refusing the general charge predicated upon a variance which could be cured by an amendment, unless it appears from the record that the variance was brought to the attention of the trial court by a proper objection to the evidence. *Sloss-Sheffield Co. v. Ross (Ala.)*, 77 So. 686.

Under circuit court rule No. 34 (175 Ala. xxi), requiring special objection for variance, in an action for personal injuries caused by defendant's automobile under a count charging that defendant negligently caused or allowed the injury, the court could not be put in error for the admission of evidence that defendant's agents or servants did the act of negligence, where there was no objection for variance. *Morrison v. Clark*, 196 Ala. 670, 72 So. 305.

Under circuit court rule 34 (175 Ala. xxi), providing that the trial court shall

not be put in error for variance not shown by the record to have been properly brought to the trial court's attention, a judgment in an action on an insurance policy could not be reversed because of variance between the date of the policy as alleged in the complaint and the date of the policy introduced in evidence, where it appeared that such variance would have been avoided by amendment without touching the merits of the case if it had been called to the court's attention on the introduction of the policy in evidence. *United Brothers v. Kelly (Ala.)*, 75 So. 312.

§ 202. Evidence and Witnesses.

§ 203. — In General.

Objections to evidence first raised on appeal can not be considered. *Birmingham Bottling Co. v. Morris*, 193 Ala. 627, 69 So. 85.

Admission of testimony is not reviewable unless objection was made to the question when asked and exception taken, or unless the answer was not responsive and motion made to exclude it and exception reserved. *Seaboard, etc., R. Co. v. Mobley*, 194 Ala. 211, 69 So. 614.

Where defendant made no objection to question until it had been asked and answered, and made no motion to exclude answer, his contention of error will not be considered, where there was no exception, and bill of exceptions shows no ruling to which an exception might have been reserved. *Denson v. Acker (Ala.)*, 78 So. 76.

Objection to affidavits as stating matters of information or conclusion held not available for the first time on appeal, where they may be fairly construed as stating affiant's knowledge. *Spenny v. Sorrell*, 12 Ala. App. 650, 68 So. 547.

Competency of Witness.—Where the competency of a witness was not challenged at the trial, it could not be raised on appeal. *Gilley v. Denman*, 185 Ala. 561, 64 So. 97.

§ 204. — Admission of Evidence.

The admission of evidence can not be reviewed in the absence of objections. *Boshell v. Cunningham (Ala.)*, 76 So. 937.

Where there were no objections below, the competency of evidence can not be questioned on appeal. *Haas v. Commerce Trust Co.*, 194 Ala. 672, 69 So. 894.

Evidence Plainly or Palpably Illegal.—

Where evidence has been admitted, the trial court will not be reversed unless an appropriate ground of objection was made at the trial, or unless the evidence was plainly and palpably illegal. *Holt Lumber Co. v. Givens*, 196 Ala. 648, 72 So. 257.

Secondary and Parol Evidence.—*Southern R. Co. v. Stonewall Ins. Co.*, 177 Ala. 327, 58 So. 313. See the title APPEAL AND ERROR, § 204, vol. 1, p. 352.

Is is too late to object for first time on appeal that parol proof was admitted to establish title to lands, since the party against whom it was offered should have objected to the admissibility thereof, and had it excluded, if it was not the best evidence on the subject. *Townley v. Birmingham Fuel Co.* (Ala.), 77 So. 28.

Insurance Policy.—Assignment of error for permitting introduction in evidence of insurance policy to which no objection was noted can not be considered. *Southern Indemnity Ass'n v. Hoffman* (Ala. App.), 77 So. 424.

Conclusion of Witness.—Where no objection was interposed that the evidence was a conclusion of the witness, the fact that it was a conclusion will not put the court in error for not excluding it. *Brantley v. State*, 11 Ala. App. 144, 65 So. 678.

That the testimony of prosecutrix, that defendant was "a suitor" of hers is a mere conclusion, and objectionable as such, does not put in error the court in overruling the objection to it; no ground of the objection suggesting this point. *Brantley v. State*, 11 Ala. App. 144, 65 So. 678.

§ 205. — Exclusion of Evidence.

An objection to exclusion of evidence could not be sustained where not raised at the trial. *Louisville, etc., R. Co. v. Fox*, 11 Ala. App. 253, 65 So. 917.

Refusal to Exclude Answer to Question Not Objected to.—The trial court will not be put in error for declining to

exclude the answer of the witness where it is not shown that the question calling for such testimony was objected to. *Williams v. State*, 7 Ala. App. 124, 62 So. 294.

§ 206. — Reception of Evidence and Examination of Witnesses.

Asking of Question.—Error can not be predicated upon the asking of a question which the record fails to show was asked and objected to, and an exception reserved. *Wilson v. State*, 195 Ala. 675, 71 So. 115.

§ 207. Arguments and Conduct of Counsel.

See post, TRIAL.

Necessity of Prompt and Specific Objection.—Where counsel made statements in the argument which were without support in the evidence, the objection must be interposed promptly and must call the court's attention to the absence of evidence. *Nashville, etc., Railway v. Crosby*, 183 Ala. 237, 62 So. 889, cited in note in Ann. Cas. 1916A, 553.

A judgment will not be reversed because of improper remarks of counsel where it does not appear that the rulings of the trial court in respect thereto were promptly invoked. *Louisville, etc., R. Co. v. Mason*, 10 Ala. App. 263, 64 So. 154, cited in note in Ann. Cas. 1916A, 556.

A statement made by counsel for defendant can not be relied on for error where no objection was made to it by plaintiff. *McCaskey Register Co. v. Nix Drug Co.*, 7 Ala. App. 309, 61 So. 484.

Statement Improper in Part—Objection to Whole.—Where only part of a statement made by plaintiff's counsel in argument was improper, being without support in the evidence, the overruling of an objection to the whole statement is proper. *Nashville, etc., Railway v. Crosby*, 183 Ala. 237, 62 So. 889, cited in note in Ann. Cas. 1916A, 555. See also, *Kinsaul v. State*, 8 Ala. App. 405, 62 So. 990, cited in note in Ann. Cas. 1916A, 555.

§ 214. Instructions.

§ 215. — Objections in General.

A slight technical inaccuracy in the language of an instruction otherwise correct is not reviewable when unobjected

to at the trial. *Starks v. Comer*, 190 Ala. 245, 67 So. 440.

Charge Not Reduced to Writing.—Objection to court's failure to reduce charge to writing as required by Acts 1915, p. 815, will not be considered on appeal where objection was not made in the trial court. *Central, etc., R. Co. v. Williams* (Ala.), 75 So. 401.

§ 216. — Requests and Failure to Give Instructions.

§ 216 (2) Further or More Specific Instructions.

In General.—Where an instruction is justified, the court will not be put in error for failing to give an explanatory charge unless an explanatory charge is requested. *Varnon v. Nabors*, 189 Ala. 464, 66 So. 593.

Misleading Instructions—Where Law Not Incorrectly Stated.—*Birmingham R., etc., Co. v. Simpson*, 177 Ala. 475, 59 So. 213. See the title APPEAL AND ERROR, § 216 (2), vol. 1, p. 356.

A misleading charge is not reversible error, where it asserts a correct proposition of law, and there was no request for an explanatory charge. *McCalley v. Penney*, 191 Ala. 369, 67 So. 696.

Where a charge states a correct legal proposition, but may be misleading, a party can not complain unless he requested an explanatory charge. *Varnon v. Nabors*, 189 Ala. 464, 66 So. 593.

Reversible error can not be predicated on giving of instructions which state correct propositions of law on ground that such instructions are misleading in absence of request for explanatory charge. *Karpeles v. City Ice Delivery Co.* (Ala.), 73 So. 642.

Charge Defining Negligence.—*Birmingham R., etc., Co. v. Simpson*, 177 Ala. 475, 59 So. 213. See the title APPEAL AND ERROR, § 216 (2), vol. 1, p. 356.

Illustrative Cases.—In an action against a carrier for wrongful ejection, and for assault and battery, plaintiff held not entitled to complain of a charge in the absence of a request for an explanatory charge. *Willoughby v. Birmingham R., etc., Co.*, 11 Ala. App. 611, 66 So. 887.

In ejectment, wherein defendant claimed by adverse possession, the fact that the instructions on the statute of

repose of 20 years were abstract and possibly tended to mislead was not ground for reversal, where plaintiff failed to request an explanatory charge. *Jordan v. Smith*, 185 Ala. 591, 64 So. 317.

Any misleading tendency of a charge in ejectment that the occupancy needful for adverse possession must be clear, definite, positive and notorious could have been obviated by an explanatory charge, and reversible error could not be predicated upon it. *Kyle v. Jordan*, 187 Ala. 355, 65 So. 522.

If the use of the expression "malicious motive" in a charge was misleading to jurors not accustomed to legal terms, a party can not complain, where he requested no explanatory charge. *Yarbrough Turpentine Co. v. Taylor* (Ala.), 78 So. 812.

Where an instruction in an action for money paid might be deemed misleading because of its failure to state that the request required to be proved by plaintiff could be either express or implied, the objection could only be obviated by a requested explanatory charge, and a party failing to request a charge could not complain. *Oliver v. Camp*, 9 Ala. App. 232, 62 So. 469.

In an action against an abutting property owner for injury caused by plaintiff falling on the sidewalk, the giving of a requested charge on contributory negligence which failed to state knowledge or notice to the plaintiff of the slippery condition of the walk, but did state that such condition must have been open and apparent to plaintiff, was not reversible error, since one definition of "apparent" is clear or manifest to the understanding; plain, evident, obvious, known and, if the instruction was misleading, plaintiff could have asked an explanatory charge. *Walker v. Smith* (Ala.), 74 So. 451.

In suit on a duebill, where the defendant pleaded that plaintiff agreed to accept the rents of a farm in full satisfaction of such bill, the contention of the plaintiff being that the rent was a mere security which he might collect or not at his option, and the contention of the defendant being that the agreement was that the rents should satisfy the bill at all events, where the court charged that

the jury might look to the fact, if such it was, that plaintiff collected rents on the land for a year in determining whether defendant agreed with plaintiff to let him have the rents in satisfaction of the bill, although the charge was misleading, since it asserted no incorrect proposition of law, and since plaintiff failed to ask any explanatory charge, it was not reversible error. *McCalley v. Penney*, 191 Ala. 369, 67 So. 696.

§ 216 (6) Objection to Refusal of Requested Charge.

Affirmative Charge for Variance.—

Error in refusing defendant affirmative charge requested because of variance can not work reversal, where defendant did not comply with new circuit court rules 33 and 34, requiring it to bring variance to attention of court by proper objection to evidence. *Southern Express Co. v. Malone* (Ala. App.), 78 So. 409.

§ 216 (7) Sufficiency of Requests and Questions Raised.

Requested Charges Not Numbered.—

Central, etc., *R. Co. v. Stewart*, 178 Ala. 651, 59 So. 507. See the title APPEAL AND ERROR, § 216 (7), vol. 1, p. 357.

§ 219. Trial, Decision and Findings by Court.

Weight Given Illegal Evidence.—

McLester Bldg. Co. v. Upchurch, 180 Ala. 23, 60 So. 173. See the title APPEAL AND ERROR, § 219, vol. 1, p. 357.

§ 220. Hearing, Findings and Report by Referee, Commissioner or Auditor.

Register's Conclusiveness of Fact.—

On a bill for an accounting, where there was a decree in favor of the defendants and no specific adjudication of the exceptions to the register's report, and both parties in argument on the exceptions stated that the items in the report were substantially correct, the court would not consider defendant's assignments of error relating back to exceptions to the register's conclusions of fact, nor the complainant's objection to their consideration, since the court will review only such questions as have been contested in the court below; but, where the chancellor restated the account and substantially dispensed with the register's re-

port, it devolved upon the court to consider objections to the chancellor's statement of the account, not previously considered by the court. *Compton v. Collins*, 197 Ala. 642, 73 So. 334.

§ 221. Amount of Recovery or Extent of Relief.

Judgment Exceeding Amount Claimed.

—*Swope v. Sherman*, 7 Ala. App. 210, 60 So. 474. See the title APPEAL AND ERROR, § 221, vol. 1, p. 357.

§ 222. Motion in Arrest or for New Trial or Rehearing.

Motion for New Trial—Jurisdiction.

—An objection to determination of a motion for a new trial because the court was without jurisdiction because there had been no order continuing the motion can not be first raised on appeal. *Shipp v. Shelton*, 193 Ala. 658, 69 So. 102.

§ 223. Judgment.

Under Code 1907, § 4143, no judgment can be annulled, arrested, or set aside for any matter not objected to, if the complaint contains a substantial cause of action. *Hall v. First Bank*, 196 Ala. 627, 72 So. 171.

Contrary to Evidence.—*Napier v. Elliott*, 177 Ala. 113, 58 So. 435. See the title APPEAL AND ERROR, § 223, vol. 1, p. 358.

§ 227. Proceedings for Review.

Notice to Defendant—Statute.—Where judgment was rendered against two defendants, and appellee did not by proper and timely motion raise the question of the appealing defendant's compliance with Acts 1911, p. 589, relating to notice to its co-defendant, such question could not be considered. *Southern R. Co. v. Irvin*, 191 Ala. 622, 68 So. 139.

§ 230. Necessity of Timely Objection.

See ante, "Arguments and Conduct of Counsel," § 207.

Objection to Complaint Seasonably Made.—

Where the complaint in detinue was in statutory form and did not indicate that plaintiff was a foreign corporation or that it involved a contract of sale illegal because defendant had not designated a place of business and an agent, an objection to the admission of the contract on that specific ground,

and a motion for a directed verdict for the same ground, seasonably raised for review the question of the validity of the transaction. *Peters v. Brunswick-Balke-Collender Co.*, 6 Ala. App. 507, 60 So. 431.

Variance.—A party can not put the court in error, because of a variance, if he fails to object to the evidence at the proper time. *Wise v. Johnson*, 14 Ala. App. 396, 69 So. 986.

Questions to Witnesses.—Objections to questions propounded to a witness and responsive answers thereto could not be considered on appeal, when not seasonably interposed below. *Birmingham R., etc., Co. v. Roach*, 188 Ala. 306, 66 So. 82.

An objection not made until after a responsive answer by the witness held too late to entitle the objecting party to a review. *Charlie's Transfer Co. v. Leedy*, 9 Ala. App. 652, 64 So. 205.

In a suit on a note given for the purchase price of a light plant, where no objection was made to a question when propounded no reversible error was committed in refusing to exclude a responsive answer. *Adams Hdw. Co. v. Wimbish (Ala.)*, 78 So. 901.

The supreme court will not permit a party to experiment as to what a witness would answer to a question, by accepting it if favorable, and by moving to exclude it if unfavorable, by successfully excepting to the ruling of the trial court admitting the answer. *Adams Hdw. Co. v. Wimbish (Ala.)*, 78 So. 901.

Requests to Charge.—Where it did not appear that requests to charge were made before the jury retired to make up their verdict, the propriety of the refusal of such requests can not be considered on appeal. *Walker & Co. v. Norris*, 10 Ala. App. 515, 63 So. 935.

Objection after Chancery Term.—On appeal from a decree setting aside a conveyance as in fraud of the holder of a judgment against the grantor, objection that complainant did not prove an assignment to him of the judgment held not open to the grantor, where not filed until after the chancery term. *Hamner v. Freeman*, 181 Ala. 109, 61 So. 106.

§ 231. Necessity of Specific Objection.

§ 231 (1) In General.

General Objection Insufficient. — *Bir-*

mingham R., etc., v. Saxon, 197 Ala. 136, 59 So. 584. See the title APPEAL AND ERROR, § 231 (1), vol. 1, p. 359.

§ 231 (2) Objections to Pleadings and Variance.

Pleading.—The appellate court will not consider defects in a pleading attacked by demurrer which were not specially assigned. *Louisville, etc., R. Co. v. Jones*, 191 Ala. 484, 67 So. 691.

Where defects in pleadings are not made ground of demurrer, they will not be considered on review. *Minor v. Coleman (Ala. App.)*, 74 So. 841.

Allowance of Amendment.—A mere general objection to the allowance of an amendment presents nothing for review. *Tennessee Coal, etc., R. Co. v. Butler*, 187 Ala. 51, 65 So. 804.

A general objection to the allowance of an amendment to the complaint, to wit, "defendant objected," was insufficient to preserve any question for review. *Harris v. Harris*, 190 Ala. 619, 67 So. 465.

Variance.—Under rule 34 of circuit court practice (175 Ala. xxi) the trial court will not be put in error for refusing a general charge predicated upon a variance, unless the record shows that the variance was brought to the court's attention by a proper objection to the evidence. *Louisville, etc., R. Co. v. Rayburn (Ala.)*, 73 So. 461.

§ 231 (3) Objections to Evidence in General.

Error could not be predicated upon an objection to evidence for which no ground was stated. *Deslandes v. Scales*, 187 Ala. 25, 65 So. 393.

A general objection to evidence as irrelevant and immaterial does not, under new circuit court rule 34 (175 Ala. xxi), present any question for review. *Southern R. Co. v. Jordan*, 192 Ala. 528, 68 So. 418.

The admission of testimony which is admissible, over an objection made that it was immaterial, irrelevant and hearsay, does not require reversal, though it was objectionable on a ground not pointed out. *Louisville, etc., R. Co. v. Kay*, 8 Ala. App. 562, 62 So. 1014.

Error can not be predicated on rulings on the admission of relevant evidence

over general objections or refusal to exclude answers in the absence of proper objections to the questions. *Oliver v. Oliver*, 187 Ala. 340, 65 So. 373.

Where no particular objection was interposed to evidence, and bill of exceptions disclosed only that defendant objected, and no ruling was made and no exceptions reserved, and the question was not argued in the brief, no question as to the admissibility of the evidence was presented for review. *Sarratt v. Arthur* (Ala.), 75 So. 365.

Where Evidence Not Manifestly Illegal.—The trial court will not be put in error on its ruling on evidence to which only a general objection was interposed unless the question on its face called for illegal evidence. *English v. State*, 14 Ala. App. 636, 72 So. 292.

Under circuit rule 33 (2 Code 1907, p. 1527), requiring specific grounds of objection to testimony, court would not review the admission of evidence not manifestly illegal and irrelevant, and incapable of being rendered admissible in connection with other evidence. *Adams Hdw. Co. v. Wimbish* (Ala.), 78 So. 901.

General Objection to Mass of Testimony.—Where a general objection was interposed to a mass of testimony the admission of such testimony is not error unless all of such testimony was inadmissible. *Gravett v. State*, 11 Ala. App. 211, 65 So. 850.

Where general objection is sustained to testimony obnoxious to any rule whatever, such objection may properly be sustained on appeal. *Louisville, etc., R. Co. v. Fleming*, 194 Ala. 51, 69 So. 125.

§ 231 (5) Nature of Evidence in General.

Secondary Evidence.—Error can not be predicated on the admission of secondary evidence where neither the objection to the same nor the motion to exclude specified that the evidence was secondary, and that the best was obtainable; the evidence being competent and relevant. *Duncan v. Watson* (Ala.), 73 So. 448.

§ 231 (7) Reception of Evidence, and Competency and Examination of Witnesses.

A ruling of the court on objections to showing plaintiff his answers to inter-

rogatories can not be reviewed where no reasons were stated. *Russell v. Bush*, 196 Ala. 309, 71 So. 397.

Where a motion to exclude testimony otherwise competent failed to raise the point that it was not responsive to the question, the motion being merely general and not specifying any grounds, that the answer was unresponsive could not avail the moving party on appeal. *Dunaway v. Roden*, 14 Ala. App. 501, 71 So. 70.

In a father's action for injuries to his minor son, general objections to questions calling for a description of a wringer, and how it was operated, and exceptions to the court's ruling overruling the defendant's objection to the questions, without more, were not sufficient to present such rulings for review, and assignments of error thereto were not well taken. *Huntsville Knitting Mills v. Butner* (Ala.), 76 So. 54.

Leading Question.—Where the defect was not pointed out by objection to the question in the trial court, an objection that a question propounded to a witness was leading can not be considered on appeal. *Thomas v. State*, 11 Ala. App. 85, 65 So. 863.

Question on Cross-Examination.—*Birmingham R., etc., Co. v. Saxon*, 179 Ala. 136, 59 So. 584. See the title APPEAL AND ERROR, § 231 (7), vol. 1, p. 360.

§ 231 (9) Instructions.

General Objection Insufficient.—*Birmingham R., etc., Co. v. Simpson*, 177 Ala. 475, 59 So. 213. See the title APPEAL AND ERROR, § 231 (9), vol. 1, p. 360.

An exception to the portion of the oral charge "as a whole, and to each sentence thereof separately and severally," amounts to no more than a mere general exception, which presents for consideration only the charge as a whole, and not to any particular part thereof, and is not sustained unless the charge be wholly bad. *Hall v. State*, 11 Ala. App. 95, 65 So. 427.

§ 232. Scope and Effect of Objection.

§ 232 (1) In General.

Defects in Complaint.—Defects in the complaint, not pointed out by the demurrer, can not be taken advantage of.

Eminent Household v. Gallant, 194 Ala. 680, 69 So. 884.

Defects in the form of a complaint not pointed out by the assignments of the demurrer can not be taken advantage of on appeal. *Merritt v. Wyatt*, 184 Ala. 262, 63 So. 962.

Replication.—An argument on appeal as to the sufficiency of a replication not made on grounds raised by the demurrer thereto will not be considered. *Beatty v. Palmer*, 196 Ala. 67, 71 So. 422.

Grounds of demurrer not specified as required by Code 1907, § 5340, will not be considered. *Winfield Bank, etc., Co. v. Roberts* (Ala.), 76 So. 79.

Grounds of demurrer to a bill not assigned in the lower court can not be assigned on appeal. *Mobile Temperance Hall Ass'n v. Holmes*, 189 Ala. 271, 65 So. 1020.

Demurrer to Pleas—Part Good against Demurrer.—Where appellant did not designate any one plea as being sufficient, his argument being general and in support of all, and some pleas were unquestionably bad, the trial court's action in sustaining the demurrer to them will be sustained. *Hurst v. Fire-Water Wheel Co.*, 197 Ala. 10, 72 So. 314.

Remarks of Counsel—No Request for Instruction.—An objection to improper remarks of counsel, without any request for an instruction to disregard is insufficient as a basis for an exception. *Birmingham R., etc., Co. v. Gonzalez*, 183 Ala. 273, 61 So. 86.

§ 232 (2) Objections to Evidence and Witnesses.

Improper Evidence.—Defendant can not complain of admission of improper evidence over their objection which was not proper. *Orr v. Stewart*, 13 Ala. App. 542, 69 So. 649.

Admission of a deed may not be complained of, though there was good ground of objection; the objections made thereto not having been tenable. *Swindall v. Ford*, 184 Ala. 137, 63 So. 651.

Documentary Evidence.—In an action for breach of a contract for the sale of a number of logs where written specifications of the sizes of the logs were offered in evidence, the general objection that the whole were irrelevant, imma-

terial and incompetent is not sufficient, the specifications generally being admissible, to raise the question of whether the specifications were objectionable in form or were secondary evidence, etc. *Curjel & Co. v. Hallett Mfg. Co. (Ala.)*, 73 So. 938.

Best Evidence.—In the absence of objection that a statement itself, which was prepared by a witness, should be offered instead of testimony of its contents, the question whether the admission of evidence of its contents was error can not be raised. *Bullock v. Mason*, 194 Ala. 663, 69 So. 882.

Objection on Particular Ground.—*Birmingham R., etc., Co. v. Saxon*, 179 Ala. 136, 59 So. 584. See the title APPEAL AND ERROR, § 232 (2) vol. 1, p. 361.

Where a particular objection to evidence was not pointed out in the lower court, the evidence being otherwise admissible, it can not be taken advantage of on appeal. *Curjel & Co. v. Hallett Mfg. Co. (Ala.)*, 73 So. 938.

Permitting plaintiff, in order to prove that he had done small item of work, not included in contract, to answer, over defendant's objection, specifically, that there was no claim for extra work, and, generally, that question called for irrelevant, illegal, incompetent, and immaterial testimony, the question whether any extra work outside of that specified in contract had been done, held not reversible error, as the complaint containing the common count for work and labor done answered the specific objection, while the general objection failed to point out that the question assumed the existence of an express contract which defendant denied. *Denson v. Acker* (Ala.), 78 So. 76.

Qualification of Witness.—Objection that witness was not qualified, to answer question saves that point for review, although question was thereafter qualified in another respect before being answered, and objection was not renewed to amended question. *Wear v. Wear*, (Ala.), 76 So. 111.

Objection to Proper Question—Statement Volunteered.—An objection to a proper question does not authorize a review of a volunteered statement by the witness to which no objection or motion

to exclude was made. *Russell v. Bush*, 196 Ala. 309, 71 So. 397.

§ 233. Mode of Making Objection in General.

Demurrer to Complaint.—Under Code 1907, § 5340, defects in a complaint, not pointed out by demurrer thereto, can not be considered on appeal. *Deason v. Gray*, 189 Ala. 672, 66 So. 646.

Requested Instructions.—The question of plaintiff's right to recover damages claimed in the complaint is properly presented in the lower court, so as to allow its review on appeal, by defendant's requested instructions directed at such right. *Birmingham Transfer, etc., Co. v. Still* (Ala. App.), 61 So. 611.

Repetition of Objection.—In widow's statutory ejectment to recover 20 acres as her homestead, where no objection was made to reception of petition in probate filed by widow, her previous objection to her examination in reference to petition on ground it was illegal, immaterial, etc., was ineffectual to reserve the inadmissibility of the paper for review in the supreme court. *Hodges v. Hodges* (Ala.), 77 So. 741.

§ 234. Necessity of Motion Presenting Objection.

§ 237. — At Trial or Hearing.

Motion to Exclude Evidence.—*Birmingham R., etc., Co. v. Saxon*, 179 Ala. 136, 59 So. 584. See the title APPEAL AND ERROR, § 237, vol. 1, p. 362.

Nonresponsive answers by a witness, not met by a motion to exclude, will not be considered. *Atlanta, etc., R. Co. v. Fowler*, 192 Ala. 373, 68 So. 283.

Where a question did not call for improper testimony, a party must move to strike an illegal answer and can not predicate error on the overruling of objections to the question. *Louisville, etc., R. Co. v. Jones*, 194 Ala. 334, 70 So. 133.

Statement of Counsel.—A statement made by counsel for defendant can not be relied on for error, where no motion was made to exclude it. *McCaskey Register Co. v. Nix Drug Co.*, 7 Ala. App. 309, 61 So. 484.

In the absence of motion to exclude improper or objectionable argument of opposing counsel, such argument is not

reviewable. *Western Railway v. Mays*, 197 Ala. 367, 72 So. 641.

§ 240. — Review of Specific Questions and Particular Decisions.

Verity of Record.—Where no motion was made to strike portions of the record, no question as to its verity was presented on appeal. *Cox Hat Co. v. Adams*, 14 Ala. App. 426, 70 So. 203.

§ 242. Necessity of Ruling on Objection or Motion.

An objection to the remarks of opposing counsel which invoked no ruling of the court afforded no basis for an assignment of error with respect thereto. *Headley v. Harris*, 196 Ala. 520, 71 So. 695.

Objections to Answer.—Where there was no ruling by the court below upon the complainant's objection to the defendant's answer, it would be passed on appeal without further notice. *Vidmer v. Lloyd*, 193 Ala. 386, 69 So. 480.

Ruling on Demurrers.—Where no ruling is shown on a demurrer, it can not be reviewed. *Western Union Tel. Co. v. Williams* (Ala. App.), 78 So. 414.

Where chancellor did not rule on demurrers, held that questions raised will not be considered on appeal, except in so far as averments of bill in connection with proof justify relief awarded. *Alabama, etc., Railway v. Tolman* (Ala.), 76 So. 381.

In absence of ruling on general objection to evidence or motion to exclude evidence, assignments of error predicated on alleged erroneous overruling of objection or admitting evidence will not be sustained. *Empire Clothing Co. v. Roberts, etc., Shoe Co.* (Ala. App.), 75 So. 634.

Objections to evidence in equity proceeding held not reviewable on appeal, when not shown to have been brought to chancellor's attention, or that rulings were made thereon. *Prince v. Prince*, 194 Ala. 455, 69 So. 906.

Motion for New Trial—Illegal Evidence Admitted.—A ground of a motion for new trial based on the admission of evidence will not be considered where no ruling at the trial was invoked as to the admissibility of the evidence. Ad-

ams v. Southern R. Co., 9 Ala. App. 201, 62 So. 466.

(C) EXCEPTIONS.

§ 248. Necessity in General.

Where there was no exception to a ruling of the trial court, the assignment of error based thereon will not be reviewed. *Adams v. Bibby*, 194 Ala. 652, 69 So. 588.

Matters assigned in the motion for new trial as error can not be availed of on appeal unless they were excepted to at the proper time during trial. *Ewart Lumber Co. v. American Cement Plaster Co.*, 9 Ala. App. 152, 62 So. 560.

§ 252. Review of Rulings as to Pleadings.

§ 253. — In General.

Striking Plea.—Where no exception was reserved to the action of the court below in striking defendant's plea, nothing is presented for review as to such action. *Walker v. State*, 11 Ala. App. 198, 65 So. 713.

Misjoinder of Courts.—In the absence of appropriate exception, the improper joinder, in an action by an injured servant of a railway company, of counts seeking recovery under the federal and state Employers' Liability Acts can not be considered on appeal. *Atlantic, etc., R. Co. v. Jones*, 9 Ala. App. 499, 63 So. 693.

§ 255. — As to Amendment.

Where it did not appear that the defendant excepted to an amendment, he can not complain on appeal of the allowance of the amendment. *Southern R. Co. v. Brewster*, 9 Ala. App. 597, 63 So. 790.

§ 257. Review of Rulings or Orders before Trial or Hearing.

Where no exception was reserved to the action of the court in requiring the parties to go to trial upon plaintiff's complaint in assumpsit and defendant's plea of the general issue, with leave to give in evidence any matters of defense as if properly pleaded, the case will be treated on appeal as if there were appropriate pleas setting up every defense to which the evidence was applicable. *Garnett v. Parry Mfg. Co.*, 185 Ala. 326, 64 So. 559.

§ 258. Review of Proceedings at Trial.

§ 259. — Mode and Conduct of Trial in General.

Motion to Correct Nunc Pro Tunc Minute Entries.—Where the bill of exceptions does not show that an exception was reserved to a ruling on a motion to correct nunc pro tunc minute entries in the case, the action of the court thereon is not presented for review. *Lewis v. State*, 10 Ala. App. 31, 64 So. 537.

§ 260. — Rulings as to Evidence.

§ 260 (1) In General.

A ruling on evidence to which no exception is shown, can not be reviewed. *Jones v. White*, 189 Ala. 622, 66 So. 605.

Where no exception was reserved to any ruling of the court relative to the admission or rejection of evidence, its admission can not be reviewed on appeal. *Phillips v. State*, 11 Ala. App. 168, 65 So. 673.

Unless the record affirmatively shows that evidence admitted was objected to and that the ruling thereon was excepted to at the time, the court will not review the question of the admissibility of such evidence. *Thomas v. State*, 12 Ala. App. 278, 68 So. 524.

Limiting Purpose of Evidence.—An exception must be reserved to the limitation of evidence in order to present that question for review on appeal. *Cogbill v. State*, 8 Ala. App. 223, 62 So. 406.

§ 260 (2) Exclusion of Evidence.

Question on Cross-Examination.—The exclusion of a question on cross-examination can not be reviewed when not made a subject of exception. *Illinois Cent. R. Co. v. Robinson*, 189 Ala. 523, 66 So. 519.

§ 260 (3) Reception of Evidence and Examination of Witnesses.

The admission of illegal evidence can not be reviewed, though assigned as a ground for motion for new trial, unless an exception was seasonably reserved at trial. *Phillips v. Jackson*, 190 Ala. 586, 67 So. 450.

Error can not be predicated upon the asking of a question which the record

fails to show was asked and objected to, and an exception reserved. *Wilson v. State*, 195 Ala. 675, 71 So. 115.

Refusal to exclude evidence held not reviewable where no exception to the ruling was taken. *Seaboard, etc., R. Co. v. Mobley*, 194 Ala. 211, 69 So. 614.

Exception to Question Eliciting Answer.—*Nashville, etc., Railway v. Hinds* (Ala. App.), 60 So. 409. See the title APPEAL AND ERROR, § 260 (3), vol. 1, p. 367.

Where no exception was taken to overruling of objection before question was answered, motion to exclude the answer and exception to the ruling held to present nothing for review. *Atlanta, etc., R. Co. v. Fowler*, 192 Ala. 373, 68 So. 283.

§ 260 (4) On Trial by Court.

Where no exceptions were reserved to action of trial court trying case without jury in overruling motions, assignments of error to such action can not be reviewed. *Wade v. Killen* (Ala.), 75 So. 970.

§ 261. — Rulings as to Arguments and Conduct of Counsel.

Separate Objections — Single Exceptions to All Rulings.—Where, though objections to alleged improper remarks of counsel were made and overruled separately, only one exception was taken to all of the rulings, and some of the remarks were not improper or prejudicial, the exception could not be sustained. *Birmingham R., etc., Co. v. Gonzalez*, 183 Ala. 273, 61 So. 80.

§ 263. — Instructions, and Failure or Refusal to Give Instructions.

One can not complain on appeal of portions of the court's oral charge to which the court's attention was not called by objection and exception. *Smith v. State*, 7 Ala. App. 55, 62 So. 301.

§ 265. Exceptions to Decisions or Findings by Court.

Under Code 1907, § 5359, as amended by Acts 1915, p. 824, the finding of fact by a court upon trial without a jury is subject to review without exceptions. *McDonough v. Commercial State Bank* (Ala. App.), 73 So. 754.

§ 268. Review of Sufficiency of Evidence to Sustain Verdict, Findings or Judgment.

Under Acts 1888-89, p. 800, § 7, relative to Jefferson county, held, that correctness of conclusion and judgment of circuit court on the evidence can not be reviewed without an exception to the judgment. *Hill v. Condon*, 14 Ala. App. 332, 70 So. 208.

Trial without Jury.—On the trial of a cause without a jury either party may by bill of exceptions present for review the judgment of the trial court on the evidence without an exception thereto. *Wallace v. Crosthwait*, 196 Ala. 356, 71 So. 666.

§ 270. Exceptions to Rulings and Orders after Trial or Judgment.

Motion for New Trial.—Assignment of error based on denial of new trial will not be considered, where no exception was reserved to court's ruling on motion, and substance of evidence in the case and decision of the court on the motion was not reduced to writing, as required by Gen. Acts 1915, p. 722, governing appeals from decisions on motion for new trial. *Bynum v. Terry* (Ala. App.), 77 So. 929.

§ 272. Necessity of Timely Exception.

Exceptions not showing when they were taken present no question for review. *Mitchell v. Bland*, 12 Ala. App. 453, 67 So. 800.

Objections to Charge—Before Jury Retire.—Exceptions to the oral charge can not be considered, where it does not affirmatively appear that they were reserved before the jury retired. *Carter v. Tennessee Coal, etc., R. Co.*, 180 Ala. 367, 61 So. 65.

An exception to a part of the court's oral charge, not shown to have been taken pending the trial and before the jury retired, can not be considered. *McCaskey Register Co. v. Nix Drug Co.*, 7 Ala. App. 309, 61 So. 484.

It must be made affirmatively to appear from the record that exceptions to the oral charge of the court were duly reserved before the jury retired in order to put the trial court in error as to giving such charge. *Wade v. State*, 14 Ala. App. 130, 72 So. 269.

The record examined and held sufficient to indicate that the exceptions to the oral charge were taken in proper time, and that the same will be reviewed. *Wade v. State*, 14 Ala. App. 130, 72 So. 269.

§ 273. Necessity of Specific Exception.

§ 273 (1) In General.

Exceptions Held Too General.—Exceptions in form, "Plaintiff objected and moved to exclude about merchandise; motion and objection sustained; defendant excepted;" and, following a series of answers, "Defendant objected to the question and answer concerning the changing of the name on the account book; overruled; defendant excepted"—were too general and indefinite. *Mitchell v. Bland*, 12 Ala. App. 453, 67 So. 800.

§ 273 (6) Sufficiency of Exceptions to Instructions.

Exception Not Separating Good and Bad Portions.—Where an oral charge, to which exception was taken, included correct statements of the law, the court can not be put in error where the exception does not separate the bad from the good parts of the charge. *Sloss-Sheffield Steel, etc., Co. v. Dunn*, 9 Ala. App. 524, 63 So. 812.

Where exceptions to an oral charge did not point out the obnoxious portions but were of a general nature directed to several judicial statements, some of which were clearly correct, they could not be considered on appeal. *Jordan v. Smith*, 185 Ala. 591, 64 So. 317.

§ 273 (7) Nature of Defect in Instruction.

Charge on Burden of Proof—One of Three Propositions Erroneous.—Where an exception to a charge on the burden of proof, which contained three distinct propositions, one of which was erroneous, in stating that the burden was on contestants to prove that activity of a legatee occupying a confidential relation with testatrix was intermeddling to procure will, and not requested by testatrix, was not specifically addressed to that part of the charge which was error, the case will not be reversed for the error indicated. *O'Neill v. Johnson*, 197 Ala. 502, 73 So. 21.

§ 273 (8) Requests and Failure or Refusal to Give Instructions.

Exceptions Good in Part.—Where the exceptions reserved to the refusal of charges are to them as a whole and not separately, the court will not be charged with error if any of the instructions were properly refused. *Tombigbee, etc., R. Co. v. Morris*, 10 Ala. App. 322, 65 So. 207.

§ 274. Scope and Effect.

§ 274 (1) In General.

Single Exception to Rulings on Separate Objections.—See ante, "Rulings as to Arguments and Conduct of Counsel," § 261.

§ 274 (3) Rulings as to Evidence.

Construed against Exceptor.—Exception to evidence must be construed most strongly against exceptor. *Wade v. Killen* (Ala.), 75 So. 970.

Testimony Admitted Subject to Motion to Exclude.—Where exception was taken to the action of the court in allowing a question asked a witness to be answered on condition that the testimony was admitted subject to subsequent motion to exclude, but no exception was reserved to the admission of the evidence, the ruling was not reviewable on appeal. *Ballard v. Bank*, 187 Ala. 335, 65 So. 356.

§ 274 (5) Instructions.

Insufficient Exceptions.—In action against a light and power company, an exception to the words in the oral charge "then this company would have been guilty of want of negligence or wanton wrong" presented nothing for review; the exception being indefinite and incomplete. *Birmingham R., etc., Co. v. Jackson* (Ala.), 73 So. 627.

Exceptions which merely show that exception was "reserved to the court's oral charge with reference to title passing," or to the court's charging the jury to count interest on the notes, are insufficient to preserve any particular action for review. *Gossett v. Morrow*, 187 Ala. 387, 65 So. 826.

Exception without Merit.—In action against a light and power company, for death from live wire, an instruction being given as to defendant's duty to have

inquiries made over its line after such a storm as would likely result in damage to its wires, an exception to merely part of a sentence therein reading "it would be the duty of the company to have made inquiries over its line" held without merit. *Birmingham R., etc., Co. v. Jackson* (Ala.), 73 So. 627.

§ 274 (6) Decision or Findings by Court, Referee, Commissioner or Auditor.

Agreed Case.—Where cause was tried on agreed statement containing no disputed facts, exception to the court's conclusion as evidenced by the judgment held all that was necessary to a review. *Parker-Blake Co. v. Ladd*, 14 Ala. App. 407, 70 So. 188.

§ 274 (7) Verdict or Judgment.

Settlement of Guardian's Account by Probate Court.—Under Code 1907, § 2856, decree of probate court on final settlement of guardian's account may be reviewed on exception to the decree alone, without separate exceptions to the rulings on each item of debit or credit. *McGowan v. Milner*, 195 Ala. 44, 70 So. 175.

Conclusion of Court on Agreed Statement of Facts.—See ante, "Decision or Findings by Court, Referee, Commissioner or Auditor," § 274 (6).

§ 275. Necessity of Ruling on Exception.

Exceptions not showing any ruling of the court presented no question for review. *Mitchell v. Bland*, 12 Ala. App. 453, 67 So. 800.

(D) MOTIONS FOR NEW TRIAL.

§ 287. Review of Proceedings at Trial.

§ 292. — Instructions, and Failure or Refusal to Give Instructions.

Where the giving of a charge was not made a ground of a motion for a new trial, the supreme court can not consider it on appeal. *McCary v. Alabama, etc., R. Co.*, 182 Ala. 597, 62 So. 18.

§ 293. Review of Objections to Verdict, Findings or Judgment.

Conclusion of Jury—Act in Scope of Employment.—In an action against a mining company for loss from injuries to plaintiff's wife from fright, caused by the act of defendant's employee in

shooting a dog in her presence, the correctness of a conclusion of the jury that the employee in shooting the dog was acting within the scope of his employment could not be considered on appeal, in the absence of a motion for new trial. *Alabama Fuel, etc., Co. v. Baladoni* (Ala. App.), 73 So. 205.

§ 295. Review of Amount of Recovery or Relief Awarded.

Reduction of Excessive Judgment.—

Under Acts 1915, p. 610, touching reversal for excessive judgment, and Code 1907, § 2846, as amended by Acts 1911, p. 198, and Acts 1915, p. 722, touching review of motion for new trial, held that the court, on appeal, can not reduce an excessive judgment, in the absence of a motion to such effect in the lower court; such question being properly raised in the trial court by a motion for a new trial. *Central, etc., R. Co. v. Chambers*, 197 Ala. 93, 72 So. 351.

§ 302. Sufficiency and Scope of Statement of Grounds.

Verdict Contrary to Law.—An assignment of error in the motion for new trial that the verdict is contrary to the law is too general to warrant consideration on appeal. *Ewart Lumber Co. v. American Cement Plaster Co.*, 9 Ala. App. 152, 62 So. 560.

Verdict Contrary to Law and Evidence.—

An objection stated as a ground for new trial that the verdict is contrary to the law, and the evidence presents for review only whether the preponderance of the evidence against the verdict is so decided as to clearly convince the court that it is wrong and unjust. *McDuffie & Sons v. Weeks*, 9 Ala. App. 282, 63 So. 739.

Verdict Contrary to Law and Instructions.—

A motion for a new trial specified as grounds therefor that the verdict was contrary to law and the court's instructions, that the court erred in giving charges requested by plaintiff "the court's action in giving each of said charges separately and severally being urged for error," and that the court erred in refusing charges requested by defendant, "the court's action in refusing to give each of said charges separately and severally being urged for error." Held, that these grounds were too

general to authorize a review of the charges given and refused. *Southern R. Co. v. Carroll*, 14 Ala. App. 374, 70 So. 984.

VI. PARTIES.

§ 331. Appellants or Plaintiffs in Error.

§ 333. — Separate Proceedings by One or More Coparties.

§ 333 (1) In General.

Under Acts 1911, p. 589, an appeal from a judgment against two or more defendants may be taken by one defendant alone. *Hall v. First Bank*, 196 Ala. 627, 72 So. 171.

§ 333 (2) Parties Severally Liable or Having Separate Interests.

Under the statute, Code 1907, § 2884, as amended by Acts 1911, p. 589, an appeal by one only of several parties to a judgment is authorized. *Birmingham v. Hawkins*, 196 Ala. 127, 72 So. 25.

§ 333 (3) Parties Jointly Liable or Having Joint Interests.

Where, in tort against defendant and codefendant, a single judgment for plaintiff against defendant and for codefendant was rendered, defendant could alone appeal. *Southern Bitulithic Co. v. Perrine*, 191 Ala. 411, 67 So. 601.

§ 331. Death.

§ 332. — Before Appeal or Writ of Error.

Under Code 1907, § 2853, when party to judgment dies before appeal, appeal may be prosecuted by or against legal representative, on producing satisfactory evidence of death and grant of letters testamentary or of administration. *Fleming v. Copeland* (Ala.), 76 So. 857.

§ 333. — Pending Appeal or Writ of Error.

Where a cause is regularly submitted on appeal to the supreme court, neither the death nor disability of any of the parties subsequently occurring will disturb the submission. *Vandiver v. American Can Co.*, 190 Ala. 352, 67 So. 299.

§ 334. — Continuance or Revival of Proceedings.

Necessity of Revival.—Where, at time of attempted perfection of appeal to the supreme court, complainant was dead,

no binding judgment could be rendered, without revivor. *Fleming v. Copeland* (Ala.), 76 So. 857.

Time for Revival.—Where order granting revivor in name of complainant's widow was prematurely made before date for hearing of petition for revivor in notice to defendant, defendant was not concluded in the order or decree. *Fleming v. Copeland* (Ala.), 76 So. 857.

Revival by Personal Representative.—The personal representative of one injured by a final decree may under the direct provisions of Code 1907, § 2837, perfect the appeal, which appeal must be taken within 12 months. *Ex parte Jonas*, 186 Ala. 567, 64 So. 960.

After Appeal Perfected — Jurisdiction of Trial Court.—After the appeal is perfected, the trial court can not authorize a revivor on the death of a party. *Lasseter v. Deas*, 9 Ala. App. 564, 63 So. 735.

Same—Jurisdiction of Appellate Court.—Where an appeal is perfected in the usual manner, the appellate court has jurisdiction to determine whether it can consider the appeal, and may make any order necessary to exercise that jurisdiction, and hence, where the appellee died pending the appeal, it may order a revivor against the appellee's administratrix. *Lasseter v. Deas*, 9 Ala. App. 564, 63 So. 735.

§ 335. Designation and Description.

On a prayer for appeal by an appellant in behalf of "itself and all other respondents," in the absence of any summons to the other respondents or severance prior to the submission of the cause, all of the respondents will be treated as appellants. *Mobile Temperance Hall Ass'n v. Holmes*, 195 Ala. 437, 70 So. 640.

VII. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.

(A) TIME OF TAKING PROCEEDINGS.

§ 338. Nature and Operation of Limitations in General.

§ 338 (1) In General.

Extension of Period by Act of 1909.—By express provisions of Acts 1909, p. 165, Code 1907, § 2868, is amended to extend the general time to appeal from six

months to one year. *Order of Calanthe v. Armstrong*, 7 Ala. App. 378, 62 So. 269.

§ 338 (2) Construction and Application of Particular Statutes.

Act Sept. 22, 1915 (Acts 1915, p. 711), providing that appeals must be taken within six months, applies to judgments rendered before its enactment, since it relates to a remedy, and does not affect a vested right. *Tennessee River Nav. Co. v. Grantland (Ala.)*, 75 So. 283.

Under Gen. Acts 1915, p. 711, providing that an appeal under Code 1907, §§ 2837-2895, must be taken within six months, an appeal, prosecuted more than a month after passage of the act, and more than six months after judgment, was not taken within the time required by law; the act containing no saving clause as to pending cases. *Coker v. Fountain (Ala.)*, 75 So. 471.

Where judgment was rendered April 20, 1915, and appeal was not taken until December 16, 1915, on the writ, the appeal was governed by Act Sept. 22, 1915 (Acts 1915, p. 711), and must be dismissed. *Walden v. Leach (Ala.)*, 78 So. 381.

§ 339. Limitations Applicable to Particular Proceedings.

§ 339 (1) In General.

Judgment of Circuit Court on Appeal from Probate Court.—An appeal to the supreme court from a judgment of the circuit court on appeal from the probate court falls within Code 1907, §§ 2855-2867, and the supreme court has no jurisdiction unless it is taken within 30 days, as prescribed by § 2857. *McKenzie v. Jensen (Ala.)*, 75 So. 939.

§ 339 (2) Interlocutory Judgments or Orders in General.

Decree Sustaining Demurrer.—An appeal from a decree sustaining a demurrer to the bill must be taken, as required by Code 1907, § 2838, within 30 days from the decree, or the appeal will be dismissed. *Bickley v. Hays*, 183 Ala. 506, 62 So. 767.

Act March 17, 1915 (Acts 1915, p. 137) amending Code 1907, § 2838, providing for appeal within 30 days from interlocutory decrees ruling upon demurrers, was not repealed by the act of September 22,

1915 (Acts 1915, p. 711), providing that any appeal taken under chapter 53 of the Code, which includes § 2838, shall be taken within six months from rendition. *Pepper v. Horn*, 197 Ala. 395, 73 So. 46.

Under Act March 17, 1915 (Acts 1915, p. 137), amending Code 1907, § 2838, providing for appeal within 30 days from interlocutory decrees ruling upon demurrers, where appeal is taken from two decrees sustaining demurrers to an original and amended bill, respectively, the assignment of error to the decree, sustaining demurrer to original bill will be stricken, when such decree was rendered more than 30 days prior to the appeal, and there has been no decree finally determining the cause. *Pepper v. Horn*, 197 Ala. 395, 73 So. 46.

§ 339 (6) Order on Motion for New Trial.

An appeal from an ordinary motion for new trial need not be taken within the 30 days prescribed by Code 1907, § 4145, it being sufficient if it be taken in accordance with §§ 2846, 2868, providing a six-month limitation. *Central, etc., R. Co. v. Goodwater Mfg. Co.*, 14 Ala. App. 258, 69 So. 343.

§ 343. Commencement of Period of Limitation.

§ 345. — Effect of Motion for New Trial or Rehearing.

Time within which an appeal from a judgment may be taken begins to run from the date of the ruling on motion for new trial seasonably made. *Shipp v. Shelton*, 193 Ala. 658, 69 So. 102.

Where trial was had February 8, 1916, motion for new trial was overruled March 11th, the bill of exceptions was presented to the presiding judge May 5th, was signed and approved by him August 1st, and the appeal was perfected August 9th, the appeal will not be dismissed on the ground that it was taken more than six months after rendition of judgment. *Wilder v. Bush (Ala.)*, 75 So. 143.

§ 347. — Rendition or Entry of Judgment or Order.

Code 1907, § 2868, required appeals to be taken within six months from rendition of judgment. Acts Sp. Sess. 1909, p. 165, required appeals to be taken

within one year from the rendition of the judgment. A judgment was rendered on September 21, 1915, and appeal taken on the 20th day of September, 1916. Acts 1915, p. 711, effective September 22, 1915, provided, without a saving clause, that appeals must be taken within six months. Held, that the appeal was too late. *Shiver v. Phillips-Boyd Pub. Co.* (Ala. App.), 74 So. 745.

§ 351. Taking and Perfecting Proceeding in Time.

Appeals Sufficiently Perfected and Prosecuted.—An appeal sued out in term time on April 1, 1914, was made returnable on the first Monday next after the expiration of 20 days, or April 27th, the call of the division to which the cause belonged commenced on April 20th, the record was filed on Monday, November 23d, the first day of the next succeeding call, and the cause was submitted the following day on the regular call of the docket. Held, that the motion to dismiss the appeal must be overruled. *Veitch v. Illinois Cent. R. Co.*, 14 Ala. App. 146, 68 So. 575.

An appeal taken April 4th, returnable under Code 1907, § 2870, to the first Monday of the term next after 20 days from that date, is docketed within time when submitted at the first call of the division the next November, where the spring call of the docket was on Monday, April 21st, which was before the time for the return of the appeal. *Cudd v. Reynolds*, 186 Ala. 207, 65 So. 41.

§ 355. Waiver of Objections to Delay.

Joinder in error may waive irregularities in mode of taking appeal, but not time within which appeal must be taken. *McKenzie v. Jensen* (Ala.), 75 So. 939.

§ 356. Effect of Delay or Failure to Take Proceedings.

Dismissal.—*Scott v. First Nat. Bank*, 178 Ala. 272, 59 So. 303. See the title APPEAL AND ERROR, § 356, vol. 1, p. 386.

Where the appeal was taken 11 months and 29 days from the rendition of the judgment, the court was without jurisdiction other than to dismiss the appeal in view of Code 1907, § 2868, and Acts 1915, p. 711, § 1. *Shiver v. Phillips-Boyd Pub. Co.* (Ala. App.), 74 So. 745.

(B) PETITION OR PRAYER, ALLOWANCE AND CERTIFICATE OR AFFIDAVIT.

§ 358. Necessity of Allowance or Leave.

Written Request for Appeal—Where No Delay Results from Omission.—Rule 43, supreme court practice, is designed merely to expedite the transmission of appeals to the appellate court, and unless a defendant's failure to file a written request for an appeal delays getting the certificate of appeal and transcript before the appellate court, and if each is before the court as early as it would have been otherwise, or soon enough to meet the purposes of the rule, then the reason for the filing of such written request for appeal ceases, and in such case the rule itself ceases, and the appeal is properly before the court despite a failure to file a written request for the appeal. *Rivers v. State*, 13 Ala. App. 362, 69 So. 387.

§ 361. Petition, Affidavit or Other Application.

Designation of Parties.—A formal application for an appeal in the name of the respondents in the case and the register's certificate that the first-named respondents "et als." applied for and took an appeal sufficiently shows that the appeal was taken on behalf of all respondents. *Richardson v. Powell* (Ala.), 74 So. 364.

(C) PAYMENT OF FEES OR COSTS, AND BONDS OR OTHER SECURITIES.

§ 372. Necessity of Security to Perfect Appeal or Other Proceeding.

§ 374. — Exemptions.

Tax officers of a county against whom, as such, mandamus is granted, having no personal interest in the litigation, but being representatives of the state and the public, being clothed with powers and duties to be exercised in behalf of the state, need not give the bond required by Code 1907, § 2843, on appeal from judgment on a remedial writ, but are within the spirit of § 2440, providing that the state is entitled to all remedies for enforcement of rights between individuals without giving security. *McLendon v. Empire Min. Co.* (Ala.), 74 So. 937.

§ 384. Form and Contents of Bond or Undertaking.

§ 384 (1) In General.

Omission of Date.—Under Code 1907, § 2886, omission to date an appeal bond was not fatal. *Sloss-Sheffield Steel, etc., Co. v. Terry*, 191 Ala. 476, 67 So. 678.

§ 384 (2) Recital of Judgment or Order.

Misrecital of Date.—An appeal and supersedeas bond, correctly describing the judgment appealed from, except for a misrecital of its date, held sufficient on a motion to dismiss. *Strain v. Irwin* (Ala.), 75 So. 151.

The fact that the appeal bond describes the judgment as of date January 8, 1916, whereas the true date was February 8, 1916, is not necessarily fatal; other elements of the description showing with reasonable certainty that it can be no other than the judgment from which the appeal was taken, and the amendment necessary to perfect the appeal bond being allowable on timely motion under Code 1907, §§ 2885, 2886. *Wilder v. Bush* (Ala.), 75 So. 143.

§ 387. Delivery or Filing and Service of Bond or Undertaking.

Where a sufficient appeal bond was filed before death of appellee, although subsequently approved, such approval related back to time bond was filed, and jurisdiction over cause was transferred within lifetime of appellee. *Roll v. Howell* (Ala. App.), 73 So. 218.

§ 390. Amendment of Bond or Undertaking.

Under the direct provision of Code 1907, § 2886, an appeal will not be dismissed because the supersedeas and appeal bond is defective without appellant being given an opportunity to file a correct bond. *Strain v. Irwin* (Ala.), 75 So. 151.

§ 392. Waiver of Security or of Defects.

Joinder in Error.—*Coats v. Elkan & Co.*, 7 Ala. App. 187, 60 So. 941. See the title APPEAL AND ERROR, § 392, vol. 1, p. 392.

(D) WRIT OF ERROR, CITATION OR NOTICE.

§ 404. Citation or Other Process.

§ 407. — Service.

Appeal by Codefendant.—Under Acts

1911, p. 589, an appeal perfected by one of two defendants will be dismissed, where appellant's codefendant was not served with summons, and, notwithstanding respondent's motion to dismiss, appellant submitted the case without application in the appellate court for summons and severance as to his codefendant. *Warren v. Georgia Fire Ins. Co.*, 10 Ala. App. 650, 65 So. 843.

§ 416. Form and Requisites of Notice.

§ 418. — Decisions and Proceedings Included.

A notice of appeal, to the effect that it was from the original judgment giving the date thereof, is sufficient to permit an assignment of the error of the court in overruling defendant's motion for new trial. *Ewart Lumber Co. v. American Cement Plaster Co.*, 9 Ala. App. 152, 62 So. 560.

§ 429. Waiver of Process or Notice or of Defects Therein.

Where no point was made or taken at or before the submission that a proper notice of the appeal had not been given or served on the other defendant, there was a waiver as to such matter by appellee. *Birmingham v. Hawkins*, 196 Ala. 127, 72 So. 25.

(E) ENTRY, DOCKETING AND APPEARANCE.

§ 435. Effect of Appearance.

Waiver of Lack of Notice of Appeal.—After a voluntary appearance an objection for want of notice of appeal comes too late. *Planters' Trading Co. v. Moore*, 7 Ala. App. 393, 62 So. 302.

VIII. EFFECT OF TRANSFER OF CAUSE OR PROCEEDINGS THEREFOR.

(A) POWERS AND PROCEEDINGS OF LOWER COURT.

§ 436. Transfer of Jurisdiction in General.

No Jurisdiction in Trial Court.—Where an appeal is perfected, the entire cause is removed from the trial court, which, pending the appeal, loses all jurisdiction. *Lasseter v. Deas*, 9 Ala. App. 564, 63 So. 735.

Effect of Filing Replication in Trial Court.—An appeal to the supreme court

removed the case from the county court to the supreme court, and complainants could not affect the result in the supreme court by filing in the court below a replication to respondents' special plea. *Anders Bros. v. Latimer* (Ala.), 73 So. 925.

§ 440. Amendment of Proceedings.

Correction of Judgment.—Where one has perfected an appeal to the supreme court, his motion to correct a judgment can not be entertained in the lower court, which has lost jurisdiction. *McLaughlin v. Beyer*, 181 Ala. 427, 61 So. 62.

(B) JURISDICTION ACQUIRED BY APPELLATE COURT.

§ 457. Effect of Subsequent Proceedings in Court Below.

See ante, "Transfer of Jurisdiction in General," § 436.

Plea of Bankruptcy Suit Pending—Subsequent Dismissal of Such Suit.—In suit, under Code 1907, § 4295, to declare a mortgage to be a general assignment, where respondents filed a special plea to abate or stay the suit on the ground of pendency of bankruptcy proceedings against them, which was held insufficient, and respondents appealed to the supreme court, and thereafter complainants filed a replication to the plea, setting up that the bankruptcy proceeding had been dismissed, the ruling on the appeal in the supreme court could not be influenced by the dismissal of the proceedings in the bankruptcy court after the appeal was taken, as the dismissal could not cure any error of the trial court in holding respondents' special plea insufficient. *Anders Bros. v. Latimer* (Ala.), 73 So. 925.

IX. SUPERSEDEAS OR STAY OF PROCEEDINGS.

§ 460. Operation of Appeal, or Writ of Error and Necessity for Security or Allowance.

Necessity of Supersedeas — "Decree for Payment of Money."—Code 1907, § 2873, provides that, when a judgment or decree is for the payment of money only, the appeal does not operate as a supersedeas, or to stay or suspend the execution of the judgment or decree, unless bond be given as therein pro-

vided. Section 2874 provides that if the decree or judgment be for the payment of money and also for the performance of some other act or duty, or for the recovery of property or the possession thereof, or for the sale of property, and the party appealing wishes to supersede the execution of the judgment or decree, he must give bonds as therein provided. Section 2875 provides that if the judgment or decree be only for the performance of some act or duty, or for the recovery of property or its possession, or for the sale of property, the party appealing, if he wishes to supersede the execution of the judgment or decree, must execute a bond as therein provided. Held, that an appeal from a decree canceling a mortgage and taxing the costs of the suit against the mortgagee, but requiring the performance of no other act by the mortgagee, operated as a stay of the execution for costs, without any supersedeas, as such decree was not a "decree for the payment of money," within § 2873, and did not come within the other sections, and at common law an appeal operates as a stay of further proceedings. *Ex parte Cudd*, 195 Ala. 80, 70 So. 721.

§ 462. Upon Security.

§ 467. — Form and Contents of Bond or Undertaking.

Misrecital of Judgment Date.—An appeal and supersedeas bond, correctly describing the judgment appealed from, except for a misrecital of its date, held sufficient on a motion to dismiss. *Strain v. Irwin* (Ala.), 75 So. 151.

§ 474. — Amendment of Bond or Undertaking.

Under the direct provision of Code 1907, § 2886, an appeal will not be dismissed because the supersedeas and appeal bond is defective without appellant being given an opportunity to file a correct bond. *Strain v. Irwin* (Ala.), 75 So. 151.

§ 484. Scope and Effect as Stay.

§ 485. — Proceeding in Cause in General.

Under Code 1907, §§ 2872, 3881, a judgment was not superseded by appeal where no bond was executed other than security for the costs of appeal. Ala-

bama Power Co. v. Hilyer (Ala. App.), 67 So. 720.

X. RECORD AND PROCEEDINGS NOT IN RECORD.

(A) MATTERS TO BE SHOWN BY RECORD.

§ 493. Jurisdiction of Lower Court.

The jurisdiction of the supreme court depends upon an affirmative showing in the transcript that the judgment from which the appeal was taken was rendered by a court organized according to law. *Richardson v. Powell* (Ala.), 74 So. 364.

The supreme court's jurisdiction over an appeal from an order of the probate court, denying admission of a will to probate, held not subject to an attack on the ground that the transcript failed to show a proper organization of the probate court. *Allen v. Scruggs*, 190 Ala. 654, 67 So. 301.

Under Loc. Acts 1911, p. 148, § 6, and Code 1907, § 4720, where a transcript from the docket and an appeal bond show a judgment regularly entered before a judge of the inferior court, such judgment is not void as being rendered by a court unknown to the laws of Alabama. *Tidwell v. Robinette*, 12 Ala. App. 655, 68 So. 555.

A caption as follows: "A transcript of the records in a certain cause pending in the circuit court" of a named county of the state, taken in connection with the certificate of appeal, which recited that the register in chancery thereby certified that in the above-entitled cause a decree was rendered by the chancery court in that county, though informal, sufficiently shows the organization of the lower court to warrant a consideration of the appeal. *Richardson v. Powell* (Ala.), 74 So. 364.

Jurisdiction of Defendant.—Where notice to a defendant is constructive only, and he does not appear, the record on appeal must show a compliance with the statute. *McMahan v. Browne*, 185 Ala. 272, 64 So. 553.

§ 494. Nature and Form of Decision.

Where the record shows no judgment entry, the appeal will be dismissed. *Birmingham R., etc., Co. v. Compton*, 194 Ala. 692, 69 So. 607.

§ 496. Proceedings Sustaining Judgment or Order.

Joinder of Issue.—That the record on appeal does not disclose the joinder of a formal issue between the parties is not ground for reversal. *Craddock v. Walden*, 184 Ala. 58, 63 So. 534.

Default Judgment—Service on Corporation.—The record on appeal from a default judgment against a corporation not showing, what was necessary to authorize the judgment, service on such an agent or officer of it as by law authorized to receive service, or that the court ascertained by proof that the person served was such an officer, there must be a reversal. *Order of Calanthe v. Armstrong*, 7 Ala. App. 378, 62 So. 269.

Demurrer Sustained Necessitating Voluntary Nonsuit.—While, in order to authorize review of a vountary nonsuit under Code 1907, § 3017, it must appear that it became necessary for plaintiff to suffer a nonsuit, this reasonably appeared where the court sustained a demurrer to plaintiff's complaint for a defect which affected his whole cause of action. *Ex parte Martin*, 180 Ala. 620, 61 So. 905.

§ 497. Grounds of Review.

§ 499. — Questions and Objections in General.

An assignment of error can not be sustained, where the bill of exceptions does not show that the objection referred to in the assignment was called to the attention of the trial court, or that there was any ruling on the objection or exception to the ruling. *Morton v. Clark*, 10 Ala. App. 439, 65 So. 408.

In preparing its bill of exceptions, it was not incumbent on defendant appellant to state objections made by plaintiff, where ruling was in favor of defendant. *Atlantic, etc., R. Co. v. Kelly* (Ala. App.), 77 So. 972.

Argument of Counsel. — Alleged improper argument of plaintiff's counsel can not be reviewed where the bill of exceptions does not show that any objection was made at the trial or that the case was argued by counsel at all. *McDuffie & Sons v. Weeks*, 9 Ala. App. 282, 63 So. 739.

§ 500. — Rulings by Lower Court.**§ 500 (1) In General.**

Forcing Defendants to Trial.—Abuse of discretion in requiring defendants to go to trial when they were not ready will not be reviewed where no objection is shown to have been preserved by bill of exceptions. *McDuffie & Sons v. Weeks*, 9 Ala. App. 282, 63 So. 739.

§ 500 (2) Rulings on Pleadings.

Demurrer to Complaint.—Where the record fails to show demurrer interposed to counts of a complaint, the sufficiency of such counts upon demurrer is not reviewable. *Birmingham v. Muller*, 197 Ala. 554, 73 So. 30.

Where a judgment entry shows rulings as to demurrers to the original complaint and each count thereof, and that the complaint was amended and the demurrers reinterposed, and that the demurrers to the amended complaint were overruled, but discloses no action on demurrers to the different counts, assignments of error based on rulings on demurrers to the different counts are not reviewable. *Central, etc., R. Co. v. Hingson*, 186 Ala. 40, 65 So. 45.

Alleged Misjoinder of Actions.—*Conway v. Clark*, 177 Ala. 99, 58 So. 441. See the title APPEAL AND ERROR, § 500 (2), vol. 1, p. 404.

Striking Pleas.—Where the bill of exceptions does not disclose the action of the court in striking some of defendant's special pleas or that any exception was reserved thereto, the ruling is not reviewable. *Sovereign Camp v. Jones*, 11 Ala. App. 433, 66 So. 834.

Refusal to Allow Withdrawal of Demurrer and Filing of Plea in Abatement.—An assignment of error relating to the court's refusal to grant defendant leave to withdraw demurrer and file plea in abatement, where such ruling is not shown by the record, will not be reviewed. *McDonough v. Commercial State Bank* (Ala. App.), 73 So. 754.

§ 500 (3) Rulings on Evidence.

Admission of Evidence.—The propriety of the admission of evidence can not be reviewed, where the bill of exceptions showed no ruling or any exception to the ruling. *Phillips v. Jackson*, 190 Ala. 586, 67 So. 450.

Assignments of error complaining of

admission of evidence present nothing for review; there being no rulings on objection to evidence shown by record. *McKenzie v. Hixon* (Ala.), 78 So. 791.

Motion to Exclude Testimony.—Assignments of error predicated on the ruling on a motion to exclude testimony can not be reviewed where the record failed to show such motion. *Southern R. Co. v. Kendall & Co.*, 14 Ala. App. 242, 69 So. 328.

The overruling of defendant's motion to exclude testimony can not be reviewed, where the bill of exceptions does not disclose any ruling on the motion, or any exception. *Ewton v. McCracken*, 9 Ala. App. 619, 64 So. 177.

The record as to the exclusion of a claim for indemnity under accident insurance policy, held insufficient to present question of error in such ruling. *Mutual Life Ins. Co. v. Witte*, 190 Ala. 327, 67 So. 263.

§ 500 (4) Instructions.

The refusal of requested charges can not be reviewed where the bill of exceptions does not show that they were requested before the jury retired. *Central, etc., R. Co. v. Mathis*, 9 Ala. App. 643, 64 So. 197.

§ 501. — Exceptions.

Motion to Strike Pleading.—In order to review a ruling on a motion to strike a pleading, an exception to the judgment should be shown by the record. *Tennessee Valley Bank v. Avery & Sons*, 9 Ala. App. 363, 63 So. 813.

Admission of Evidence.—The court of appeals can not review a ruling on the admission of evidence to which no exception appears in the record. *Stamps v. Thomas*, 7 Ala. App. 622, 62 So. 314.

Assignments that the court erred in admitting certain evidence and in sustaining respondent's motion to quash the proceedings could not be reviewed where no exceptions appear in the record. *State v. Powell*, 184 Ala. 46, 63 So. 542.

Exception to Oral Charge before Jury Retire.—A bill of exceptions must affirmatively show that exceptions to a part of the oral charge were taken pending trial and before the jury retired. *Capital Security Co. v. Owen*, 196 Ala. 385, 72 So. 8.

Where the record does not show that an exception to an oral charge was taken in open court in the presence of jury before it retired, such exception will not be considered on appeal. *Oil-Well Supply Co. v. West Huntsville Cotton Mills Co. (Ala.)*, 73 So. 899.

Code 1907, § 5364, requiring requested charges to be in writing, and § 3016, providing that exceptions to rulings thereon are presumed, take such charges out of the rule requiring the bill of exceptions to show that the exceptions to the charge were made before the jury retired. *Central, etc., R. Co. v. Courson*, 186 Ala. 155, 65 So. 179.

Same—Sufficient Showing.—A record showing that after an exception to a part thereof was taken, the court concluded the oral charge, shows affirmatively that the exception was taken pending the trial and before the jury retired. *Capital Security Co. v. Owen*, 196 Ala. 385, 72 So. 8.

Amendment of Judgment Nunc Pro Tunc.—Without bill of exceptions showing that exception was duly reserved, the amendment of a judgment nunc pro tunc can not be reviewed. *Floyd v. Lamar*, 13 Ala. App. 504, 69 So. 227.

§ 502. — Motions for New Trial.

Ruling or Order of Court on Motion.—Where record fails to set out judgment of lower court on motion for new trial, this will not be reviewed on appeal. *Smith v. Yearwood*, 197 Ala. 680, 73 So. 384.

To review the denial of a new trial, the court's ruling must be incorporated in the bill of exceptions. *Stokes v. Hinton*, 197 Ala. 230, 72 So. 503.

Where the record failed to show that the motion for new trial was acted upon, nothing is presented for review by assignments of error based on such motion. *Southern R. Co. v. Kendall & Co.*, 14 Ala. App. 242, 69 So. 328.

Ruling of court on motion for new trial, which does not appear by bill of exceptions, presents nothing for review. *Empire Clothing Co. v. Roberts, etc., Shoe Co. (Ala. App.)*, 75 So. 634.

Exception to Decision.—To review the granting or denial of a new trial, the exception taken to the court's ruling must be incorporated in the bill of ex-

ceptions. *Stokes v. Hinton*, 197 Ala. 230, 72 So. 503.

Action of trial court on motion for new trial will not be reviewed, unless the bill of exceptions shows an exception to the ruling on the motion in view of Acts 1915, p. 722, as to review of rulings on motion for new trial. *Patterson v. Holt (Ala. App.)*, 78 So. 637.

Under Acts 1915, p. 598, dealing with motions, providing that an exception need not be reserved in order to review the action upon the same, and page 722, a subsequent enactment dealing specially with motions for new trial, providing for an exception to the decision on motion for new trial, and that the evidence in support of the motion and the decision of the court shall be included in the bill of exceptions, where motion for new trial does not appear in either the bill of exceptions or the record proper, and it does not appear from the bill of exceptions that appellant excepted to the ruling, the trial court will not be reversed for refusing to grant the motion. *Powell v. Folmar (Ala.)*, 78 So. 47.

§ 504. Taking and Perfecting of Appeal or Other Proceeding for Review.

§ 507. — Allowance or Leave.

The objection that a widow was not allowed to appeal from a judgment under the provisions of Code 1907, § 2879, as amended by Acts 1915, p. 715, as to married women's appeals, was not reviewable where no order or decree concerning such appeal appeared in the record. *Kimball v. Cunningham Hdw. Co.*, 197 Ala. 631, 73 So. 323.

§ 509. Process or Notice.

The record not showing any citation or notice of appeal was issued or served on an adverse party, as required by Code 1907, § 2881, and no appearance being entered by or for any one as appellee, appeal must be dismissed. *Eutaw Ice, etc., Co. v. McGee (Ala. App.)*, 76 So. 990.

(B) SCOPE AND CONTENTS OF RECORD.

§ 518. Pleadings and Proceedings Relating Thereto.

§ 518 (1) When Part of Record in General.

Stricken Pleas Refiled without Leave.—The refiled without leave of court of

special pleas which had been stricken because filed too late does not make those pleas a part of the record. *Broun, Jr., Timber Co. v. Coleman*, 190 Ala. 315, 67 So. 243.

§ 518 (3) Demurrers and Rulings Thereon.

Ruling on Demurrer.—*Prattville, etc., Co. v. McKinney*, 178 Ala. 554, 59 So. 498. See the title APPEAL AND ERROR, § 518 (3), vol. 1, p. 412.

A recital in a minute entry as to filing demurrers to the complaint as amended and hearing and considering demurrers to the pleas held not to show any ruling on the demurrers to the complaint. *Birmingham, etc., R. Co. v. Hoskins*, 14 Ala. App. 254, 69 So. 339.

Demurrer Not Shown.—An assignment of error complaining of the overruling of a demurrer to a special plea can not be considered where only the judgment entry recited a ruling on the demurrer to that plea, and the record contains no such demurrer. *Warble v. Sulzberger Co.*, 185 Ala. 603, 64 So. 361.

§ 518 (4) Amendment of Pleadings.

Amended bill of complaint held included within submitted case as shown by the record, although not noted; chancery rules 75 and 76 being substantially complied with. *Dinsmoor v. Thomas* (Ala.), 73 So. 820.

§ 518 (6) Striking out Pleadings, and Proceedings Relating Thereto.

General Rule.—*Shahan v. Brown*, 179 Ala. 425, 60 So. 891. See the title APPEAL AND ERROR, § 518 (6), vol. 1, p. 413.

In order to review a ruling on a motion to strike a pleading, the record should show a judgment. *Tennessee Valley Bank v. Avery & Sons*, 9 Ala. App. 363, 63 So. 813.

§ 520. Interlocutory Motions, Orders and Judgments.

In General.—Motions and rulings thereon during the progress of the trial are not parts of the record, and can be reviewed only when presented by bill of exceptions. *Ex parte Watters*, 180 Ala. 523, 61 So. 904.

§ 521. Evidence.

§ 522. — In General.

Sufficiency of Agreed Statement of

Facts.—Contention that bill of exceptions did not purport to set out all of the evidence held without merit, where it set out an agreed statement of facts on which cause was tried. *Parker-Blake Co. v. Ladd*, 14 Ala. App. 407, 70 So. 188.

§ 523. — Depositions and Affidavits.

The noting of depositions in a register's note of testimony included a notation of exhibits referred to by the depositions, so that the exhibits could be considered in the case. *Dinsmoor v. Thomas* (Ala.), 73 So. 820.

§ 524. — Documents.

Daybook Entries.—Effect of entries in daybook introduced in evidence can not be considered on appeal, where they are not incorporated in bill of exceptions, although original book is sent up for inspection. *Darrow v. Darrow* (Ala.), 78 So. 383.

Paper Relating to Proceedings to Change Plaintiff's Corporate Name.

—The admission of a paper relating to proceedings to change plaintiff's corporate name, where not set out in bill of exceptions, will not be considered upon review. *McDonough v. Commercial State Bank* (Ala. App.), 73 So. 754.

§ 525. Instructions.

Refused Charge Not in Record Proper.

—Where neither the oral charge of the court nor the refused charges are set out in the record, in accordance with Acts 1915, p. 815, and appear only in the bill of exceptions, assignments of error predicated thereon will not be considered. *Tennessee, etc., R. Co. v. Cavin* (Ala. App.), 77 So. 80.

In the absence of a bill of exceptions giving to the reviewing court evidence or data from which to determine whether charges are proper, this court can not review the charges even if the law requires the court to review them as a part of the record. *Taylor v. State*, 14 Ala. App. 13, 70 So. 949.

Refused Charges Not in Bill of Exceptions.

—The refusal of charges copied in the record, but not incorporated or mentioned in bill of exceptions, can not be made the basis of assignments of error. *Mitchell v. Bland*, 12 Ala. App. 453, 67 So. 800.

Where the record does not contain a bill of exceptions furnishing data for re-

view, and the oral charge of the court is not set out, the appellate court can not review intelligently the charges refused to a defendant as required by Acts 1915, p. 815, although the record contains the charges given and refused to defendant requested in writing. *Dorough v. State*, 14 Ala. App. 110, 72 So. 208.

Marking "Given" or "Refused."—Under Acts 1915, p. 815, providing that charges moved for by either party must be in writing, and must be given or refused in the terms in which they are written, and that it is the duty of the judge to write "Given" or "Refused," as the case may be, on the document and sign his name thereto, which thereby becomes a part of the record, charges which were not marked "Refused" nor signed by the presiding judge did not become a part of the record. *Parnell v. Farmers' Bank, etc., Co.* (Ala. App.), 77 So. 442.

§ 527. Verdict, Findings or Decision.

Conclusion or Judgment on Evidence.

—Under Acts 1896-97, p. 270, § 16, providing for review of the judgments and decisions of the county court of T. county by bill of exceptions, a conclusion or judgment of such court on the evidence was not reviewable, where the bill did not show that the judge reached a conclusion, or that judgment was entered by the court. *Alabama, etc., R. Co. v. Taylor*, 7 Ala. App. 583, 61 So. 475.

Under Code 1907, § 5361, on a trial without a jury, the conclusion and judgment on the evidence are not reviewable, unless the bill of exceptions shows what they were. *Bridgman v. Doss*, 9 Ala. App. 615, 64 So. 173.

§ 529. Judgment or Decree.

Granting New Trial.—The judgment entered upon the order granting a new trial must be shown by the record. *Stokes v. Hinton*, 197 Ala. 230, 72 So. 503.

Denial of New Trial.—To review denial of a new trial, the original judgment must be a part of the record proper. *Stokes v. Hinton*, 197 Ala. 230, 72 So. 503.

Vacation of Judgment.—Where the record contained no bill of exceptions,

the motion to vacate the judgment in the main case and the court's ruling thereon was not properly a part of the record on appeal from the main judgment, and could not be presented for review by its unauthorized insertion in the transcript. *Caravella v. Bernheim Distilling Co.*, 13 Ala. App. 458, 69 So. 241.

§ 535. Bill of Exceptions, Case or Statement.

§ 537. — Necessity of Timely Making and Filing in Lower Court.

Ninety-Day Period.—Bill of exceptions presented, according to indorsement of trial judge, more than 90 days after rendition of judgment, can not be considered on appeal. *Pate v. Baker* (Ala. App.), 73 So. 125.

If the bill of exceptions was not signed by the Judge within 90 days after the judgment entry, as required by Code 1907, § 3019, it must be stricken, notwithstanding it was kept open by the judge at the request of appellee's counsel to enable appellee to insert a copy of the oral charge. *Tennessee Coal, etc., R. Co. v. Perry*, 10 Ala. App. 371, 64 So. 651.

§ 543. Effect of Loss or Destruction of Record.

Statutory Proceeding to Supply Lost Bill of Exceptions.

—Where a bill of exceptions, after having been signed and filed, was lost, it could only be supplied by a proceeding for that purpose on notice as provided by Code 1907, §§ 5739-5741, and a copy of the original bill, which relator procured to be signed and filed as another original, was ineffective. *State v. Powell*, 184 Ala. 46, 63 So. 542.

(C) NECESSITY OF BILL OF EXCEPTIONS, CASE OR STATEMENT OF FACTS.

§ 544. Decisions Not Otherwise Reviewable.

§ 544 (1) Necessity in General.

Rulings on Motions.—The rulings of the trial court on motions can only be presented for review by bill of exceptions showing the rulings and exceptions thereto. *Peters v. Nolen*, 10 Ala. App. 599, 65 So. 699, certiorari denied in *Ex parte Peters*, 187 Ala. 672, 65 So. 1034.

Motion Enrolled on Docket by Order of Court.—Enrollment of a motion on the motion docket by order of court, while rendering its incorporation in the bill of exceptions for review unnecessary, will not dispense with the necessity of the bill of exceptions for the authentication of other essential incidents. *Ex parte Watters*, 180 Ala. 523, 61 So. 904.

Motion to Strike Pleading.—A ruling on motion to strike a particular pleading, to be reviewable, must be shown by bill of exceptions. *Continental Casualty Co. v. Ogburn*, 186 Ala. 398, 64 So. 619.

A ruling on a motion to strike a plea can not be reviewed, in the absence of a bill of exceptions. *Bush v. Russell*, 180 Ala. 590, 61 So. 373.

Where a record disclosed that pleas 2 and 3 were filed on a stated date, whereas the judgment entry on second trial recites that "pleas heretofore filed" were withdrawn and no other pleas are shown to have been filed except by a recital in the judgment entry that "whereupon defendant files pleas 1, 2 and 3, and plaintiff moves the court to strike 2 and 3, which motion is granted by the court," and the action of the court in striking the pleas is not presented by a bill of exceptions, and the ruling appears only by such recitals of the judgment entry, and is not shown by motion in writing or as a part of the record, as provided in Acts 1915, p. 598, the ruling of the court striking such pleas was not shown by the record to be erroneous. *Huntsville Knitting Mills v. Butner* (Ala.), 76 So. 54.

Motion for Discontinuance.—A ruling on a motion for a discontinuance must be shown by proper bill of exceptions, or it will not be reviewed on appeal. *North Birmingham Trust, etc., Bank v. Adams*, 184 Ala. 564, 63 So. 1022.

Rulings on Evidence and Decree as to Widow's Homestead.—The court having heard testimony as to whether the homestead set apart to the widow constituted all the real estate in the state owned by deceased at his death, on which, under Code 1896, § 2071, depends the estate to be awarded her therein, its rulings on evidence, and its decree

awarding a life estate only, can be reviewed only by bill of exceptions. *Rowe v. Buttram*, 180 Ala. 456, 61 So. 258.

The refusal of requested instructions can not be reviewed, in the absence of a bill of exceptions. *Payne v. State*, 10 Ala. App. 85, 65 So. 262.

Refusal of Affirmative Charge and Verdict Contrary to Law and Evidence.—Where the errors assigned were the refusal of the trial court to give an affirmative charge and that the verdict was contrary to the law and evidence, those assignments could not be reviewed in the absence of a bill of exceptions. *Higdon v. Warrant Warehouse Co.*, 10 Ala. App. 496, 63 So. 938.

Court Proceeding to Judgment after Due Service.—In absence of bill of exceptions, an appellate court can not review the action of the court in proceeding to judgment after due service, where the judgment was not premature. *Floyd v. Lamar*, 13 Ala. App. 504, 69 So. 227.

Granting New Trial.—On appeal from order granting new trial, the ruling can be reviewed only by bill of exceptions, and not on the record proper, in view of Acts 1915, p. 722, as to review of rulings on motion for new trial. *Bank v. Elmore Fertilizer Co.* (Ala. App.), 78 So. 648.

§ 544 (2) Extent of Review in General.

Whether Complaint States a Cause of Action.—*Swope v. Sherman*, 7 Ala. App. 210, 60 So. 474. See the title APPEAL AND ERROR, § 544 (2), vol. 1, p. 421.

§ 544 (3) Matters Apparent of Record.

In the absence of bill of exceptions, the court on appeal can consider only assignments of error based on rulings shown by the record proper. *Sovereign Camp, W. O. W. v. Ward* (Ala.), 78 So. 824.

Demurrer to Complaint Sustained and Final Judgment for Defendant.—Where the court sustained demurrers to the complaint, and on plaintiff's refusal to plead further rendered judgment for defendant, plaintiff was entitled to an appeal on the record. *Limbaugh v. Boaz* (Ala. App.), 78 So. 421.

§. 546. Presentation of Grounds of Review.

§ 547. — Facts Not Shown by Record in General.

Giving and Refusal of Charges.—Assignments of error relating to the giving and refusal of charges can not be reviewed, where they are not preserved in a bill of exceptions. *Morris v. Bragan*, 195 Ala. 372, 70 So. 717.

Giving and refusing of affirmative charge can not be reviewed without a bill of exceptions. *Pate v. Baker* (Ala. App.), 73 So. 125.

Striking Amendment to Complaint.—

Where the action of the trial court in striking an amendment to the complaint was not preserved by bill of exceptions, it can not be reviewed. *Morris v. Bragan*, 195 Ala. 372, 70 So. 717.

§ 548. — Evidence.

§ 548 (1) Necessity of Bringing Up Evidence in General.

Attack on Default Judgment.—On a motion to annul, arrest, or vacate a default judgment rendered on a note, where the bill of exceptions does not present the evidence, such evidence is no part of the record and can not be reviewed. *Hall v. First Bank*, 196 Ala. 627, 72 So. 171.

Probate Court's Dismissal of Administrator's Escheat Proceedings.—While an administrator may appeal from the order of the probate court dismissing escheat proceedings instituted by him, where the only issue is of fact whether certain claimants were heirs of the intestate, the order of the probate court can not be reviewed, in the absence of a bill of exceptions showing the proceedings and evidence on the hearing before it. *McKenzie v. Jensen*, 195 Ala. 36, 70 So. 678.

§ 548 (3) Nature of Question or Issue.

Form of Note Sued on.—On an appeal from a default judgment rendered on a note, where the evidence is not presented by a bill of exceptions, the form of the note as set forth by a copy in the transcript can not be considered; but the form of the note must be determined by the averments of the complaint. *Hall v. First Bank*, 196 Ala. 627, 72 So. 171.

§ 549. Presentation of Exceptions Taken.

Rulings on Pleadings.—Where alleged error relates to pleadings alone, and there has been no nonsuit, and the appeal is only on the record, there should be a bill of exceptions showing the alleged errors were among the issues. *Henderson v. Tennessee Coal, etc., R. Co.*, 190 Ala. 126, 67 So. 414.

In order to review a ruling on a motion to strike a pleading, an exception to the judgment should be shown by the bill of exceptions. *Tennessee Valley Bank v. Avery & Sons*, 9 Ala. App. 363, 63 So. 813.

Refusal to Quash Service—Allowing Amendment to Complaint.—Neither the

refusal to quash the service of summons, nor the allowance of an amendment to the complaint to correct the name of the corporation sued, can be reviewed on appeal, unless presented by bill of exceptions, and a statement in the record proper that an exception was taken or reserved does not present the matter for review. *Central Foundry Co. v. Laird*, 189 Ala. 584, 66 So. 571.

§ 553. Substitutes.

Agreement as to Facts.—Under Code 1907, §§ 3018, 5361, an agreement as to facts not incorporated in the record or bill of exceptions or signed by the trial judge held not to be accepted as a substitute for a bill of exceptions in determining whether the trial court erred in its findings of fact. *Southern Exp. Co. v. State*, 10 Ala. App. 655, 65 So. 844; *S. C.*, 11 Ala. App. 271, 65 So. 845.

§ 554. Effect of Failure to Make Bill, Case or Statement.

Affirmance on Motion.—Where appeal is on record and time for filing bill of exceptions has expired, motion to affirm will be granted, where the record is free from error. *Baxley v. White* (Ala. App.), 77 So. 984.

§ 555. Effect of Striking Out Bill, Case or Statement.

Affirmance.—Where all errors assigned were predicated upon the bill of exceptions, which was stricken because in violation of Code 1907, p. 1526, rule 32, the cause will be affirmed. *Turner v. Thornton*, 192 Ala. 98, 68 So. 813.

(D) CONTENTS, MAKING AND SETTLEMENT OF CASE OR STATEMENT OF FACTS.

§ 567. Time for Settlement.

Assignments of error in bill of exceptions which was not presented and signed by trial court within 90 days as required by Code 1907, § 3019, can not be reviewed. *Graham v. Wall* (Ala. App.), 77 So. 421.

Where the time allowed by law for presenting the bill of exceptions to the trial judge and his approval and signing thereof had expired before the call of the division to which the cause was returnable, and no excuse was shown for a failure to prosecute the appeal properly, the appeal will be dismissed. *Avery v. State*, 13 Ala. App. 277, 69 So. 255.

§ 569. Settlement and Signing.

Necessity.—Under Code 1907, § 3019, as to bill of exceptions, a purported bill of exceptions could not be considered where it bore no indorsement of its presentation by the trial judge, or that it was ever signed as such by the judge who tried the case; a bill of exceptions being as "a formal statement in writing of exceptions taken by a party on the trial to a ruling, decision, charge or opinion of the trial judge, setting out the proceedings on the trial, the acts and rulings of the trial judge alleged to be erroneous, the objections and exceptions taken thereto, together with the grounds therefor, and authenticated by the signature of the trial judge," and its character as a record and its verity as such coming from the fact of its approval by the trial judge, which can be evidenced in no other way than by his signature. *Scott v. Alabama, etc., R. Co.* (Ala. App.), 77 So. 983.

(F) MAKING, FORM AND REQUIREMENTS OF TRANSCRIPT OR RETURN.

§ 597. Record or Part Thereof Included.

Judgment in Bill of Exceptions Only.—A judgment appealed from can be presented only by a certified transcript of the record, and a bill of exceptions can not be looked to for the judgment. *McLeod v. Garrick*, 196 Ala. 389, 72 So. 72.

§ 605. Form and Arrangement.

An assignment of errors in the record proper, preceding the citation of appeal and certificate, substantially complies with the supreme court rules. *Jackson v. Roanoke Banking Co.*, 197 Ala. 349, 72 So. 530.

§ 608. Sufficiency.

Where the transcript contained properly worded appeal bonds, both from the original judgment and from the judgment denying defendant's motion for a new trial, the appellate court will consider the assignments of error based on the rulings of the court in the original trial, as well as those based on the refusal of a new trial. *Atlantic, etc., R. Co. v. Jones*, 9 Ala. App. 499, 63 So. 693.

(G) AUTHENTICATION AND CERTIFICATION.

§ 612. Transcript or Return.

Necessity of Certification.—Where the transcript of appeal contains no certificate of the clerk of the court from which the appeal comes that it was a complete transcript of all the proceedings, in the cause, as required by § 2848, Code 1907, and no certificate that the transcript is correct, or is a transcript of the record and proceedings in the case, the appeal can not be entertained, but must be dismissed. *Davis v. State*, 13 Ala. App. 309, 69 So. 338.

§ 613. Bill of Exceptions.

Motion in Arrest.—Under Code 1907, § 4145, on motion to annul, vacate or arrest a judgment, exceptions may be taken to any ruling; and a bill of exceptions may be signed and certified as part of the record and an appeal taken as in any other action. *Hall v. First Bank*, 196 Ala. 627, 72 So. 171.

(H) TRANSMISSION, FILING, PRINTING AND SERVICE OF COPIES.

§ 620. Time for Transmission and Filing.

§ 621. — Limitations Applicable.

Where appeal was taken several days after call of division to which county of trial belonged, transcript filed thereafter, and appeal submitted next day on call of another division, no call of

other division intervening after appeal was taken before submission, appeal will not be dismissed for delay in filing transcript. *Covington & Co. v. Sewell* (Ala.), 76 So. 318.

Under supreme court rule 41 (175 Ala. xx, 56 South. vi), where appeal was taken in vacation and the transcript filed during the next term on the first day of the call of the division to which the appeal belonged, it was not subject to dismissal. *Sloss-Sheffield Steel, etc., Co. v. Terry*, 191 Ala. 476, 67 So. 678.

§ 626. Failure to File in Time.

§ 627. — Effect in General.

§ 627 (2) Dismissal.

Where, under Code 1907, § 2870, the term to which an appeal was returnable expired by operation of law June 30, 1913, and no certificate of appeal or transcript was filed until September 29, 1913, the appeal was subject to dismissal on motions. *Jones v. Higgins*, 10 Ala. App. 625, 65 So. 681.

Dismissal or Certiorari to Bring Up Transcript.—If a certificate of appeal is before the court, the court has jurisdiction to authorize a dismissal for want of prosecution, even before the transcript on appeal reaches the court, where defendant is negligent in bringing up the transcript; it also has jurisdiction to authorize issuance of certiorari to the clerk of the court below to send up the transcript, and if he fails, to authorize contempt proceedings against him. *Rivers v. State*, 13 Ala. App. 362, 69 So. 387.

Appeal Filed at First Call of Proper Division.—An appeal will not be dismissed for the failure to file the transcript in time, where it was filed on the first day of the first call of the division to which the appeal was returnable. *Williams v. Hyde*, 10 Ala. App. 566, 65 So. 708.

Where the record in a cause was filed at the first call of the division to which it belonged, after the appeal was taken, the cause can not be dismissed because the record was not filed within 20 days after the taking of the appeal. *Sloss-Sheffield Steel, etc., Co. v. Webster*, 183 Ala. 322, 62 So. 764.

Though under Code 1907, § 2870, an

appeal was returnable in June, the appeal will not be dismissed because no return was made until December, where there was no call of any division after that date, during that term of court at which the case could have been submitted, and the transcript was actually filed and case submitted at the earliest date. *National Union v. Sherry*, 180 Ala. 627, 61 So. 944.

Where Submission of Cause Not Delayed.—Motion to dismiss appeal for failure to file transcript sooner than was done must be overruled where submission of cause was not delayed, and transcript disclosed sufficient excuse. *Rhodes v. Downing*, 13 Ala. App. 494, 68 So. 788.

Where a transcript is filed 30 days before the cause can possibly be submitted, the appeal will not be dismissed, though it was not filed on the first Monday after the expiration of the 20 days for taking the appeal, as directed by Code 1907, § 2870. *Barney Coal Co. v. Hyche*, 187 Ala. 520, 65 So. 798.

After Continuances in Supreme Court.—Where appeal was taken within a year after judgment and continuances were twice entered in the supreme court, so that the case was submitted a year and a half after appeal, at which time the transcript was filed, the appeal would not be dismissed for undue delay in filing transcript. *Street v. Shadix*, 197 Ala. 446, 73 So. 73.

§ 627 (3) Affirmance.

Where a case was tried and determined May 1, 1915, appeal taken May 12, 1915, and notice of appeal served May 13, 1915, while the certificate was filed in the Court of Appeals November 25, 1915, appellee's motion to affirm must be granted. *Long v. Baltimore Bargain House*, 14 Ala. App. 666, 71 So. 75.

§ 628. — Excuses for Delay.

See post, "Relief," § 629.

Failure of Trial Judge to Sign Bill of Exceptions.—Where the bill of exceptions was not signed by the trial judge in time for it to be transcribed and filed at the call to which the appeal was returnable, the appeal will not be dismissed for failure to comply with court rule 41 (56 South. vi). *Birmingham Bottling Co. v. Morris*, 193 Ala. 627, 69 So. 85.

§ 629. — Relief.

Necessity of Affidavits to Support Record.—Where the record shows an excuse for delay in filing a transcript, affidavits of excuse are not necessary. *Rhodes v. Downing*, 13 Ala. App. 494, 68 So. 788.

Certiorari to Bring Up Transcript.—See ante, "Dismissal," § 627 (2).

(I) DEFECTS, OBJECTIONS, AMENDMENT, AND CORRECTION.

§ 634. Effect of Defects in General.

Confused Record Presenting Nothing for Review.—Where a record showed that the complaint originally consisted of one count, which was afterwards amended by striking therefrom one of the parties defendant, and subsequently amended by additional counts 1 and 2, and demurrers were filed to the complaint, and to the complaint as amended, which did not seem to be directed to any particular count, the judgment of the court shows that the demurrers to the complaint as amended were overruled, and the minute entry shows that the general issue was then pleaded, but the plaintiff amended his complaint by another separate paper that day filed, and the defendant demurred to the complaint as last amended, which demurrers were sustained, no reference appearing in either instance to any particular count of the complaint, and that thereupon the plaintiff withdrew count 1 of the complaint as amended, the record on appeal is in so confused a condition as to present no question involving any of the substantial rights of the parties. *Mudd v. Gray* (Ala.), 75 So. 468.

§ 635. Effect of Omissions.

§ 635 (1) In General.

Legal Judgment.—The failure of the transcript to show a legal judgment as the basis for the appeal requires a dismissal. *McLeod v. Garrick*, 196 Ala. 389, 72 So. 72.

Final Judgment.—Where the record shows no final judgment which would support an appeal under Code 1907, § 2837, providing for appeals from final judgments or decrees of the chancery, circuit or other courts, the appellate court is without jurisdiction to consider

the errors assigned. *Gibbs v. Southern Exp. Co.* (Ala.), 78 So. 860.

Organization of Trial Court.—Where the judgment to be reviewed was entered on May 6, 1912, and the only organization of the trial court shown by the record is that for the November, 1912, term, the appeal must be dismissed for failure to show that the court was organized pursuant to law. *Gallahar v. Ingram & Co.*, 9 Ala. App. 432, 62 So. 989.

Where the record shows no organization of the lower court, from the judgment of which the appeal is taken, the appeal will be dismissed. *Hudgins v. Pickens County*, 9 Ala. App. 228, 62 So. 995.

§ 635 (2) Jurisdictional Facts.

An appeal will be dismissed, where the record shows that the circuit court did not have original jurisdiction under Code 1907, § 3255, subd. 1, and does not show that it was brought to the circuit court on appeal from a court having jurisdiction. *Central, etc., R. Co. v. Coursen*, 8 Ala. App. 589, 62 So. 977.

Where a transcript of record does not comply with the requirement of Code 1907, § 2848, and rules numbered 26 and 29, pp. 1512 and 1513, and is so totally defective as not to set forth jurisdictional facts, a rehearing after an affirmance for failure to assign errors will not be granted to give the appellant an opportunity to file assignments of error. *Hudgins v. Pickens County*, 9 Ala. App. 228, 62 So. 995.

§ 637. Defects or Errors in Making Bill of Exceptions.

Bill Not Presented and Signed in Time.—See ante, "Time for Settlement," § 567; "Settlement and Signing," § 569.

Failure of the bill of exceptions to state the date of presentation to the trial judge, as required by Code 1907, § 3019, is jurisdictional, and the Supreme Court can not consider errors presented by such bill. *Box v. Southern R. Co.*, 184 Ala. 598, 64 So. 69.

§ 639. Defects or Errors in Making Abstract or Brief of Evidence.

Incorrect Statement of Date of Deed in Evidence.—*Dailey v. Alabama Consol. Coal, etc., Co.*, 178 Ala. 337, 57 So. 693.

See the title APPEAL AND ERROR, § 639, vol. 1, p. 435.

§ 644. Waiver of Defects or Objections.

Submission without Motion to Strike.—Code 1907, § 3020, only forbids the striking of a bill of exceptions on the ground that it was not seasonably signed, except on motion of a party to the record, and does not require consideration of a bill where it does not show that it was seasonably presented, which defect is not waived by the submission of the cause without formal motion by appellee to strike the bill from the files. *Box v. Southern R. Co.*, 184 Ala. 598, 64 So. 69.

§ 652. Amendment in Appellate Court.

§ 655. — Striking Out.

Discretion of Court.—*Long v. Seigel*, 177 Ala. 338, 58 So. 380. See the title APPEAL AND ERROR, § 655, vol. 1, p. 437.

Incomplete Bill.—A bill of exceptions will not be stricken because incomplete. *Johnston Bros. Co. v. Washburn* (Ala. App.), 77 So. 461.

Unauthorized Alteration in Bill.—Where bill of exceptions was presented to the presiding judge January 22, 1917, and he approved and signed it April 16th, and it was filed in the office of the circuit court May 12th, and some time subsequent, more than six months after trial, the bill of exceptions was altered by adding the direction, "Clerk will leave in motion for new trial," the alteration was unauthorized, whether done by the presiding judge or some one else; but the action did not justify striking of the entire bill, it not appearing to have been made by direction of appellants, or that they had any notice or knowledge, as the alteration was void, and to be disregarded. *Heath v. Lewis* (Ala.), 76 So. 451.

Bill Not Presented in Time.—*Tuggle v. Wilson*, 179 Ala. 671, 60 So. 391. See the title APPEAL AND ERROR, § 655, vol. 1, p. 438.

A bill of exceptions, not signed within the time prescribed by Code 1907, § 3019, must, on motion, be stricken out. *Deason v. Gray*, 189 Ala. 672, 66 So. 646.

Where a bill of exceptions is not filed within the time fixed by Code 1907, § 3019, it will be stricken from the record

on motion, and such failure may be shown by parol. *Buck Creek Lumber Co. v. Nelson*, 188 Ala. 243, 66 So. 476.

Under Code 1907, § 3019, a bill of exceptions, not signed until after 90 days from presentation, will be stricken. *Sellers v. Dickert*, 194 Ala. 661, 69 So. 604.

Where it affirmatively appears that bill of exceptions was not presented within 90 days from the day judgment was entered, as required by Code 1907, § 3019, it will be stricken on motion. *Melton v. Fort Produce Co.* (Ala. App.), 77 So. 979.

Same—Bills Unseasonably Signed or Presented—Statute.—Code 1907, § 3020, forbidding appellate courts to strike a bill of exceptions ex mero motu, applies to bills unseasonably signed by the trial judge, and not to those unseasonably presented to him. *Wrenn v. Baker* (Ala. App.), 73 So. 756.

Same—Motion Made after Second Submission.—Where a motion to strike the bill of exceptions because not filed in time was not made until after the case had been submitted a second time, and after an affirmance had been set aside by consent, it was too late. *Lockridge v. Brown*, 184 Ala. 106, 63 So. 524.

Stenographic report of trial, signed by judge and filed as bill of exceptions, but not showing any exception to action of court in rendering judgment for appellee, the only question sought to be reviewed thereby, held to be stricken from the record on appellees' motion. *Clancy v. Taylor*, 12 Ala. App. 557, 68 So. 522.

Under Rule 32 for circuit and inferior courts, providing that bills of exception shall not contain a statement of the testimony in extenso, a bill containing a stenographic report of the trial, giving the testimony in question and answers, is so unnecessarily prolix and such a flagrant violation of the rule that it will be stricken on motion. *Higdon v. Warrant Warehouse Co.*, 10 Ala. App. 496, 63 So. 938.

Under Code 1907, p. 1526, rule 32, held, that bill of exceptions, expressly purporting to be nothing other than the stenographic report of the trial below, will be stricken on motion. *Turner v. Thornton*, 192 Ala. 98, 68 So. 813.

Where Entire Testimony in Bill.—*Long v. Seigel*, 177 Ala. 338, 58 So. 380.

See the title APPEAL AND ERROR, § 655, vol. 1, p. 438.

The supreme court has expressly reserved the right to strike bills of exceptions, containing a statement of the testimony in extenso, in violation of Code 1907, p. 1526, rule 32, without motion by the appellee. *Turner v. Thornton*, 192 Ala. 98, 68 So. 813.

Questions and Answers Where Testimony Obtained by Depositions.—Motion to strike bill of exceptions on ground it contained questions and answers of witnesses, and did not contain evidence in narrative form, is without merit, where testimony was obtained by depositions. *Manson v. Sutterer* (Ala.), 77 So. 375.

§ 656. — Correcting or Curing Errors or Defects.

Correction in Pencil Disapproved—Transcript Controlling Except as to Clerical Errors.—It is bad practice to correct a transcript in pencil, particularly omission that is not self-correcting; and appellate court, in absence of agreement of counsel or effected correction by certiorari, can consider only transcript certified by clerk, except where imperfection is clerical. *Kilgore v. Birmingham R., etc., Co.* (Ala.), 75 So. 996.

Certificate of Inadvertence by Trial Judge.—Where a bill of exceptions omitted to show the date of presentation to the judge for signing, the defect could not be cured by a certificate from the trial judge showing that the bill was presented and signed in time, and that the omission of indorsement was by his own inadvertence. *Box v. Southern R. Co.*, 184 Ala. 598, 64 So. 69.

§ 658. Certiorari or Other Proceeding to Bring Up Record.

§ 661. — Return.

On contest of stock law election, where probate court upon certiorari certified as part of the record omitted from the transcript a copy of the petition calling for a stock law election, part of the proceedings in the cause, the petition might be considered as part of record. *Browning v. St. Clair County*, 195 Ala. 121, 71 So. 108.

(J) CONCLUSIVENESS AND EFFECT, IMPEACHING AND CONTRADICTING.

§ 662. Conclusiveness of Record.

§ 662 (1) In General.

No Ruling on Demurrers Shown.—Where the minute entry shows no ruling on demurrers to pleas, the Supreme Court can not consider assignments of error presupposing such a ruling. *Middleton v. Western Union Tel. Co.*, 197 Ala. 243, 72 So. 548.

§ 662 (2) Recitals.

Recital of Defendant's Nonappearance.

—A judgment entry reciting that defendant did not appear is conclusive, in absence of contrary showing in the record. *Potter v. Tucker*, 11 Ala. App. 466, 66 So. 922.

Recitals as to Rulings on Pleadings.—Supreme court, in determining whether plaintiffs in action for unlawful detainer recovered in circuit court for land not sued for in justice court, must look to recitals of record proper, by which it is bound as to rulings on pleadings. *Johnson v. Cox* (Ala.), 73 So. 922.

§ 662 (3) Bill of Exceptions.

Recitals in bill of exceptions must be taken as true. *Porter v. Tennessee Coal, etc., R. Co.*, 13 Ala. App. 632, 68 So. 808.

§ 663. Conclusiveness of Certificate.

Conflict with Record Proper.—Where the record proper showed an amendment of the complaint which, however, was not contained in the transcript, it would not be presumed from the clerk's certificate that the transcript contained a full, true and complete record of the proceedings in the cause; that no amendment was in fact filed. *General Acci. Fire, etc., Ins. Co. v. Shields*, 9 Ala. App. 214, 62 So. 400.

Conflict with Court Orders or Entries.

—Since all orders and entries made in the progress of a cause during term time emanate from the court, such a memorial is conclusive evidence of everything it contains, and can not be contradicted by the clerk's certificate as to the contents of the record. *General Acci. Fire, etc., Ins. Co. v. Shields*, 9 Ala. App. 214, 62 So. 400.

§ 664. Conflict in Record.**§ 664 (1) In General.**

Between Judgment Entry and Certificate.—A judgment entry reciting the amendment to the pleadings must be accepted as true, though the clerk certified that no such amendment was made; since if there were no amendments the judgment entry should have been corrected to so show. *Pacific Mut. Life Ins. Co. v. Shields*, 182 Ala. 106, 62 So. 71.

Between Judgment Entry and Special Pleas.—In an action by indorsee of a note, a judgment entry, reciting that issue was joined "on general issue in short by consent," held conclusive, although record disclosed special pleas stating defenses not available under general issue. *Stewart v. Keller*, 197 Ala. 575, 73 So. 89.

Between Judgment Recital and Answer Not in Record.—Where, on appeal in garnishment, the conditional judgment, regular in form, recites that the garnishee has not answered as required by law, such recital must prevail over any inference to the contrary from an answer set out in the transcript, but not made part of the record by bill of exceptions or by any reference in the judgment entry. *Fruitticher v. Ebersole*, 10 Ala. App. 411, 64 So. 650.

Between Bill of Exceptions in Transcript and One Returned under Certiorari.—When a bill of exceptions is sent up as a return to a writ of certiorari, and differs from the one contained in the transcript, the one returned under the writ will be regarded as the correct bill. *Jones v. White*, 189 Ala. 622, 66 So. 605.

§ 664 (2) Between Bill of Exceptions and Other Parts of Record.

Where there is a conflict between record proper and bill of exceptions, the former controls as to matter which should appear by the record proper, while the bill of exceptions controls as to matter which should appear by the bill. *Central, etc., R. Co. v. Gross*, 192 Ala. 354, 68 So. 291.

Where there was conflict between recitals of record proper, and those of bill

of exceptions, as to matter which must appear of record proper, recitals in record proper control; and, where conflict is as to matter which should properly be shown by bill of exceptions, recitals of latter control. *Johnson v. Cox* (Ala.), 73 So. 922.

Where a statement in a bill of exceptions conflicts with matter properly a part of, and shown by, the record proper, the recitals of the record will control. *McDaniel v. State*, 10 Ala. App. 79, 64 So. 641.

A judgment entry in the record proper will control recitals in the bill of exceptions. *McEntire v. Paffe*, 12 Ala. App. 507, 67 So. 713.

Procedure Followed by Court.—A judgment determines conclusively what the court did and, regarding the procedure followed, can not be varied by bill of exceptions. *Green v. Stephens* (Ala.), 73 So. 532.

Rulings on Demurrer.—Where the record proper and the bill of exceptions differ in their recitals as to rulings on demurrers, the record proper governs. *Bruce v. Citizens' Nat. Bank*, 185 Ala. 221, 64 So. 82.

Issues Made.—Recitals of the judgment entry confining the issues are conclusive, and can not be impeached by the bill of exceptions. *Wahouma Drug Co. v. Clay*, 193 Ala. 79, 69 So. 82.

Giving or Refusal of Charge.—Where a bill of exceptions as to the giving or refusal of a charge was self-contradictory, the court on appeal could, under Code 1907, § 5364, look to the record proper. *Baker v. Lauderdale*, 14 Ala. App. 224, 69 So. 299.

Where the exception states the charge of the court complained of materially different from the charge as given, such exceptions will not be considered on appeal. *Murray v. State*, 13 Ala. App. 175, 69 So. 354.

§ 666. Impeaching or Contradicting.**§ 670. — Affidavits.**

Time Bill Signed.—*Johnson v. Frix*, 177 Ala. 251, 58 So. 427. See the title APPEAL AND ERROR, § 670, vol. 1, p. 443.

(K) QUESTIONS PRESENTED FOR REVIEW.**§ 671. Limitation by Scope of Record in General.****§ 671 (1) In General.**

In absence of bill of exceptions or assignments of error, as required by law, judgment may be affirmed on motion. *Batson v. Keller* (Ala. App.), 77 So. 922.

§ 671 (3) Effect of Omission of Evidence, or Recital or Certificate That It Is All Included.

General Rule.—Where the bill of exceptions which undertook to set out evidence on which the judgment was based did not purport to set out all of it, the judgment will be affirmed. *State v. Lovejoy*, 12 Ala. App. 630, 67 So. 738, affirming judgment 64 So. 1021, certiorari denied in *Ex parte State*, 191 Ala. 664, 67 So. 1018.

Where evidence besides that contained in the bill of exceptions might have been heard below, the question whether the judgment was contrary to the evidence can not be reviewed. *Phillips v. Jackson*, 190 Ala. 586, 67 So. 450.

Where, though the judgment of the court of appeals in affirmance of the judgment below was reversed by the supreme court as to the proposition of law involved, yet, on it appearing that the bill of exceptions, which undertook to set out the evidence on which the trial court based its judgment, did not purport to set out all of the evidence, the court of appeals would affirm the judgment below. *State v. Lovejoy*, 12 Ala. App. 630, 67 So. 738, affirming judgment 64 So. 1021, certiorari denied in *Ex parte State*, 191 Ala. 664, 67 So. 1018.

In Equity—Chancery Issue.—In equity case, where fact goes to jury as matter of right, and chancellor incorporates verdict in decree, held, in view of Code 1907, § 5955, that court on appeal may consider certified exceptions to procedure before jury or chancellor. *Alabama, etc., R. Co. v. Aliceville Lumber Co.* (Ala.), 74 So. 441.

Illustrative Cases.—On appeal from an order substituting a lost paper in the record, the question whether the paper was properly a part of the record will

not be reviewed unless all the evidence is presented by a bill of exceptions. *Worrell v. State* (Ala. App.), 72 So. 601.

Where purchaser at foreclosure brought ejectment, and defendant relied on payment of the mortgage debt before foreclosure, the court on appeal could not pronounce erroneous a judgment for plaintiff, where the record failed to show date of foreclosure, and the bill of exceptions did not contain all of the evidence. *Baker v. Shoemaker* (Ala.), 78 So. 826.

§ 671 (4) Effect of Omission of Facts, Proceedings or Evidence Relating to Particular Questions.

Clerk's Notation of Loss of Documentary Evidence.—Where clerk, in his certificate to the transcript, noted that three matters of documentary evidence could not be found and were omitted from the bill of exceptions, there could be no review of refusal of the general affirmative charge for appellant. *Street v. Shadix*, 197 Ala. 446, 73 So. 73.

§ 671 (5) Effect of Omission of Instrument Sued on or Involved.

Insurance Policy.—Where count setting up terms of contract in complaint to recover on insurance policy incorporated copy of policy by reference, court of appeals can not pass upon demurrer thereto in absence of such copy from record. *Southern Indemnity Ass'n v. Hoffman* (Ala. App.), 77 So. 424.

Note and Contract.—Where suit was brought on a note and contract, but the bill of exceptions did not set out either the note or contract introduced in evidence, it was insufficient to show error in a judgment for defendant. *McCaskey Register Co. v. Nix Drug Co.*, 7 Ala. App. 309, 61 So. 484.

§ 671 (6) Limitation by Bill of Exceptions, Case or Statement of Facts.

Rulings Not Shown by Bill of Exceptions.—Where matters complained of are properly shown by the bill of exceptions, and the bill of exceptions on file contained no recital as to such matters or ruling thereon, they can not be reviewed on appeal. *Sears v. State*, 10 Ala. App. 76, 65 So. 300.

No Showing That Affirmative Charge Was Given.—Where the bill of exceptions does not show that a general affirmative charge was given, an assignment of error complaining of the giving of such a general charge can not be considered. *Ewart Lumber Co. v. American Cement Plaster Co.*, 9 Ala. App. 152, 62 So. 560.

Judgment Not Shown—Review of Rulings on Evidence.—Though the bill of exceptions does not show what the judgment was so as to require a review thereof, rulings on the admissibility of evidence may be reviewed. *Peters v. Brunswick-Balke-Collender Co.*, 6 Ala. App. 507, 60 So. 431.

§ 678. Pleading.

§ 679. — In General.

Necessity of Setting Forth Pleas Stricken.—The appellate court can not say that pleas stricken by trial court were not frivolous, irrelevant, or prolix in absence of such plea. *Huntsville Knitting Mills v. Butner* (Ala.), 76 So. 54.

§ 680. — Demurrers.

§ 680 (1) In General.

Demurrer to Replication.—*Dupuy v. Wright*, 7 Ala. App. 238, 60 So. 997. See the title APPEAL AND ERROR, § 680 (1), vol. 1, p. 445.

Rulings on Demurrer.—A judgment entry stating that demurrers were "overruled as to all other pleas" held insufficient to support assignments of error based upon the overruling of demurrers. *American Sales Book Co. v. Pope & Co.*, 7 Ala. App. 304, 61 So. 45.

Where the record showed no judgments on plaintiff's demurrers to defendants' plea, the assignments of error predicated on the overruling of such demurrers could not be considered. *Clancy v. Taylor*, 12 Ala. App. 557, 68 So. 522.

An assignment of error to the overruling of a demurrer to a count of the complaint could not be reviewed, where the record proper did not disclose action by the court on demurrer to that count. *Copeland v. Union Nursery Co.*, 187 Ala. 148, 65 So. 834.

Demurrer Sustained to Pleas Not Replied to Amended Complaint.—Defendant can not complain of the court's action in

sustaining demurrers to pleas filed to the original complaint, which the record does not show were made applicable to the complaint, as last amended, by being refiled. *General Acci. Fire, etc., Ins. Co. v. Shields*, 9 Ala. App. 214, 62 So. 400.

§ 680 (2) Necessity for Setting Forth Demurrer or Grounds Thereof.

Demurrer.—Where judgment appealed from recited that defendant's demurrer to a plea was overruled, but demurrer was not in record, court of appeals can not pass on ruling on demurrer. *Home Supply Co. v. Almon* (Ala. App.), 76 So. 473.

§ 680 (3) Necessity of Setting Forth Pleadings.

Amended Bill or Complaint.—The court's action in overruling demurrers to amended bill can not be reviewed on appeal, where amended bill does not appear in the transcript. *Butler & Co. v. Henry & Co.* (Ala.), 78 So. 912.

Where record does not set forth amended counts of complaint demurred to or any ruling of court on any demurrer to amended counts, reversible error can not be predicated on action of court overruling such demurrer. *Carland & Co. v. Burke*, 197 Ala. 435, 73 So. 10.

Defendant can not object on appeal to the overruling of demurrers to a complaint which the record affirmatively shows was amended, in the absence of any showing that the complaint, as amended, was demurred to, or subject to any of the objections urged. *General Acci. Fire, etc., Ins. Co. v. Shields*, 9 Ala. App. 214, 62 So. 400.

Amended Pleas.—Where the judgment entry not only recited the sustaining of demurrers to certain pleas, but the overruling of demurrers to the same pleas amended, and the record failed to show in what way the pleas were amended, no question as to the propriety of the sustaining of the first demurrers was presented for review. *Central, etc., R. Co. v. Campbell*, 10 Ala. App. 288, 64 So. 540.

§ 681. — Amendments.

See ante, "Demurrers," § 680.

Upon record, held, that there was nothing to support appellant's assignments predicated on its objection to the

allowance of an amendment to the complaint and upon its motion to strike. *Louisville, etc., R. Co. v. Laney*, 14 Ala. App. 287, 69 So. 993.

§ 682. — Striking Out.

See ante, "Amendments," § 681.

Necessity of Motion and Ruling Thereon.—Where the bill of exceptions does not contain a motion to strike a plea and the ruling thereon, no question is presented for review on appeal. *Weller & Sons v. Rensford*, 185 Ala. 333, 64 So. 366.

Where judgment appealed from recited that defendant's motion to strike was overruled, but motion was not in record, court of appeals can not pass on ruling on motion. *Home Supply Co. v. Almon* (Ala. App.), 76 So. 473.

§ 683. Depositions and Affidavits.

Objection to deposition and motion to exclude answer of deponent, because not responsive to an interrogatory, could not be considered, where such interrogatory was not set out in bill of exceptions. *Bynum v. Terry* (Ala. App.), 77 So. 929.

§ 684. Questions on Interlocutory Proceedings.

Requiring Answers to Interrogatories.

—Where the record fails to show that defendant was required to answer certain interrogatories, the court on appeal need not determine whether such a requirement would have been proper. *Sovereign Camp, W. O. W. v. Ward* (Ala.), 78 So. 824.

Nonsuit by Plaintiff—Evidence Excluded.—Where the bill of exceptions on appeal stated that defendant objected to certain evidence, the rulings on which had been set out, that the objection was sustained, that plaintiff duly excepted, whereupon plaintiff took a nonsuit with bill of exceptions, the questions of evidence presented by the record were reviewable on appeal. *Priebe v. Southern R. Co.*, 189 Ala. 427, 66 So. 573.

§ 689. Admissibility of Evidence.

§ 690. — In General.

§ 690 (1) In General.

Objection Overruled to Question Not Answered.—Error in overruling an ob-

jection to a question can not be reviewed, where it is not shown to have been answered. *Plott v. Foster*, 7 Ala. App. 402, 62 So. 299.

§ 690 (2) Necessity of Showing That Evidence Was Introduced.

Necessity of Showing Question Answered.—Before a defendant can complain of the overruling of an objection to a question, it must be shown that the question was answered. *McConnell v. State*, 13 Ala. App. 79, 69 So. 333.

Where the record did not show that questions, to which objections were interposed were ever answered, no error can be predicated upon the overruling of such objection. *Gravett v. State*, 11 Ala. App. 211, 65 So. 850.

§ 690 (3) Necessity of Setting Forth Facts Establishing Objection.

Erasure in Mortgage—Fact of Erasure Not Shown.—A bill of exceptions which states that defendant objected to the introduction in evidence of a mortgage on the ground that there was an erasure in it, which was referred to in the objection, but which failed to show that there was in fact such an erasure or that the objection was founded in fact, was insufficient. *Hutto v. Garner*, 7 Ala. App. 412, 61 So. 477.

§ 690 (4) Necessity of Setting Forth Evidence in General.

Documents.—Error in admitting in evidence an instrument is not shown, where the bill of exceptions does not set forth the instrument or the substance thereof. *Baker v. Lauderdale*, 14 Ala. App. 224, 69 So. 299.

In ejectment, where plaintiff introduced mortgage and foreclosure deed, and the bill of exceptions failed to set them out, or state their stipulations and recitals, the court could not determine whether defendant's objections to their admission were well taken. *Baker v. Shoemaker* (Ala.), 78 So. 826.

Necessity of Showing Purpose and Use of Evidence.—Where it is not made to appear how the summons and complaint in a previous suit by plaintiff could be used to contradict her testimony as a witness, for which purpose alone it was offered, the exclusion can not be re-

viewed. *McLaughlin v. Beyer*, 181 Ala. 427, 61 So. 62.

§ 690 (5) Necessity of Setting Forth Evidence Bearing on That Admitted or Excluded.

Written Instrument — Parol Agreement.—In the absence of an instrument from the record, the court can not determine if the trial court erred in excluding evidence of an oral contemporaneous agreement. *Hedden v. Wefel*, 13 Ala. App. 485, 69 So. 225.

§ 690 (7) Necessity of Setting Forth Question Asked or Excluded.

Question Excluded. — In an action against a railroad for personal injuries, exclusion of question as to whether defendant immediately after the accident did not offer its surgeon, in view of the record, held not error. *Central, etc., R. Co. v. Stephenson*, 189 Ala. 553, 66 So. 495.

Answer Expected. — *Birmingham R., etc., Co. v. Simpson*, 177 Ala. 475, 59 So. 213. See the title APPEAL AND ERROR; § 690 (7), vol. 1, p. 451.

§ 692. — Necessity of Setting Forth Evidence Excluded.

See ante, "Necessity of Setting Forth Question Asked or Excluded," § 690 (7).

Expected Answer to Question.—The sustaining of objections to questions asked of a witness presents nothing for review on appeal, where the record does not disclose the evidence expected. *Owen v. Alabama, etc., R. Co.*, 181 Ala. 552, 61 So. 924.

Sustaining of an objection to a question asked a witness is not reviewable, where the record does not show what the answer would have been. *Lookout Fuel Co. v. Phillips*, 11 Ala. App. 657, 66 So. 946.

Where the trial court properly sustained objection to a question in the absence of showing in the record as to what facts material to the issue the party expected to elicit, such party's endeavors, in his brief on appeal, to inform the appellate court, are unavailing. *Steverson v. Agee & Co.*, 14 Ala. App. 448, 70 So. 298.

Where it did not appear but that the witness would have answered in the nega-

tive, then where the record did not show that after objection was sustained, the defendant stated to the court that he expected an affirmative answer, or as to what he proposed to show by the witness, any error in excluding a question must be held harmless under rule 45, Supreme Court Practice. *Robbins v. State*, 13 Ala. App. 167, 69 So. 297.

Deposition Excluded.—The exclusion of a deposition not included in bill of exceptions can not be reviewed. *Rosebrook v. Martin (Ala.)*, 76 So. 950.

Writing Excluded.—Where the bill of exceptions merely recites that a paper was offered in evidence by defendant, and was excluded, and an exception reserved, but the paper itself is not set out in the bill of exceptions, the ruling of the trial court thereon is not presented for review. *Farrior v. State*, 12 Ala. App. 123, 67 So. 633.

§ 693. Sufficiency of Evidence.

§ 694. — In General.

Right to Affirmative Charge.—A record does not show that a party was entitled to the general affirmative charge when it fails to show that the evidence in the case afforded no basis for an inference adverse to his claim. *Fowlkes v. Lewis*, 10 Ala. App. 543, 65 So. 724.

A directed verdict will not be reviewed where it was based partly on a view of the place of an accident, and a demonstration of plaintiff's position at the time of injury. *Warble v. Sulzberger Co.*, 185 Ala. 603, 64 So. 361.

§ 695. — Necessity of Setting Forth All the Evidence.

§ 695 (1) In General.

A bill of exceptions which undertakes to set out the evidence on which the trial court based its judgment must purport to set out all the evidence. *State v. Lovejoy*, 12 Ala. App. 630, 67 So. 738.

Distances Graphically Illustrated by Witness.—On appeal in action against a railroad for injuries received when its locomotive frightened plaintiff's mule, distances indicated by a witness, as "from here to the jury box" or "from here to the spittoon" should have been given more specifically in the bill of exceptions.

Louisville, etc., *R. Co. v. Jenkins*, 196 Ala. 136, 72 So. 68.

§ 695 (2) Dismissal, Nonsuit, Demurrer to Evidence or Direction of Verdict.

See post, "Omission of Exhibits, Maps or Documents," § 695 (3).

Direction of Verdict.—Where it is sought to review the action of the court in declining to exclude the evidence and direct a verdict for the defendant the bill of exceptions should contain all of the evidence. *Boice v. State*, 10 Ala. App. 100, 65 So. 83.

§ 695 (3) Omission of Exhibits, Maps or Documents.

Note and Indorsement.—Refusal of affirmative charge will not be reviewed, where the bill of exceptions does not purport to set out all the evidence, and does not include the note and indorsement upon which plaintiff recovered. *Choctaw Bank v. Gewin* (Ala. App.), 78 So. 96.

Maps.—Chancellor's conclusion on the facts held not reviewable, where maps by reference to which witness testified and which were made exhibits to their depositions, did not appear in the transcript. *Hale v. Tennessee Coal, etc., R. Co.*, 193 Ala. 507, 62 So. 783.

Photographic Views and Plans.—Where the bill of exceptions did not set out all the evidence, and photographic views and plans were not certified as provided by supreme court rule 24, assignments of error on refusal of affirmative charge can not be considered. *Montgomery v. Stephens*, 14 Ala. App. 274, 69 So. 970.

In a suit to enjoin the making of a road improvement whereby surface water would be diverted into a stream, which it was claimed would injure complainant's property, conceding that a diversion of surface water so as to cause it to overflow or injure complainant's land as a result of a road improvement would amount to a taking of such land as distinguished from resulting or consequential damages and that the value of the improvement could not be set off against the value of the property taken, still a judgment denying an injunction to restrain the improvement must be affirmed where the court found that complainant's property was neither taken

nor injured and maps and photographs before the trial court which may have been a material factor in forcing such conclusion were not brought before the supreme court. *Dancy v. Batliff* (Ala.), 77 So. 688.

Model Machine Used to Illustrate Testimony.—A bill of exceptions which recites that it sets out all the evidence, but which shows that a model was used by the witnesses in testifying in reference to the machine causing the injury to plaintiff complained of, and that the jury visited defendant's factory and saw the machine, discloses that the record on appeal does not contain all the evidence, and the court will not pass on its sufficiency to sustain the verdict. *Continental Gin Co. v. Milbrat*, 10 Ala. App. 351, 65 So. 424.

Immaterial Diagram.—Failure to include in bill of exceptions an immaterial diagram explained in the bill of exceptions held not to prevent the court on appeal from reviewing refusal to give an affirmative charge. *Woodward Iron Co. v. Wade*, 192 Ala. 651, 68 So. 1008.

§ 697. — Sufficiency of Recital or Certificate That All the Evidence Is Included.

§ 697 (5) Necessity and Sufficiency of Recital or Certificate That All Evidence Offered Is Included.

Sufficient Recital.—A bill of exceptions reciting "the foregoing being substantially all the evidence in the case" sufficiently recites that it contains all the evidence introduced. *Climer v. St. Clair County Tel. Co.* (Ala.), 77 So. 30.

Insufficient Recital.—A bill of exceptions merely showing that the parties offered certain witnesses who testified as shown, that at certain stages the parties, respectively, rested or reopened the cases, that after the testimony of a certain witness the testimony was closed, and that "at the conclusion of the testimony the court gave the following charges," does not show it contains all the evidence on which the trial was had. *Middlebrooks v. Sanders*, 180 Ala. 407, 61 So. 898.

Where the bill of exceptions, though it recited that it contained all of the evidence, showed that the fact was other-

wise, an assignment, complaining of the overruling of an affirmative charge, can not be considered. *Southern R. Co. v. Kendall & Co.*, 14 Ala. App. 242, 69 So. 328.

Where the bill of exceptions on its face shows that all the evidence is not set out therein, the fact that it concludes with the statement that all the evidence is set out therein, is not controlling. *Thornhill v. State*, 14 Ala. App. 647, 72 So. 297.

§ 697 (6) Omissions Apparent though Recital or Certificate Is Sufficient.

§ 698. Instructions.

Where the bill of exceptions, though it recited that it contained all of the evidence, showed that the fact was otherwise, an assignment complaining of the overruling of an affirmative charge can not be considered. *Southern R. Co. v. Kendall & Co.*, 14 Ala. App. 242, 69 So. 329.

§ 699. — In General.

§ 699 (1) In General.

Showing That Charges Were "Given."

—A bill of exceptions reciting that the court "gave the following written charges requested" is insufficient to show such charges were read to jury or that jury was present when charges were marked "Given." *East Pratt Coal Co. v. Jones* (Ala. App.), 75 So. 722.

Where none of the charges were in the record, it can not be held that the court's remarks that written charges given at defendant's request were to be considered with the oral charge, but not as contradicting them, limited defendant's charges. *Northern Alabama R. Co. v. White*, 14 Ala. App. 228, 69 So. 308.

§ 699 (2) Necessity of Setting Forth Instructions in General.

Oral Charge Not in Record.—Under Acts 1915, p. 815, the oral charge to the jury must be taken down by the reporter, and it was the duty of the clerk to incorporate it in the record, and unless appellant, seeking reversal, takes proper steps to get it before the court, it will not be considered. *Sudduth v. Central, etc., R. Co.* (Ala.), 77 So. 350.

No Showing of Charges Given or Refused.—Court's refusal to give a general

charge for defendant could not be reviewed, though the request was set out in the transcript, where the bill of exceptions showed no charges given or refused. *Norton v. Allaire Woodward & Co.*, 185 Ala. 344, 64 So. 609.

Where the instructions refused to defendant are not shown in the bill of exceptions the action of the court in refusing them is not reviewable on appeal. *Brown v. State*, 11 Ala. App. 321, 66 So. 829.

Where neither general charge nor refused charges requested by defendant are set out in record as required by Acts 1915, p. 815, rulings on refusal to give written charges at defendant's request, and exceptions to portion of oral charge, can not be reviewed. *Pearson v. Hancock & Son* (Ala. App.), 77 So. 934.

Identification of Part of Charge Excepted to.—Where the bill of exceptions states that before the jury retired defendant excepted to that portion of the court's oral charge in quotations and underscored, and there appeared in such bill nothing purporting to be a quotation from the charge which was underscored, the exception was not sufficiently identified to be availing. *Woods v. State*, 10 Ala. App. 96, 64 So. 508.

Charges in Bill of Exceptions Not Shown by Record Proper.—Under the act of September 25th (Acts 1915, p. 815), amending Code 1907, § 5364, to as to provide that charges moved for by either party must be in writing, and must be given and refused in the terms in which they are written, and that it is the duty of the judge to write "Given" or "Refused," as the case may be, on the document and sign his name thereto, which becomes a part of the record, assignments of error complaining of the giving or refusal of written charges appearing in the bill of exceptions, but not in the record proper, can not be considered; the amendment having changed the old rule, and being intended to incorporate all requested charges in the record proper. *Mobile Light, etc., Co. v. Thomas* (Ala. App.), 77 So. 463.

Statute Requiring Charges to Be Shown by Record Proper.—Assignments of error predicated on the giving or refusing of written charges can not be re-

viewed under Gen. Acts 1915, p. 815, where the charges do not appear in the record proper. *Alabama, etc., R. Co. v. Lawrence* (Ala. App.), 77 So. 432.

Charge not incorporated in record as required by Acts 1915, p. 815, is not reviewable. *Lang v. Leith* (Ala. App.), 77 So. 445.

Same—Cases Tried before Statute Approved.—Code 1907, § 5364, as amended by Acts 1915, p. 815, requiring charges to be set out in the record proper, does not apply to a case tried before the passage and approval of the amendment. *Knight v. Harris, etc., Co.* (Ala. App.), 77 So. 440.

Acts 1915, p. 815, requiring the charge of the court and the given and refused charges to be set out in the record, does not apply to an appeal filed after such enactment, where it was tried before such date in the court below. *Kinney v. Ehrensperger* (Ala. App.), 77 So. 439.

§ 699 (4) Requests for Instructions.

No Showing of Written Requests or Rulings.—Where there is no statement in the bill of exceptions proper showing that the charges were requested in writing or that they were either given or refused by the court, they can not be reviewed. *Anderson v. Anniston Elect., etc., Co.*, 11 Ala. App. 560, 66 So. 925.

§ 701. — Necessity of Setting Forth Evidence.

§ 701 (1) In General.

Set Out in Extensio.—*Watters v. Brown*, 177 Ala. 78, 58 So. 291. See the title APPEAL AND ERROR, § 701 (1), vol. 1, p. 458.

Giving of Affirmative Charge.—On bill of exceptions, on plaintiff's appeal in ejectment, not containing all the evidence, the supreme court can not review the trial court's affirmative charge that the land in suit was part of a homestead, but must presume that it was proper. *Perkinson v. Gibson*, 194 Ala. 648, 70 So. 117.

§ 701 (2) To Review Instructions Refused.

In General.—*Brannon v. Birmingham*, 177 Ala. 419, 59 So. 63. See the title APPEAL AND ERROR, § 701 (2), vol. 1, p. 458.

Charge on Particular Issue or Phase of Evidence.—*Handley v. Shaffer*, 177 Ala. 636, 59 So. 286. See the title APPEAL AND ERROR, § 701 (2), vol. 1, p. 458.

Refusal of Requested Charge.—The refusal of a requested charge can not be reviewed, where the bill of exceptions fails to show that it states all, or substantially all, the evidence. *General Acci. Fire, etc., Ins. Co. v. Shields*, 9 Ala. App. 214, 62 So. 400.

The trial court can not be put in error for refusing a request to charge hypothesizing the existence of a fact of which there is no evidence in the bill of exceptions. *Louisville, etc., R. Co. v. Shepherd*, 7 Ala. App. 496, 61 So. 14.

Refusal of Affirmative Charge.—Where the bill of exceptions does not purport to set out all the evidence, the appellate courts will not review the refusal to give the affirmative charge. *Storey v. State*, 14 Ala. App. 127, 72 So. 267.

Where the bill of exceptions failed to disclose that the evidence set out was all the evidence, error could not be predicated upon a refusal of the affirmative charge. *Crow v. McKown*, 192 Ala. 480, 68 So. 341, L. R. A. 1915E, 372.

Where a map introduced in evidence did not appear in the transcript, held that the appellate court could not review the refusal of affirmative charges for defendant. *Alabama Terminal R. Co. v. Benns*, 189 Ala. 590, 66 So. 589.

Exception to General Rule.—Refusal of requested instruction stating a correct proposition of law held reviewable, although bill of exceptions did not set out entire evidence or all its tendencies where the evidence showed without conflict facts to which such instruction was properly applicable. *Johnston Bros. Co. v. Washburn* (Ala. App.), 77 So. 461.

§ 701 (3) Necessity and Sufficiency of Recital That All the Evidence Is Included.

See ante, "In General," § 701 (1); "To Review Instructions Refused," § 701 (2).

§ 702. — Necessity of Setting Forth Entire Charge.

Where only a portion of the charge is set out in the bill of exceptions, the appellate court can consider such portion without reference to the rest of the

charge. *Wise v. Fuller*, 11 Ala. App. 427, 66 So. 827.

Oral Charge Not Set Out—Statute.—

Error can not be predicated on refusal of requested charge, where the oral charge is not set out as required by statute. *Climer v. St. Clair County Tel. Co.* (Ala.), 77 So. 30.

§ 706. Grounds for Arrest of Judgment, New Trial or Rehearing.

§ 706 (2) Necessity of Setting Forth Motion or Grounds Thereof.

Necessity of Bill of Exceptions.—

Kreamer v. Jackson Lumber Co., 179 Ala. 225, 60 So. 88. See the title APPEAL AND ERROR, § 706 (2), vol. 1, p. 460.

To review the court's action on a motion for new trial, the motion must be incorporated in the bill of exceptions. *Stokes v. Hinton*, 197 Ala. 230, 72 So. 503.

Motion and Recital of Overruling.—

Where the bill of exceptions sets out a motion for new trial followed by a recital that it was overruled and that defendant excepted, that is sufficient to authorize the appellate court to review the overruling of the motion for new trial. *Ewart Lumber Co. v. American Cement Plaster Co.*, 9 Ala. App. 152, 62 So. 560.

Grounds of Motion.—*Southern R. Co. v. Foster*, 7 Ala. App. 487, 60 So. 993. See the title APPEAL AND ERROR, § 706 (2), vol. 1, p. 460.

Newly-Discovered Evidence.—*Southern R. Co. v. Foster*, 7 Ala. App. 487, 60 So. 993. See the title APPEAL AND ERROR, § 706 (2), vol. 1, p. 461.

§ 706 (5) Necessity of Setting Forth All the Evidence.

Only Tendencies of Evidence Shown.

—Where the bill of exceptions only purports to set out the tendencies of the evidence, the refusal of a new trial and the refusal of special charges can not be reviewed. *Morrison v. Clark*, 14 Ala. App. 323, 70 So. 200.

§ 711. Questions in Intermediate Courts.

The dismissal of an appeal from the action of a city council as to street improvement assessments could not be reviewed where there was no bill of exceptions and the motion to dismiss was

not enrolled by order of the court. *Decatur Land Co. v. New Decatur*, 184 Ala. 56, 63 So. 1024.

(L) MATTERS NOT APPARENT OF RECORD.

§ 713. Matters Improperly Included.

§ 713 (1) In General.

Recital of Plea in Abatement.—Where the only indication of a plea in abatement was the recital that one was interposed and made before a prior trial, the alleged error for failure to dispose of defendant's plea in abatement before trial on the merits can not be considered on appeal; there being no such plea in the record, and no indication that the plea was insisted on. *De Wyre v. State*, 190 Ala. 1, 67 So. 577.

Instructions.—The instructions given are not reviewable when not presented by the bill of exceptions, though set out in the record proper. *Pantaze v. West*, 7 Ala. App. 599, 61 So. 42.

§ 713 (3) Including Matters in Bill of Exceptions Which Should Go into Record Proper.

Ruling on Motion for New Trial.—

Since under Code 1907, § 3238, the April term of the Limestone circuit court would not be regularly in session May 13, 1910, a bill of exceptions, reciting that a motion for a new trial was submitted on that day, was insufficient to show that such motion was lawfully heard and determined, in the absence of a record entry of an adjournment of the term in the minutes covering such date, as required by § 3249, and hence an order denying a new trial, made on May 13th, was not reviewable. *Ashford v. McKee*, 183 Ala. 620, 62 So. 879.

Instructions.—When charges given for appellee and refused to appellant appear only in the bill of exceptions and not in the record proper, as required by Gen. Acts 1915, p. 815, rulings thereon can not be considered. *Bynum v. Terry* (Ala. App.), 77 So. 929.

Affirmative Charge. —An assignment that court erred in giving general affirmative charge can not be considered, where charge is set out in bill of exceptions, but not in record proper, as required by Acts

1915, p. 815. *Southern R. Co. v. Propst* (Ala. App.), 76 So. 470.

Effect of Act of 1915.—Acts 1915, pp. 815, 816, making it unnecessary to set out the charges in the bill of exceptions or to state therein that an exception was reserved to the giving or refusing of charges requested, and providing that it shall be presumed that each charge was separately requested and a separate exception reserved, and that every general charge shall be in writing, merely renders it unnecessary to have the charge, the ruling and the exception appear in the bill of exceptions if they appear in the record proper, and does not prevent a review on appeal if such matters appear only in the bill of exceptions and not in the transcript as part of the record proper. *Ex parte Mobile Light, etc., Co.* (Ala.), 78 So. 399.

§ 714. Matters Appearing Otherwise than by Record.

§ 714 (5) Briefs.

Where a fact nowhere appears except in brief of counsel, it can not be considered by the supreme court on appeal. *Ex parte Adams*, 187 Ala. 10, 65 So. 514.

§ 714 (6) Official Certificates and Statements.

On appeal by trust company from an order appointing a receiver at instance of state superintendent of banks, a certificate showing that since submission of cause company has divested itself of all charter authority to carry on either a banking or a trust business could not be considered. *Montgomery Bank, etc., Co. v. State* (Ala.), 78 So. 825.

XI. ASSIGNMENT OF ERRORS.

§ 718. Purpose and Functions.

The office of an assignment of error, which is in the nature of a pleading by the appellant, is to inform the appellate court and the respondent of the precise errors relied upon. *Kinnon v. Louisville, etc., R. Co.*, 187 Ala. 480, 65 So. 397.

§ 719. Necessity.

§ 719 (1) In General.

No Review of Error Not Assigned.—*Wise v. Curl*, 177 Ala. 324, 58 So. 286.

See the title APPEAL AND ERROR, § 719 (1), vol. 1, p. 464.

Rulings not assigned as error can not be reviewed on appeal. *Ewton v. McCracken*, 9 Ala. App. 619, 64 So. 177. See also, *Hays v. Walker* (Ala. App.), 77 So. 930.

§ 719 (3) Jurisdictional Questions.

In the absence of assignments of error, no error can be considered except one of jurisdiction. *Hays v. Walker* (Ala. App.), 77 So. 930.

§ 719 (4) Pleadings and Rulings Thereon.

Failure of Complaint to Show Several Defendants Sued.—The defendant, who alone appeals from a judgment against several defendants, can not rely upon the failure of the complaint to show that there was more than one defendant sued, where there was no assignment of error on that point. *Broun, Jr., Timber Co. v. Coleman*, 190 Ala. 315, 67 So. 243.

Demurrer to Complaint.—A ruling on a demurrer to a count in the complaint not assigned as error in the record will not be considered on appeal. *North Birmingham Trust, etc., Bank v. Adams*, 184 Ala. 564, 63 So. 1022.

Where overruling of demurrer is not assigned as error, defendant can not complain of defects that would subject complaint to demurrer, and all doubt and intendment must be resolved in favor of the complaint. *Morrison v. Clark*, 14 Ala. App. 323, 70 So. 200.

Demurrers to Pleas.—The rulings on demurrers to pleas can not be considered, where no error is assigned to such rulings. *Barney Coal Co. v. Davis*, 9 Ala. App. 235, 62 So. 985.

§ 719 (5) Rulings as to Evidence.

Excluding testimony not having been assigned as error, such testimony can not be considered in passing on the question whether the giving of the general affirmative charge was proper. *Reynolds v. Reynolds*, 10 Ala. App. 420, 65 So. 194, certiorari denied in *Ex parte Reynolds*, 187 Ala. 672, 65 So. 1034.

§ 719 (8) Verdict, Findings or Judgment.

Verdict in Detinue Not Assessing Damages.—Though the verdict in detinue

did not comply with the law in assessing damages, appellant, who did not assign that error, can not on appeal complain that the court received the verdict. *Nixon v. Smith*, 193 Ala. 443, 69 So. 117.

Judgment in Replevin Not Assessing Value.—The failure of the judgment in replevin to assess the alternate value of the property as required by statute, did not render it void, but was a mere irregularity for which the judgment would not be reversed where it was not assigned as error. *Starr Piano Co. v. Baker*, 8 Ala. App. 449, 62 So. 549.

Court's Judgment and Conclusion on Evidence.—Where there was no assignment of error predicated on the defendant's exception to the court's judgment and conclusion on the evidence, no question was presented as to the correctness of the finding on the evidence. *Bowdon Lime Works v. Moss*, 14 Ala. App. 433, 70 So. 292.

Where no assignment presents question whether court reached erroneous conclusion as to facts, such question can not be considered. *Spalding Mfg. Co. v. Larren* (Ala. App.), 77 So. 971.

§ 721. Joint or Separate Assignments.

§ 721 (1) Joint Assignments in General.

Must Be Prejudicial to All Parties Joining in Assignment.—A joint assignment of error can not be sustained, unless the alleged erroneous ruling involves injury to all those joining in the assignment. *Morton v. Clark*, 10 Ala. App. 439, 65 So. 408.

Joint assignments of error on a joint appeal are unavailing, unless the errors are injurious to all who join therein. *Hall v. First Bank*, 196 Ala. 627, 72 So. 171.

Where errors are jointly assigned by appellants, to be available to any, injury must be shown to all. *Sloss-Sheffield Steel, etc., Co. v. Taylor* (Ala. App.), 77 So. 79.

Matters Prejudicial Only to Some of Parties.—The general rule is that assignments of error made jointly by all the defendants as to matters prejudicial to some of them only will be disregarded. *Shortridge v. Southern Mineral Land Co.*, 186 Ala. 660, 65 So. 354.

Assignments of error jointly by all of the respondents as to errors prejudicial only to some of them are not available to reverse a cause, and will not be considered on appeal. *Mobile Temperance Hall Ass'n v. Holmes*, 195 Ala. 437, 70 So. 640.

Where a judgment was right as to some of the defendants, though improper as to another, it will not be disturbed on appeal upon a joint assignment complaining that the judgment was contrary to the charge. *Walker & Co. v. Norris*, 10 Ala. App. 515, 63 So. 935.

Rulings Affecting Codefendant.—Where the rulings complained of affected only one of the two defendants, joint assignments of error thereon can not be considered. *Alabama Penny Sav. Bank v. Holmes*, 184 Ala. 469, 63 So. 969.

Joinder by One Not Party to Judgment.—Where one of the defendants who nominally appealed was not a party to the judgment, his joinder in the other's assignments of error would be regarded as redundant and without prejudice to the consideration of the assignments on their merits. *Gilley v. Denman*, 185 Ala. 561, 64 So. 97.

Where there was no judgment for or against defendants other than A., although there was judgment against him and a joint appeal, the joint assignment of errors of all defendants will be considered as that of A. *Adams v. Bibby*, 194 Ala. 652, 69 So. 588.

Error Not Harmless to Complainant.—In suit by the assignee of a mortgage against the mortgagor, husband and wife, error in denying defendants reformation of the mortgage, as prayed in the cross bill, on the ground that laches precluded the relief, a defense to the cross bill not pleaded, was not harmless to the feme mortgagor, where, if the reformation had been accorded, 120 acres of land in which the feme mortgagor had an undivided half interest would have been exempt from an order of sale for division at the instance of complainant, who would not then have been a tenant in common with the feme mortgagor in the tract. *Wilson v. Henderson* (Ala.), 75 So. 935.

§ 721 (2) To Ruling on Demurrer or Motion.

Demurrer for Misjoinder. — Where there was no severance in the assignments of error, error, if any, in overruling a corporation's separate demurrer for its misjoinder as a defendant in a stockholder's proceeding for examination of its books, in no wise affecting its managing officer, the other respondent, was not reversible error. *Home Guano Co. v. State*, 193 Ala. 548, 69 So. 419.

Where one count of the complaint, in an action against two defendants, was fatally defective for misjoinder, the judgment for plaintiff could not be sustained on the ground that, while the assignment of errors was joint, the error effected only one defendant; defendants being entitled to complain jointly or separately of the count and to have the judgment treated as an entirety. *National Baking, etc., Co. v. Wilson (Ala.)*, 73 So. 436.

Demurrer to Pleas. — To sustain joint assignment of error that court erred in sustaining demurrers to six pleas filed by defendant, it must appear that all pleas were good. *Southern R. Co. v. Slaton (Ala. App.)*, 76 So. 478.

A joint assignment of error based on the sustaining of the motions of plaintiff to strike portions of the several pleas filed by a defendant can not be sustained, where a codefendant did not except to the rulings, and was not injured by them. *Morton v. Clark*, 10 Ala. App. 439, 65 So. 408.

§ 722. Form and Requisites in General.

Typewritten assignments of error held sufficient, under Supreme Court rule 1 (20 South. iv), in view of Code 1907, § 1, providing that writing includes printing. *Carter v. Tennessee Coal, etc., R. Co.*, 180 Ala. 367, 61 So. 65.

Signature of Counsel. — Under rule 1, rules of practice in the supreme court (2 Code 1907, p. 1506), assignments of error need not be signed by counsel. *Amerson v. Corona Coal, etc., Co.*, 194 Ala. 175, 69 So. 601.

On Paper Pasted to Transcript. — Assignments of error, made on a separate paper and pasted in the transcript, are

not in compliance with the rule of court. *Gates Lumber Co. v. Givens*, 181 Ala. 670, 61 So. 330.

A separate piece of letter paper, containing the business card of appellant's counsel embossed thereon, attached to a page of the transcript by pasting the left-hand edge thereof to such page, is not sufficient as an assignment of errors. *Moon v. Butler & Co.*, 9 Ala. App. 438, 62 So. 1019.

§ 723. Specification of Errors.**§ 724. — In General.**

No question is presented for review on appeal from a decree, where appellant fails to state concisely in what the error complained of consists, as required by rule 1 (Code 1907, p. 1506), or to write the assignment upon the transcript, unless the error goes to the whole decree. *Carney v. Kiser Co. (Ala.)*, 76 So. 853.

§ 725. — Rulings as to Evidence.

Overruling Demurrers. — An assignment of error that "the court erred in overruling defendant's demurrers to each count of the complaint" is too general to require a separate review of the demurrers to each count, unless all counts are bad, and, one count being good, the demurrers will be held properly overruled. *Roach v. Wright*, 195 Ala. 333, 70 So. 271.

Where some of several pleas were not subject to any grounds of demurrer assigned, the assignment of error that the trial court erred in overruling demurrers to all such several pleas must fail. *Brown v. Shorter*, 195 Ala. 692, 71 So. 103.

§ 726. — Rulings as to Evidence.

Admission of Testimony. — An assignment of error complaining that the court erred in overruling defendant's objection to the testimony of insured, as to a conversation he had with its agent, is too general for consideration. *Farmers' Mut. Ins. Ass'n v. Tankersley*, 13 Ala. App. 524, 69 So. 410.

§ 727. Submission of Issues or Questions to Jury.

Court's Refusal to Submit Case under the Evidence. — An assignment of error that the court erred in refusing to sub-

mit the case to the jury under the evidence is not sufficient to warrant consideration under rule 1 of supreme court practice (Code 1907, p. 1506), for the assignment lacked precision, and numerous errors might have prevented the case going to the jury. *Kinnon v. Louisville, etc., R. Co.*, 187 Ala. 480, 65 So. 397.

Where the transcript showed that the court on defendant's motion excluded all of plaintiff's evidence, and upon its motion instructed the jury to find for defendant, an assignment of error, complaining generally of the failure of the court to submit the case to the jury, can not be considered. *Kinnon v. Louisville, etc., R. Co.*, 187 Ala. 480, 65 So. 397.

§ 730. — Instructions.

Objectionable Part of Oral Charge Not Identified.—An assignment of error to part of the court's oral charge was unavailing, where it went also to unobjectionable matter of the charge. *Bryan v. Stewart*, 194 Ala. 353, 70 So. 123.

An assignment of error "in that portion of the charge set out at the bottom of page 33 numbered B" held not sufficiently definite to be considered where the oral charge was contained on page 33 and several subsequent pages, and there was a "B" written on the margin of the record on page 33, but it could not be determined where the part of the charge so designated ends. *Empire Coal Co. v. Gravlee*, 9 Ala. App. 657, 64 So. 207.

Refused Charges Not Specified.—An assignment of error, stating that "the court erred in refusing to give each and every one of the written charges requested by plaintiff," not specifying any particular one of the twelve refused, is not sufficiently definite to warrant consideration of refused charges. *Sudduth v. Central, etc., R. Co. (Ala.)*, 77 So. 350.

§ 731. — Verdict, Findings or Decision.

Decree Overruling Exceptions to Referee's Report.—An assignment of error in overruling objections and exceptions to a referee's report on reference and confirming such report is insufficient if any of the exceptions to the report were properly overruled. *Heard v. Heard*, 181 Ala. 230, 61 So. 343.

§ 733. — Judgment.

In an action at law, assignments that the court erred in rendering judgment for defendant and that such judgment was contrary to law and the evidence, presented nothing for review. *Baldwin Alabama Truck Farms Co. v. Strode*, 184 Ala. 213, 63 So. 521.

§ 735. Including Errors in One Assignment.

§ 736. — In General.

Assignment Must Be Valid against All Rulings.—*Hull v. Wimberley, etc., Hdw. Co.*, 178 Ala. 538, 59 So. 568. See the title APPEAL AND ERROR, § 736, vol. 1, p. 471.

A joint assignment of error as to several distinct rulings is bad if the trial court's ruling as to any one of such matters was correct. *Smith v. Roney*, 182 Ala. 540, 62 So. 753.

Where several matters are made the subject of a single assignment of error, the assignment can not be sustained, if any one of the matters relied on was properly determined. *McCaskey Register Co. v. Nix Drug Co.*, 7 Ala. App. 309, 61 So. 484.

Where several rulings are involved in one assignment of error, all the matters therein complained of must constitute error, or the assignment can not be sustained. *Morton v. Clark*, 10 Ala. App. 439, 65 So. 408.

§ 737. — Rulings on Pleadings.

Demurrer to Pleas.—Where a demurrer to a plea which was good as to some of the counts of the petition was overruled, the ruling can not be reversed on appeal. *Hull v. Wimberley, etc., Hdw. Co.*, 178 Ala. 538, 59 So. 568.

Where a plea was made applicable to each of two counts, an assignment that the court erred in overruling demurrers to such plea would be overruled, if the plea was not demurrable as to either one of the counts. *Jones v. Adler*, 183 Ala. 435, 62 So. 777.

Where a plea was interposed to each of two counts, an assignment that the court erred in refusing to charge that defendants had not proved such plea would be overruled, if the plea had been estab-

lished as against either count. *Jones v. Adler*, 183 Ala. 435, 62 So. 777.

Where error to the overruling of several pleas is included in one assignment, the assignment is bad if any one of the pleas is defective. *Louisville, etc., R. Co. v. Turney*, 183 Ala. 398, 62 So. 885.

One assignment of error to the overruling of four pleas will not be sustained, where the record shows that one of the pleas was not overruled by the trial court. *Barney Coal Co. v. Davis*, 9 Ala. App. 235, 62 So. 985.

Demurrer to Replications.—Where a general demurrer to several replications, some of which were only the general issue, was sustained generally, a general assignment of error could not be sustained on appeal. *Varnon v. Nabors*, 189 Ala. 464, 66 So. 593.

Appellant could take nothing under an assignment of error in sustaining demurrers to replications "1, 2, 3 and 4, respectively," if any one of such replications was subject to demurrer. *Middleton v. Western Union Tel. Co.*, 197 Ala. 243, 72 So. 548.

§ 738. — Rulings as to Evidence.

Either of Two Questions Properly Excluded.—An assignment of error complaining of the exclusion of two questions must fail if either question was properly excluded. *King Land Co. v. Bowen*, 7 Ala. App. 462, 61 So. 22.

Where assignment covered sustaining of objections to two questions to a witness, one of which was previously answered, the assignment can not avail as to the other. *Hamilton v. Cranford Mercantile Co. (Ala.)*, 78 So. 401.

Objection to Several Interrogatories.—A single assignment of error directed against the overruling of separate and several objections interposed by defendants to each of several direct interrogatories propounded by plaintiff can not be sustained, where several of the interrogatories are unobjectionable. *Morton v. Clark*, 10 Ala. App. 439, 65 So. 408.

Objection to Two Statements as to Proof by Absent Witness.—A single assignment of error to the overruling of objections made to the admission of two statements concerning what it was ex-

pected to prove by an absent witness could not be sustained, where one of the statements was not subject to the objection made to it. *General Acci. Fire, etc., Ins. Co. v. Shields*, 9 Ala. App. 214, 62 So. 400.

§ 739. — Instructions.

Refusal of Several Charges.—An assignment of error in refusing to give defendant's requested charges "numbered 1, 2, 3," etc., was joint and too general to evoke a separate ruling on each of such charges. *Bessemer v. Whaley*, 10 Ala. App. 569, 65 So. 691, judgment reversed in *Ex parte Whaley*, 188 Ala. 381, 66 So. 145.

Where the points relied on to show error in the refusal of certain charges were not stated in form of propositions, as required by Civ. Code, p. 1508, rule 10, and the court was not advised as to the ground on which plaintiff contended it was entitled to have the charges given, the assignments of error would not be reviewed. *General Acci. Fire, etc., Ins. Co. v. Shields*, 9 Ala. App. 214, 62 So. 400.

§ 740. — Verdict, Findings or Decision.

Order Appointing Receiver—Objection to Entire Decree.—Though an order appointing a receiver of mortgaged land and the rents thereof was improper, assignments of error impeaching the order in whole, and not in part, could not be sustained. *Bowdoin v. People's Bank (Ala.)*, 76 So. 866.

§ 742. Propositions and Statements Accompanying Assignment of Errors.

Instructions.—A proposition of appellant's brief is without merit which is based on an assignment of error predicated on an exception to a part of the court's oral charge which is itself but a part of the court's instructions on that phase of the case. *Greenwood Café v. Walsh (Ala.)*, 74 So. 82.

§ 743. References to Record.

The charges should be numbered or otherwise designated so that the transcript shows the particular charges referred to by the assignment of error. *Pacific Mut. Life Ins. Co. v. Shields*, 182 Ala. 106, 62 So. 71.

The court will only consider those refused, charges identified by the assignment of error, by numbers, or otherwise. *Tennessee Coal, etc., R. Co. v. Wright*, 192 Ala. 422, 68 So. 339.

Erroneous Reference to Record.—

Where the only reference to the record in the assignments of error for an alleged ruling is an incorrect one, there is a failure to comply with practice rule 10 (61 So. vii), and the assignment will not be considered. *Wilson v. Lewis*, 11 Ala. App. 261, 65 So. 919.

Where the ruling on which error was predicated could not be found at the page reference in the assignment, no question for determination was presented. *Crews v. Parker*, 192 Ala. 383, 68 So. 287.

§ 747. Assignment of Cross Errors.

Necessity in General.—*Hall v. Santangelo*, 178 Ala. 447, 60 So. 168. See the title APPEAL AND ERROR, § 747 (2), vol. 1, p. 474.

Demurrer Sustained in Part.—Where a demurrer was sustained only as to specific parts of the bill and overruled as to the balance, and there were no cross-assignments of error, the ruling could not be reviewed only to the extent to which the demurrer was sustained. *Pollak v. Stouts Mountain Coal, etc., Co.*, 184 Ala. 331, 63 So. 531.

§ 748. Defects, Objections and Amendment.

Submission on Merits as Waiver of Defects.—Where, notwithstanding the failure of appellant's counsel to sign the assignment of error, the case was submitted without objection, the court of appeals could disregard the irregularity and treat it as waived. *Ex parte Shoaf*, 186 Ala. 394, 64 So. 615, denying certiorari *Hagin v. Shoaf*, 9 Ala. App. 300, 63 So. 764.

Objection to assignments of error because not signed by counsel came too late after submission of case on the merits. *Hagin v. Shoaf*, 9 Ala. App. 300, 63 So. 764, certiorari denied in *Ex parte Shoaf*, 186 Ala. 394, 64 So. 615.

§ 750. Scope and Effect of Assignment.

Assignment to Admission of Evidence of Witness.—The general assignments of error that the court erred in admitting

the evidence of a witness, there being no objection made to his testimony as a whole, and no motion being made in the court below to exclude it, did not bring up for review objections to one or two questions interposed on the examination of the witness. *Hatfield v. Riley (Ala.)*, 74 So. 380.

Where the overruling of a motion for new trial was generally assigned as error, the grounds of the motion must be treated as the specific assignments of error. *Ewart Lumber Co. v. American Cement Plaster Co.*, 9 Ala. App. 152, 62 So. 560.

§ 753. Effect of Failure to Make or File.

Affirmance of Judgment.—Under Civ. Code 1907, p. 1506, rule 1, the judgment will be affirmed where the record contains no assignments of error. *Hudgins v. Pickens County*, 9 Ala. App. 228, 62 So. 995.

Where no errors are assigned on the record, the decree appealed from will be affirmed. *Malantey v. Ladura Consol. Mines Co.*, 191 Ala. 655, 65 So. 666.

Where a transcript on appeal from judgment for \$68.80 contains no assignment of error, judgment will be affirmed on motion. *American Health, etc., Ins. Co. v. McMatthews*, 14 Ala. App. 668, 70 So. 956.

§ 754. Effect of Failure to Assign Particular Errors.

Whether plaintiff should have recovered on evidence of an indebtedness on the part of any one of the defendants held not reviewable in the absence of assignments of error as to the findings. *Bowdon Lime Works v. Moss*, 14 Ala. App. 433, 70 So. 292.

XII. BRIEFS.

§ 758. Specification of Errors.

§ 758 (1) Necessity in General.

Brief, not pointing out specific error or citing authorities, held insufficient to require a review of the alleged errors. *Western Union Tel. Co. v. Emerson*, 14 Ala. App. 247, 69 So. 335.

Under Supreme Court Rules 10 and 12 (175 Ala. xviii, 61 So. vii), regulating contents of appellant's brief, etc., the

court of appeals will not review errors not pointed out in appellant's brief in conformity with such rules where appellee insists that other errors are waived. *East Pratt Coal Co. v. Jones* (Ala. App.), 75 So. 722.

§ 758 (3) Requisites and Sufficiency.

Mere Statement that Charge Should Have Been Given.—Statement in appellant's brief that a requested charge was proper and should have been given is not an insistence on grounds of error, and the assignment will be disregarded. *Republic Iron, etc., Co. v. Quinton*, 194 Ala. 126, 69 So. 604.

Failure to Separate Demurrer Rulings.—Where the brief of appellants in dealing with assignments of error to the sustaining of demurrers to pleas of appellants, who filed separate pleas presenting different matters, dealt with the rulings together, without any specification of the grounds of error, as required by Civ. Code 1907, p. 1508, rule 10, the assignments of error would not be considered. *Morton v. Clark*, 10 Ala. App. 439, 65 So. 408.

§ 760. References to Record or Assignment of Errors.

The charges should be numbered or otherwise designated so that the transcript shows the particular charges referred to in the brief. *Pacific Mut. Life Ins. Co. v. Shields*, 182 Ala. 106, 62 So. 71.

The court will only consider those refused charges identified by the brief by numbers or otherwise. *Tennessee Coal, etc., R. Co. v. Wright*, 192 Ala. 422, 68 So. 339.

Erroneous Reference to Record.—Where the only reference to the record in the brief for an alleged ruling is an incorrect one, there is a failure to comply with practice rule 10 (61 South. vii), and the ruling will not be considered. *Wilson v. Lewis*, 11 Ala. App. 261, 65 So. 919.

Court Will Not Search Record.—Where the brief of counsel for appellant does not direct the attention of the court to what is deemed error in rulings referred to, the appellate court will not search the record for errors not specified in the manner required by Civ. Code

1907, p. 1508, rule 10. *Morton v. Clark*, 10 Ala. App. 439, 65 So. 408.

§ 761. Points and Arguments.

Argument on Instructions—Consideration of Others Involving Same Legal Principle.—Where instructions, the refusal of which was assigned as error, were argued at length in appellant's brief under the assignment addressed thereto, which argument also related to two other charges involving practically the same legal principle, there was a sufficient insistence as to the two other charges to warrant the court in considering them. *Seeley v. Curts*, 180 Ala. 445, 61 So. 807.

§ 762. Reply Briefs.

Argument on Point Not Presented Originally.—Argument in the supplemental or reply brief, on a point not presented on submission of the cause in the original brief, is too late for consideration. *Nashville, etc., Railway v. Abramson-Boone Produce Co.* (Ala.), 74 So. 350.

§ 763. Additional or Supplemental Briefs.

Points Not Referred to in Original Brief.—Points made in appellant's supplemental brief, filed after submission of the cause for decision, they not having been referred to in the original brief, came too late. *Jebesles, etc., Confectionery Co. v. Booze*, 181 Ala. 456, 62 So. 12. See also, *Nashville, etc., Railway v. Abramson-Boone Produce Co.* (Ala.), 74 So. 350.

An argument in a supplemental brief as to the sufficiency of the complaint, not discussed in the original brief, could not be considered, as the additional brief must be in support of the assignments of error urged in the brief required to be filed as a prerequisite to the submission of the cause. *Supreme Lodge of World v. Kenny* (Ala.), 73 So. 519.

Points Waived by Original Brief.—Where the brief filed on submission for the appellant insisted upon only one of the errors assigned, the other errors are waived, and can not be taken advantage of by a supplemental brief. *Rosenau v. Powell*, 184 Ala. 396, 63 So. 1020.

The filing of an additional brief, insisting on errors, could not retract the waiver of such assigned errors made by

brief filed on the original submission not so representing them as to authorize their consideration. *Western Union Tel. Co. v. Emerson*, 14 Ala. App. 247, 69 So. 335.

XIII. DISMISSAL, WITHDRAWAL OR ABANDONMENT.

§ 779. Grounds for Dismissal.

§ 781. — Want of Actual Controversy.

Expiration of Year for Which Liquor License Sought.—Where an appeal was taken from a judgment in mandamus requiring excise commissioners to grant petitioner a liquor license for 1912, and the appeal was not reached until after the year had expired and the questions become moot, the appeal will be dismissed. *Agee v. Cate*, 180 Ala. 522, 61 So. 900.

Release of Judgment—Prosecution by Attorney Claiming Lien.—Where a plaintiff after judgment releases his damages without consent of his attorney who claims a lien for attorney's fees an appeal will not be dismissed as a moot case. *Empire Coal Co. v. Bowen*, 195 Ala. 348, 70 So. 283, cited in note in Ann. Cas. 1918B, 559, citing *Fuller v. Lavett Bleaching Co.*, 186 Ala. 117, 65 So. 61.

§ 782. — Want of Jurisdiction.

An appeal not conferring jurisdiction upon the court of appeals to review an order would be dismissed at appellant's cost. *Osborn v. Robertson Tire, etc., Co.* (Ala. App.), 73 So. 229.

No Question of Law Reserved.—Where the record shows no question of law reserved, either in the judgment entry or by bill of exceptions, the jurisdiction of the appellate court does not attach, and the appeal will be dismissed. *Chandler v. State*, 12 Ala. App. 287, 68 So. 536.

Lower Court without Jurisdiction.—As under Code 1907, §§ 5203, 5222, and § 5231, as amended by Laws 1909 (Sp. sess.), p. 124, chancery court of Jefferson county had no jurisdiction of bill for sale for division or partition of land entirely in Bibb county, an appeal from its decree will be dismissed. *Clark v. Smith*, 191 Ala. 166, 67 So. 1000.

§ 792. Dismissal by Court on Its Own Motion.

If there is no valid judgment from

which an appeal may be taken, the court will of its own motion dismiss it. *Temple v. Dooley*, 196 Ala. 360, 71 So. 683.

Judgment Sustaining Demurrer.—An appeal from a judgment sustaining a demurrer will be dismissed by the court *ex mero motu*; the matter being jurisdictional. *Wise v. Spears* (Ala.), 76 So. 869.

Appeal Not Taken within Statutory Period.—The supreme court will dismiss an appeal for want of jurisdiction of its own motion, where it is not taken within the time prescribed by statute. *McKenzie v. Jensen* (Ala.), 75 So. 939.

§ 794. Motion for Dismissal.

§ 797. — Time for Making.

After Submission on Merits.—Where a motion to dismiss an appeal is not made until after the submission of the case on its merits, the objection to the consideration of the appeal is waived. *Twin Tree Lumber Co. v. Day*, 181 Ala. 565, 61 So. 914.

XV. HEARING AND REHEARING.

§ 827. Setting Aside Submission.

Where parties appealing from an adverse judgment voluntarily submitted the case without calling the court's attention to their bankruptcy after the judgment, the supreme court will not set aside the submission. *Vandiver v. American Can Co.*, 190 Ala. 352, 67 So. 299.

§ 829. Rehearing.

§ 833. — Application.

Striking Improper or Disrespectful Brief.—*Birmingham, R., etc., Co. v. Saxon*, 179 Ala. 136, 59 So. 584. See the title APPEAL AND ERROR, § 833, vol. 1, p. 481.

Time for Application.—Application for rehearing filed after expiration of 15 days allowed can not be considered. *Birmingham Waterworks Co. v. Davis* (Ala. App.), 77 So. 927.

Motion to modify decree, made after the special term at which the decree appealed from was corrected and affirmed, and after expiration of period allowed by rule 38 (Civ. Code 1907, p. 1515) for application for rehearing, held too late. *Morrison v. Formby*, 191 Ala. 104, 67 So. 668.

Where an applicant for rehearing placed his application in the mail in time to have reached the clerk of the supreme court within the time for filing in the ordinary course of the mails, but it did not reach him within the time, it was not "filed," as required by supreme court practice rule 38 (Code 1907, pp. 1515, 1516), and could not be considered. *In re State*, 185 Ala. 347, 64 So. 310.

§ 835. — Scope and Conduct.

Matters Not Presented on Original Hearing.—Matters not presented in the original brief of appellant will not be considered on rehearing. *Thompson v. Strong* (Ala.), 74 So. 34.

Error not assigned on the first submission of the cause on appeal can not be subsequently urged. *Mobile Temperance Hall Ass'n v. Holmes*, 189 Ala. 271, 65 So. 1020.

XVI. REVIEW.

(A) SCOPE AND EXTENT IN GENERAL.

§ 837. Matters or Evidence Considered in Determining Question.

§ 837 (4) Pleadings and Rulings Thereon.

If, on appeal, there is uncertainty as to what was decided, resort may be had to the pleadings and the opinion of the court. *Alabama, etc., R. Co. v. Aliceville Lumber Co.* (Ala.), 74 So. 441.

Theory of Ambiguous Complaint—Proof and Charge Considered.—The proof and charge may be looked to to determine the theory of the trial held on an ambiguous complaint. *Birmingham Bottling Co. v. Morris*, 193 Ala. 627, 69 So. 85.

§ 837 (6) Review of Instructions.

In determining whether reversible error was committed in giving of instructions, oral and special charges may be considered. *Clinton Min. Co. v. Bradford* (Ala.), 76 So. 74.

§ 837 (8) Motion for New Trial.

Newly Discovered Evidence.—See post. "Consideration of Evidence Not Introduced or Offered," § 837 (10).

§ 837 (10) Consideration of Evidence Not Introduced or Offered.

Alleged newly discovered evidence set up as a ground for a new trial could not be considered on appeal in determining whether the trial court properly granted the affirmative charge. *Starr Piano Co. v. Baker*, 8 Ala. App. 449, 62 So. 549.

§ 837 (12) Consideration of Evidence Excluded.

Evidence Erroneously Excluded.—Under an assignment in a motion for new trial that the verdict was contrary to the evidence, the appellate court is confined to evidence actually before the jury and can not consider evidence which might have been before them but for the error of the lower court in excluding it. *Ewart Lumber Co. v. American Cement Plaster Co.*, 9 Ala. App. 152, 62 So. 560.

§ 838. Questions Considered.

§ 839. — Scope of Inquiry in General.

Creditors' Suit—Effect of Bill for Receiver in Federal Court.—Where pending creditors' suit against consolidated corporation in state court, federal court appointed receiver, on appeal from decision of state court thereafter appointing receiver, merits or defects of bill filed in federal court will not be decided. *Alabama, etc., Railway v. Tolman* (Ala.), 76 So. 381.

§ 843. — Matters Not Necessary to Decision on Review.

§ 843 (1) In General.

An appellate court should only consider and decide questions material to the disposition of the case. *Eborn v. Clark*, 184 Ala. 363, 63 So. 1018.

Where Cause Must Be Reversed on the Record.—*Bieker v. Cullman*, 178 Ala. 662, 59 So. 625. See the title APPEAL AND ERROR, § 843 (1), vol. 1, p. 484.

Where the affirmative charge was properly given, errors assigned by the defeated party will not be considered. *Landrum & Co. v. Wright*, 11 Ala. App. 406, 66 So. 892.

Plaintiff Not Entitled to Recover in Any Event.—Where plaintiff in ejectment claimed under devisees, but a deed to other parties was proved, it is unneces-

sary to decide alleged errors occurring during the trial, since the deed foreclosed plaintiff's right to recover. *Seamans v. Blankenship* (Ala.), 73 So. 469.

Questions Waived on Appeal.—Since the appellant may waive on appeal questions other than jurisdictional questions, and so invest the appellee with rights which he would not have without such waiver, the court's review will be confined to the single ground upon which insistence for error in overruling demurrer to the bill was made. *Broughton v. Broughton* (Ala.), 78 So. 87.

§ 843 (2) Review of Specific Questions in General.

Reversal on Other Grounds—Remarks of Counsel.—Where a reversal is required on other grounds, the court need not consider whether remarks of counsel were improper, since that question is not likely to arise on another trial. *Wilson v. State*, 195 Ala. 675, 71 So. 115.

Matters Stricken from Cross Bill.—Where court by sustaining demurrer required cross bill to be amended by striking so much as related to conveyances of certain tract, question of duress in procurement of such conveyances can not be considered on appeal. *Betts v. Ward*, 196 Ala. 248, 72 So. 110.

Directed Verdict Improperly Refused.—Where defendant's motion for directed verdict was improperly denied, as to one count of complaint, question whether evidence warranted verdict against defendant on other count need not be determined on appeal. *Bains v. Dank* (Ala.), 74 So. 341.

Part of Decree Not Objected to.—Where all parties to suit to remove settlement of estate from probate to chancery court were sui juris and before the court, and no objection was taken to the part of the decree granting relief under the cross bill, and no material error assigned or insisted upon as to the part ordering sale for distribution among the parties, the court will not determine the propriety of such part of the decree. *Watkins v. Chapman*, 195 Ala. 666, 71 So. 473.

Reversal of Judgment — Taxation of Costs.—Reversal of the main judgment

also annuls the judgment for costs, rendering moot the question whether they were properly taxed. *Tuscaloosa v. Hill*, 14 Ala. App. 541, 69 So. 486, certiorari denied in *Ex parte Hill*, 194 Ala. 559, 69 So. 598.

No Review Merely to Fix Liability for Costs.—The supreme court will not decide questions of importance after their decision has become useless, merely to ascertain which party is liable for costs. *Agee v. Cate*, 180 Ala. 522, 61 So. 900.

§ 843 (4) Review of Questions of Pleading.

Good and Bad Counts.—*Clayton v. Martin*, 7 Ala. App. 190, 60 So. 963. See the title APPEAL AND ERROR, § 843 (4), vol. 1, p. 484.

Demurrer to Stricken Count.—The striking out of a count of the complaint eliminates questions arising on rulings on a demurrer to that count. *North Birmingham Trust, etc., Bank v. Adams*, 184 Ala. 564, 63 So. 1022.

Evidence Rendering Review Unnecessary.—On appeal in an action for negligence, where the evidence failed to show negligence on the part of defendant, it was not necessary to consider technical objections to defendant's pleas. *Carlisle v. Central, etc., R. Co.*, 183 Ala. 195, 62 So. 759.

§ 844. Review Dependent on Mode of Trial in Lower Court.

§ 847. — Trial in Equitable Actions.

Review Confined to Issues Recited in Decree.—The court on appeal from a decree in chancery is bound by recital in decree as to issues below, and must treat other issues not specified in decree as waived. *Law, etc., Co. v. Mitchell* (Ala.), 76 So. 923.

§ 851. Theory and Grounds of Decision of Lower Court.

§ 852. — Scope and Theory of Case.

General Issue Pleaded—Trial as if Defense Specially Pleaded.—When it is manifest from the record that an action has been tried to its conclusion as if a defense required to be specially pleaded was an issue, though the record shows only the general issue pleaded, the appel-

late court will review the ruling of the trial court as to such defense as if specially pleaded, a rule not applicable, where it is sought to put the trial court in error, unless it affirmatively appears from the record that the trial court took cognizance of the defense and treated it as an issue. *Atlantic, etc., R. Co. v. Kelly* (Ala. App.), 77 So. 972.

§ 854. — Reasons for Decision.

§ 854 (2) Review of Correct Decisions Based on Erroneous Reasoning in General.

Denial of Motion to Quash Execution.

—The denial of motion to quash an execution having been proper, placing it on a wrong ground does not require reversal. *State v. Ham*, 13 Ala. App. 648, 69 So. 253.

§ 854 (3) Rulings on Pleadings.

Demurrer Overruled—Review Confined to Specified Grounds.—Where the court, overruling a demurrer to the complaint in a specified ground, did not decree as to other grounds, the court on appeal will only review the ruling on the ground specified. *Decatur v. Southern R. Co.*, 183 Ala. 531, 62 So. 855.

§ 854 (4) Rulings as to Evidence and Instructions.

Admission of evidence without good reasons held not reversible error, if otherwise admissible, unless thereby admitted for an improper purpose. *Briggs v. Birmingham R., etc., Co.*, 194 Ala. 273, 69 So. 926.

Sustaining Objection to Question.—

Where the court properly sustained an objection to the question, error can not be predicated on the fact that the ground urged was an improper ground. *Daniel v. State*, 14 Ala. App. 63, 71 So. 79.

§ 854 (6) Granting or Refusing New Trial.

Granting New Trial.—A judgment granting a new trial will be affirmed if justifiable on any of the grounds specified in the motion. *Harrison v. Birmingham Water Works Co.*, 9 Ala. App. 605, 64 So. 164.

Proper Denial—Assignment of Wrong Reason.—Where a motion for a rehear-

ing, denied by the chancellor for want of jurisdiction, should have been denied on the showing made for the rehearing, it was unimportant that the chancellor assigned a wrong reason for his ruling. *Dawsey v. Culbreth* (Ala.), 75 So. 459.

§ 856. — Grounds for Sustaining Decision Not Considered.

New Trial Properly Granted on Any Ground in Motion.—

It is enough that the order for a new trial, not disclosing on what ground it was granted, was authorized on any of the grounds assigned in the motion. *Peyton v. Lewis*, 10 Ala. App. 360, 64 So. 472.

Where several separate grounds for motion for new trial were included in one joint assignment of error, the assignment is properly overruled if the action of the lower court can be sustained as to any one of the grounds assigned. *Ewart Lumber Co. v. American Cement Plaster Co.*, 9 Ala. App. 152, 62 So. 560.

§ 862. Extent of Review Dependent on Nature of Decision Appealed from.

§ 863. — In General.

Appeal from Judgment or Order on Motion for New Trial—Statute.—

A party may appeal either from the judgment or, under Code 1907, § 2846, from the order disposing of the motion for new trial, and in the latter case only assignments of error predicated upon the overruling of a motion can be reviewed, while in the former case all proceedings leading up to the judgment and incidentally including the disposition of the motion may be heard. *Ewart Lumber Co. v. American Cement Plaster Co.*, 9 Ala. App. 152, 62 So. 560.

§ 865. — On Appeal from Judgment by Confession or Default or from Orders Relating Thereto.

Default Judgment at Regular Nonjury Term.—

Swope v. Sherman, 7 Ala. App. 210, 60 So. 474. See the title APPEAL AND ERROR, § 865, vol. 1, p. 489.

§ 868. — On Appeal from Decision on Motion for Dismissal or Nonsuit or Direction of Verdict.

Nonsuit.—After nonsuit, it was the plaintiff's right to have a review of the

rulings of the court on demurrers to the special pleas, although the general issue was also pleaded. *Paterson v. Bridges* (Ala. App.), 75 So. 260.

On appeal from an order granting a nonsuit because of plaintiff's contemptuous refusal to answer proper questions on cross-examination, the scope of review was limited to the question whether the nonsuit was properly entered, since Code, § 3017, only applies to nonsuits granted because of some adverse ruling. *Roy v. Louisville, etc., R. Co.*, 9 Ala. App. 377, 63 So. 772.

Where plaintiff takes, because of adverse rulings on evidence, a nonsuit with bill of exceptions under Code 1907, § 3017, the rulings on evidence are alone reviewable. *Hedden v. Wefel*, 13 Ala. App. 485, 69 So. 225.

On plaintiff's appeal from nonsuit in consequence of rulings adverse to plaintiff on demurrers to four pleas and to two replications to a plea, sufficiency of count of complaint is not brought under review, and no consideration can be given it, other than to construe it with a view to determine questions presented as to sufficiency of pleas and replications. *Martin v. Powell* (Ala.), 75 So. 358.

Under Code 1907, § 3017, providing that if, from any ruling or decision of the court on the trial of the cause, either upon pleadings, admission, or rejection of evidence, or upon charges to the jury, it may become necessary for the plaintiff to suffer a nonsuit, the facts, point, ruling, or decision may be reserved for the decision of the supreme court by bill of exceptions or by appeal on the record as in other cases, when a nonsuit is taken with bill of exceptions and appeal is perfected, there is presented for decision the ruling of the court that made is necessary for the plaintiff to suffer such involuntary nonsuit; i. e., such nonsuit with bill of exceptions does not present for review all the rulings theretofore made by the court on the pleadings or on the introduction of evidence, but only that ruling or rulings going to plaintiff's right to proceed in his effort for recovery, although where several adverse rulings taken together superinduced the nonsuit, and such fact or ne-

cessity is apparent by the record or bill of exceptions, such adverse rulings will be considered on appeal. *Schillinger v. Wickersham* (Ala.), 75 So. 11.

§ 867. — On Appeal from Decision on Motion for New Trial or after Grant of New Trial.

Errors during trial assigned in the motion for new trial as grounds will not avail unless it appears that the error was such as would have resulted in a reversal of the cause on appeal and direct assignment. *Ewart Lumber Co. v. American Cement Plaster Co.*, 9 Ala. App. 152, 62 So. 560.

Newly Discovered Evidence.—In reviewing denial of motion for new trial on ground that verdict is contrary to the evidence, alleged newly discovered evidence held not to be considered. *Stewart Veneer Co. v. Windham & Co.*, 12 Ala. App. 642, 68 So. 516.

Affidavits Presented with Motion.—On appeal from denial of new trial by the probate court, the circuit or supreme court can consider affidavits presented to the probate court on motion for new trial only for the purpose of determining whether a new trial should be granted, and not for their evidentiary weight. *Bell v. Bell*, 196 Ala. 465, 71 So. 465.

(B) INTERLOCUTORY, COLLATERAL, AND SUPPLEMENTARY PROCEEDINGS AND QUESTIONS.

§ 868. Power to Review in General.

Generally an appeal brings up for review only the order appealed from. *Anderson v. Anniston Elect., etc., Co.*, 11 Ala. App. 560, 66 So. 925.

§ 869. On Appeal from Final Judgment.

§ 870. — Interlocutory Proceedings Brought up in General.

§ 870 (2) Particular Orders or Rulings Reviewable in General.

Order Restoring Cause to Docket.—Where the court sets aside an order of dismissal for want of prosecution, and restores the cause to the docket for trial, the ruling may be reviewed on appeal from the final judgment. *Marx v. Bar-*

bour Plumbing, etc., Co., 10 Ala. App. 404, 64 So. 645.

§ 870 (5) Review of Rulings on Pleadings.

Ruling on Demurrer in General.—*Walshe v. Dwight Mfg. Co.*, 178 Ala. 310, 59 So. 630. See the title APPEAL AND ERROR, § 870 (5), vol. 1, p. 492.

Demurrers to Petition — Nonsuit by Plaintiff Denied Right to Amend.—Under Code 1907, § 3017, providing that plaintiff suffering nonsuit may take a bill of exceptions, where four demurrers to petition were overruled but the fifth was sustained which caused plaintiff to take a nonsuit, after the court declined to let him further amend, a review of the refusal is authorized. *Guiler v. United States Cast Iron Pipe, etc., Co.*, 197 Ala. 233, 72 So. 498.

Demurrer to Pleas—Nonsuit by Plaintiff.—Where plaintiff took a nonsuit on rulings adverse to him on demurrers to special pleas, the rulings will be reviewed on appeal. *McRight v. Farned*, 14 Ala. App. 445, 70 So. 297.

Plaintiff, taking a nonsuit, after demurrers to the pleas were overruled, and the demurrers to its replications were sustained, may, under Code 1907, § 3017, have the rulings on the demurrers to the pleas, as well as those on the demurrers to the replications, reviewed. *Berlin Mach. Works v. Ewart Lumber Co.*, 184 Ala. 272, 63 So. 567.

Same—No Nonsuit by Plaintiff.—Where plaintiff, when his demurrer to a special plea was overruled, took issue on that plea and did not take a nonsuit with bill of exceptions to bring the matter to the court of appeals, the ruling on the demurrer can not be considered on defendant's appeal from the judgment. *Western Union Tel. Co. v. Brazier*, 10 Ala. App. 308, 65 So. 95.

§ 870 (6) Order on Motion for New Trial.

Claim of Excessive Damages.—Where compensatory damages awarded passenger for wrongful ejection was claimed excessive in motion for new trial, the court's action overruling such motion is reviewable on appeal from the judgment. *Louisville, etc., R. Co. v. Boggs* (Ala.), 74 So. 337.

§ 871. — Interlocutory and Intermediate Judgments and Orders Included in Appeal.

Ruling on Demurrer.—See ante, "Review of Rulings on Pleadings," § 870 (5).

Setting Aside Order of Dismissal for Want of Prosecution.—See ante, "Particular Orders or Rulings Reviewable in General," § 870 (2).

§ 874. On Separate Appeal from Interlocutory Judgment or Order.

§ 874 (1) In General.

Review of Case by Piecemeal.—*Harris v. Johnson*, 176 Ala. 445, 58 So. 426. See the title APPEAL AND ERROR, § 874 (1), vol. 1, p. 494.

§ 874 (2) Appeal from Orders Relating to Injunctions.

Review Confined to Particular Order Granting Injunction.—On appeal from the action of the circuit judge in granting an injunction pendente lite after hearing as provided in Code 1907, §§ 4528, 4529, 4531, the review is confined to the particular order granting the injunction. *Lynne v. Ralph* (Ala.), 78 So. 889.

§ 874 (4) Appeal from Decisions Relating to Pleadings.

General Demurrer to Bill.—Where no demurrers were addressed to particular feature of bill, sufficiency of particular feature, further than a determination of its general equity, need not be considered on appeal from decree overruling demurrer to whole bill. *Macke v. Macke* (Ala.), 76 So. 26.

§ 874 (7) Appeal from Orders Relating to Reference.

Intermediate Judgment.—*Harris v. Johnson*, 176 Ala. 445, 58 So. 426. See the title APPEAL AND ERROR, § 874 (7), vol. 1, p. 495.

(C) PARTIES ENTITLED TO ALLEGE ERROR.

§ 877. Appellant or Plaintiff in Error.

§ 877 (1) In General.

Appellant Not Party to Suit.—An appeal from adverse rulings by one not a party to the suit will not be considered. *Gattis Turpentine Co. v. Russell* (Ala.), 74 So. 231.

Receiver.—See post, "Error Not Affecting Appellant or Plaintiff in Error," § 877 (2). See generally post, RECEIVERS.

Defendant Complaining of Excessive Proof by Plaintiff.—A defendant can not complain of plaintiff alleging and proving more than the law requires to entitle him to maintain the right of action which he asserts. *Jackson Lumber Co. v. Courcay*, 9 Ala. App. 488, 63 So. 749.

§ 877 (2) Error Not Affecting Appellant or Plaintiff in Error.

Complaint of Ruling on Demurrer to Correspondent.—Appellant may not assign error to the overruling of a demurrer interposed by appellant's correspondent, who did not appeal. *Larkin v. Haralson*, 189 Ala. 147, 66 So. 459.

Receiver Contesting Creditor's Claim.—A receiver can not ordinarily appeal from a decree allowing a claim of a creditor, he not being interested in the distribution. *Cobbs v. Vizard Inv. Co.*, 182 Ala. 372, 62 So. 730, cited in notes in L. R. A. 1915D, 809, 810. See post, RECEIVERS.

Receiver Ordered to Pay over Fund.—A receiver appointed to administer a trust fund for the benefit of creditors as directed by the court, has no personal interest in the matter, and can not be heard to complain on appeal as to when he is directed to pay the funds or assets so long as he is required only to distribute the funds in his hands, and on assignment of error by him alone the court will not undertake to decide as between the claimants to the fund. *State v. Cobbs*, 182 Ala. 331, 62 So. 729, cited in note in L. R. A. 1915D, 804.

§ 878. Appellee, Respondent, or Defendant in Error.

Absence of Separate Appeal.—Appellee can not prevent reversal for errors prejudicial to appellant by showing he was entitled to directed verdict because of insufficiency of proof by appellant; appellee not having appealed from refusal to direct verdict for him. *Barnett v. Freeman*, 197 Ala. 142, 72 So. 395.

Overruling of Demurrers to Pleas.—On defendant's appeal, the propriety of the overruling of demurrers to the pleas

will not be considered. *Burnwell Coal Co. v. Setzer*, 191 Ala. 398, 67 So. 604.

Motion to Exclude Answer to Question.—Since motion to exclude an answer merely because not responsive to the question can only be availed of by the questioner, the other party is not entitled to allege error therefor. *Borok v. Birmingham*, 191 Ala. 75, 67 So. 389.

§ 880. Error Affecting Only Coparty.

§ 880 (1) In General.

Coparties Not Appealing.—A mortgagee can not complain on appeal that the deed to his mortgagors should be reformed where the mortgagors, although coparties defendant with the mortgagee, did not appeal. *Russell v. Stockton (Ala.)*, 74 So. 225.

Discontinuance of Action or Default Judgment against Codefendants.—In an action on a complaint in Code form against the several makers of a note, the only defendant who defended can not complain that, as to other defendants who were not served, the action was discontinued, as authorized by Code 1907, § 2505, nor that, as to others against whom default judgment was rendered, the service was not proper. *Long v. Gwin*, 188 Ala. 196, 66 So. 88.

§ 880 (2) Pleading and Errors Occurring at Trial.

Misjoinder of Parties.—The objection that one of the parties was improperly joined can not be raised on an appeal by the other party alone. *Seaboard, etc., Railway v. Anniston Mfg. Co.*, 186 Ala. 264, 65 So. 187.

Demurrer Sustained to Plea of Codefendant.—A defendant is not injured by the sustaining of a demurrer to a plea of a codefendant in which defendant does not join. *Morton v. Clark*, 10 Ala. App. 439, 65 So. 408.

§ 881. Estoppel to Allege Error.

§ 882. — Error Committed or Invited by Party Complaining.

§ 882 (5) Pleading in General.

Confession of Demurrer.—In a suit on notes, where plaintiff confessed demurrer, and amended by permission in conformity with the demurrer, which was

sustained, he can not obtain by his nonsuit a review of the ruling of the trial court on the demurrer, or at least a review of the ruling as to the two grounds of demurrer confessed. *Schillinger v. Wickersham* (Ala.), 75 So. 11.

§ 882 (6) Issues, Proof and Variance.

Failure to Prove Material Fact Assumed in Requested Instruction.—In proceeding to enforce attorney's lien, where there was error in the trial, judgment for defendant will not be affirmed on the ground that plaintiff failed to prove averment of material fact, which was assumed in instruction requested by defendant. *Denson v. Alabama Fuel, etc., Co.* (Ala.), 73 So. 525.

Charge Conceding Claim of Damages.—Defendant's request to charge that, if there was a finding for plaintiff, he could not be awarded more than nominal damages for decreased earning capacity, was a concession that complainant claimed damages for "decreased earning capacity." *Birmingham R., etc., Co. v. Colbert*, 190 Ala. 229, 67 So. 513.

§ 882 (7) Rulings on Evidence and Mode of Proof in General.

Objection to Offer of Proof Sustained—Effect as Waiver.—In an action for the conversion of mortgaged crops, where the trial court admitted the mortgage without proof of execution, expressly reserved the right to rule on the question later, and, at the close of evidence, defendant again called attention to the error by motion to exclude the mortgage on the ground its execution had not been proved, whereupon plaintiff offered to call a witness to make the proof, but defendant objected, and the court sustained the objection, the court's action in sustaining the objection, doubtless based on the assumption that defendant waived proof of the execution of the mortgage, thus consenting that the trial proceed without the proof, was invited error, of which defendant can not receive the benefit on his appeal. *Pearson v. Hancock & Son* (Ala. App.), 77 So. 934.

§ 882 (8) Admission of Evidence in General.

No Motion to Exclude.—Plaintiff may

not allege error in the admission of evidence which was brought out on its own examination of a witness, and which it did not move to exclude. *McCaskey Register Co. v. Nix Drug Co.*, 7 Ala. App. 309, 61 So. 484.

Evidence in Rebuttal.—It is not erroneous to receive irrelevant evidence to rebut evidence of like kind offered by the opposite party. *Windham v. Hydrick*, 197 Ala. 125, 72 So. 403.

Appellant can not complain of the admission of illegal evidence in rebuttal of illegal evidence introduced by himself. *Lockridge v. Brown*, 184 Ala. 106, 63 So. 524.

Same—Declarations as to Title.—Where defendant had given in evidence declarations made by plaintiffs' predecessor after parting with the title, he can not put the court in error for admitting similar declarations by his predecessor in rebuttal. *Gibson v. Gaines* (Ala.), 73 So. 929.

Same—Location of Road in Boundary Case.—Where in a boundary line dispute, plaintiff introduced evidence as to the existence of a settlement road, he could not object to defendant's evidence as to the location of such road. *Ward v. Lane*, 189 Ala. 340, 66 So. 499.

Same—Proof of Lease in Action for Wrongful Injunction.—In action for damages for wrongful injunction against operating a plant on certain land, where plaintiff introduced evidence as to the terms of a lease when executed and its unchanged condition at the time of the trial, he can not complain that defendant was permitted to introduce evidence to show that the lease had been fraudulently altered, even though such question had been concluded adversely to defendant in the injunction suit. *Yarbrough Turpentine Co. v. Taylor* (Ala.), 78 So. 812.

Introducing Rebuttal Evidence to Evidence Stricken out.—Where, in response to a motion to that effect, evidence was excluded, and the jury directed not to consider such evidence, but the defendant afterwards introduces evidence to rebut such excluded evidence, he can not then complain of the improper evidence

formerly introduced. *Brand v. State*, 13 Ala. App. 390, 69 So. 379.

Objection that Record Was Best Evidence—Introduction of Record.—Where the contestant of a will in chancery had objected to testimony that the will had been duly probated on the ground that the record of the probate was the best evidence, he can not complain that the court declined to exclude the record. *Cummings v. McDonnell*, 189 Ala. 96, 66 So. 717.

§ 882 (10) Exclusion of Evidence.

Objection to Question—Extent of Exclusion.—In suit to redeem land from a mortgage foreclosure sale, where a defendant testified as to the terms of the trade between her father and complainants' ancestor, and complainants objected to the question, and moved to exclude all the words of the answer, "except in so far as they show a balance was due on this same property and unpaid," on the ground that the testimony was the opinion of the witness, complainants could not complain that the chancellor excluded the entire testimony of the witness, since testimony can not be excluded on one party's motion with a saving clause preserving for the moment some supposedly beneficial effect; if complainants deserved to leave in evidence any particular part of the testimony, a motion should have been framed to point out to the chancellor exactly what words were sought to be excluded. *O'Neal v. Lovett*, 197 Ala. 628, 73 So. 329.

§ 882 (12) Instructions in General.

Instruction to Find for Adverse Party if Evidence Believed.—Plaintiff can not complain of the consequences of an instruction recited by the record to have been given at his request, that the jury, if they believe the evidence, must find for defendant. *White Trunk, etc., Co. v. Brantley* (Ala. App.), 75 So. 182.

Instruction According to Appellant's Contentions.—Appellant can not complain of an instruction in accordance with its contentions. *Empire Coal Co. v. Bowen*, 195 Ala. 348, 70 So. 283.

Where contestants claimed that a legacy was obtained by undue influence, held that contestants could not complain that

court charged as a matter of law that a confidential relation existed between testatrix and legatee. *O'Neill v. Johnson*, 197 Ala. 502, 73 So. 21.

Requesting Antagonistic Charges.—A party can not successfully assert error in a refusal of a request to charge which is opposed to a charge already given at his instance. *Corona Coal, etc., Co. v. Ferrier*, 187 Ala. 530, 65 So. 780.

Where antagonistic charges are given in civil case at request of one party, such party can not be heard on appeal to complain that either charge was erroneous. *Talley v. Whitlock* (Ala.), 73 So. 976.

Request for Charge and Complaint of Lack of Evidence.—Defendant, inducing court to give a charge, may not on appeal object to the want of evidence to support it. *Clinton Min. Co. v. Bradford*, 192 Ala. 576, 69 So. 4.

Giving Requested Charges before Request for Affirmative Charge.—Giving of charges applicable to issues presented by count of complaint held not erroneous, when requested and given before affirmative charge as to such count was requested. *Birmingham R., etc., Co. v. Donaldson*, 14 Ala. App. 160, 68 So. 596.

Objection to Adverse Party's Withdrawal of Charges after Given to Jury.—Where defendant objected to the withdrawal of plaintiff's written charges after they had been read to the jury, and such objection was sustained, defendant on appeal could not assign error in such charges, since to allow such assignments would be allowing him to take advantage of his own wrong. *Vinegar Bend Lumber Co. v. Soule Steam Feed Works*, 182 Ala. 146, 62 So. 279.

§ 883. — Assent to Proceeding.

Where a proposed amendment to pleading read, "Your complainant, with leave of court first had and obtained, amends his bill," etc., and there is nothing in the record to refute it, the complainant can not claim on appeal that there was no allowance of his amendment under Gen. Acts 1915, pp. 705, 706. *Sloss-Sheffield Steel, etc., Co. v. Yancey* (Ala.), 77 So. 726.

§ 884. Recognition of Validity of Proceeding.

Requesting Instructions. — *Louisville,*

etc., *R. Co. v. Bogue*, 177 Ala. 349, 58 So. 392. See the title APPEAL AND ERROR, § 884, vol. 1, p. 501.

(D) AMENDMENTS, ADDITIONAL PROOFS, AND TRIAL OF CAUSE ANEW.

§ 885. Amendment of Proceedings of Lower Court.

§ 888. — As to Pleadings.

Conforming Detinue Judgment to Description in Declaration.—A judgment in detinue which describes the property as different from that described in the declaration and verdict may be corrected by the appellate court. *Chappell v. Falkner*, 11 Ala. App. 382, 66 So. 890.

§ 889. Amendments Regarded as Made.

Supplying Independent Allegations Necessary to Equity of Bill.—While a bill, in determining its equity, must be viewed as if all amendable defects had been remedied the assumed amendment thereof can not supply allegations of independent facts or matter essential to be averred to give it equity. *Slaughter v. Grand Lodge*, 192 Ala. 301, 68 So. 367.

(E) PRESUMPTIONS.

§ 900. Nature and Extent in General.

Presumptions in Favor of Rulings.—All presumptions will be indulged in favor of the ruling of the trial court. *Stanton v. State*, 8 Ala. App. 221, 62 So. 387.

On appeal, all fair and legitimate presumptions will be indulged to support the ruling of the trial court. *Farrior v. State*, 12 Ala. App. 123, 67 So. 633.

All the presumptions are that the trial court committed no error. *Capital Security Co. v. Owen*, 196 Ala. 385, 72 So. 8.

Error will not be presumed on appeal. *Louisville, etc., R. Co. v. Bouchard*, 190 Ala. 157, 67 So. 265.

Presumption in Favor of Judgment.—*Prattville, etc., Co. v. McKinney*, 178 Ala. 554, 59 So. 498. See the title APPEAL AND ERROR, § 900, vol. 1, p. 503.

"It is the established rule to indulge all presumptions favorable to the correctness of the judgment or order of the lower court in order to sustain, and not to reverse it." *Hanby v. Phillips But-*

torff Mfg. Co., 12 Ala. App. 543, 68 So. 477.

Foreclosure Proceedings According to Law.—The court of appeals must presume that the chancellor in foreclosure suit proceeded in accordance with law. *Cox v. Brown (Ala.)*, 73 So. 964.

Doubtful Recitals Construed against Exceptor.—Doubtful recitals in the record must be construed most strongly against the exceptor. *Birmingham R., etc., Co. v. Gonzalez*, 183 Ala. 273, 61 So. 80.

The court of appeals will indulge necessary presumptions in favor of the trial court's rulings, and the bill of exceptions will be construed most strongly against appellant. *Hedden v. Wefel*, 13 Ala. App. 485, 69 So. 225.

§ 901. Burden of Showing Error.

In General.—*Watters v. Brown*, 177 Ala. 78, 58 So. 291. See the title APPEAL AND ERROR, § 901, vol. 1, p. 503.

"Error must be made to affirmatively appear, as appellate courts can not presume error." *Hanby v. Phillips-Buttorff Mfg. Co.*, 12 Ala. App. 543, 68 So. 477.

The duty rests upon appellants to clearly point out error, and all reasonable presumptions are indulged in favor of trial court. *Mudd v. Gray (Ala.)*, 75 So. 468.

Under Rule 45, supreme court practice, the appellant must affirmatively show that the error complained of probably affected his substantial rights, as every intendment will be indulged in favor of the rulings of the trial court. *Chandler v. State*, 12 Ala. App. 287, 68 So. 536.

Rejection of Evidence.—The party appealing must affirmatively show error as the rejection of evidence complained of in order to bring about a reversal. *Randall v. State*, 14 Ala. App. 122, 72 So. 214.

Suppression of Deposition.—Burden of showing error with respect to suppression of deposition held not sustained, if not appearing that it was not suppressed for lack of notice of the taking. *Barfield v. South Highland Infirmary*, 191 Ala. 553, 68 So. 30.

§ 902. Matters Shown by Record.**§ 903. — In General.**

Instructions Given.—The court on appeal will presume that the record shows instructions as originally given. *Harold v. State*, 12 Ala. App. 74, 67 So. 761.

§ 904. — Recitals.

Where the transcript of the justice's judgment recited the filing of an answer by the garnishee, a letter written by the garnishee's agent must be presumed to have been the answer referred to, where it was the only document appearing in the record that could be called an answer by the garnishee. *Hutson v. Illinois Cent. R. Co.*, 186 Ala. 436, 65 So. 62.

§ 906. Facts or Evidence Not Shown by Record.**§ 907. — In General.****§ 907 (1) In General.**

Protection of Interest of Cotenants.—Where the chancery court had jurisdiction of the foreclosure of a mortgage against a part of several cotenants, and nothing to the contrary appears, it will be presumed on appeal that the interests of all the tenants were properly protected. *Jordan v. Walker (Ala.)*, 77 So. 838.

§ 907 (2) Failure to Set Forth Evidence in General.

Where a bill of exceptions fails affirmatively to show that it contains all the evidence, any state of evidence will be presumed to uphold the ruling of the trial court. *Atlantic, etc., R. Co. v. Jones*, 9 Ala. App. 499, 63 So. 693.

Presumption as to Right of Action.

Where the bill of exceptions to the action of the trial court in denying motion to open a judgment by default did not contain all, or substantially all, the evidence before the court at the hearing of the motion, or even its tendencies, while the recitals showed that the grounds for the motion, as set out in the bill, were called to the attention of the court, together with the fact that the motion was sworn to, the denial of vacation of the judgment was proper, since error must be made to appear affirmatively, as appellate courts can not presume it; the

presumption in the instant case being that there was evidence before the court justifying its conclusion in denying the motion. *Hanby v. Phillips-Buttorff Mfg. Co.*, 12 Ala. App. 543, 68 So. 477.

Omitted Evidence Presumed Properly Admitted.—Where neither a letter admitted in evidence nor its contents are set out in the transcript, the court, on appeal, will presume that its introduction was proper, although it was objected to by defendant. *Bufford v. State*, 14 Ala. App. 69, 71 So. 614.

Where the bill of exceptions fails to set out the record in a certain trial which was introduced in evidence in the instant case, the court will indulge in presumptions necessary to support the action of the court in overruling objections to the introduction of such evidence. *Perolio v. Woodward Iron Co.*, 197 Ala. 197, 73 So. 197.

Complaint and Warrant of Arrest.

Where it does not appear from the bill of exceptions what the complaint and warrant were, on which defendant was arrested, it can not be held that the introduction in evidence of the complaint and warrant merely for the purpose of showing the authority of the officers to make the arrest was prejudicial error. *Richardson v. State*, 177 Ala. 8, 58 So. 908.

Contents of Omitted Letter Presumed to Support Court's Conclusion.

Where the contents of letter referred to in record on appeal do not appear, it will be assumed that they tend to support trial court's conclusion. *O'Rear v. American Trust, etc., Bank*, 195 Ala. 277, 71 So. 105.

§ 907 (3) Failure to Make Bill of Exceptions, Case, or Statement of Facts.**Defenses Admitted under General Issue.**

In the absence of a bill of exceptions showing the contrary, held that it would be presumed that defendant had the benefit under the general issue of all defensive matter available thereunder. *Strain v. Irwin*, 195 Ala. 414, 70 So. 734.

Conclusion of Fact Sustained by Evidence.

In the absence of bill of exceptions, court of appeals must assume that conclusion of fact on which alone judgment can be supported was clearly sus-

tained by evidence. *Howze v. Powers* (Ala. App.), 77 So. 985.

Vacation of Judgment Properly Denied.—In the absence of a bill of exceptions, the trial court, in passing on a motion to set aside and vacate a judgment, must be presumed to have had evidence before it to justify the denial of the motion. *Hall v. First Bank*, 196 Ala. 627, 72 So. 171.

§ 907 (4) Failure to Set Forth All the Evidence.

Judgment Presumed Supported by Evidence.—Where an action is tried to the court and the bill of exceptions does not purport to set out all the evidence, it will be presumed that there was sufficient legal evidence to justify the findings and judgment. *Smith v. Allen*, 9 Ala. App. 371, 63 So. 770.

Where depositions which appear to have been related to the subjects on which the cause was submitted are omitted from the record, it will be presumed that the decree was sustained by proof. *MacPherson v. Hood*, 191 Ala. 146, 67 So. 994.

Presumption of Existence of Other Evidence Supporting Ruling.—Where a bill of exceptions did not set out all the evidence, it will be presumed that there was other evidence in the case sufficient to justify the court's action. *Jones v. White*, 189 Ala. 622, 66 So. 605.

Where the bill of exceptions recites that it does not contain all the evidence, it will be presumed that the omitted evidence supported the trial court's findings. *Reid v. McElderry*, 188 Ala. 150, 66 So. 7.

Where the bill of exceptions recited that the evidence therein set out was substantially all of the evidence, and all that the evidence tended to show, except certain papers and account books offered in evidence, it would be presumed that the omitted evidence supported the trial court's finding. *Reid v. McElderry*, 10 Ala. App. 472, 65 So. 421.

When Rule Inapplicable.—The rule that the supreme court will presume all facts necessary to support the ruling below where the bill of exceptions does not set out all the evidence is inapplicable where the bill states that its recited facts were

established without contradiction. *Kelley v. Shropshire* (Ala.), 75 So. 291.

§ 907 (5) Contents of Documents Omitted from Record.

See ante, "Failure to Set Forth Evidence in General," § 907 (2).

Presumption against Contention of Exceptor.—It will be presumed that the contents of documents which were not properly made a part of the bill did not support the contention of the exceptor. *Padgett v. Gulfport Fertilizer Co.*, 11 Ala. App. 366, 66 So. 866.

Contents of Depositions Justifying Decree.—Where it appears in note of submission that complainants submitted cause upon depositions of certain witnesses, which depositions record does not contain, and decree recites that submission was upon testimony as noted, it will be presumed on appeal that evidence justified decree rendered. *Cooper v. Cooper* (Ala.), 78 So. 381.

§ 908. — Exhibit or Proof of Instrument Sued on.

Mortgage Offered in Detinue.—If the mortgage offered in evidence in detinue does not sustain the claim, appellant should incorporate such mortgage in his bill of exceptions, or the court will presume that the trial court ruled correctly. *Consolidated Mercantile Co. v. Warren* (Ala. App.), 74 So. 738.

§ 909. — Particular Facts Necessary to Sustain Decision.

Formality and Sufficiency of Dedication of Land.—Where the defense of dedication of the locus in quo for a highway was sustained in trespass *quare clausum* and the bill of exceptions did not show the form of the dedication nor when nor to whom it was made, it would be presumed that it was a formal and absolute dedication made by the owner of the land prior to the trespass. *Smith v. Southern Iron, etc., Co.*, 183 Ala. 482, 62 So. 766.

Acknowledgment of Deed before One Signer — Initials.—It will be presumed that B. M. F., the justice who took the acknowledgment of some of the signers of a deed, was the B. M. F. who was one of the signers; the bill of exceptions,

purporting to set out all the evidence, not showing there were two persons of that name in the county. *Swindall v. Ford*, 184 Ala. 137, 63 So. 651.

Tax Sale—Auditor's Compliance with Statute.—Where the agreed statements of facts did not deny that the auditor, in selling land bid in by the state for taxes, secured the Governor's approval of the sale, it being private, and that the price was fixed by the auditor and treasurer as required by the statute, and the chancellor's opinion showed that the deed recited the necessary facts, it will be presumed on appeal that the auditor complied with the statute in such respects. *Gamble v. Andrews*, 187 Ala. 302, 65 So. 525.

§ 912. Venue.

Presumption in Favor of Venue.—*Singleton v. Jackson*, 177 Ala. 123, 59 So. 45. See the title APPEAL AND ERROR, § 912, vol. 1, p. 510.

§ 913. Parties.

Partnership or Corporate Character of Defendant's Name.—Where the name of defendant is appropriate for either a partnership or a corporation, and the record is silent as to the character of defendant, no presumption either way arises. *Hitt Lumber Co. v. Turner*, 187 Ala. 56, 65 So. 807.

§ 914. Process and Appearance.

Where Record Shows Notice to Guardian ad Litem.—*Jackson v. Putman*, 180 Ala. 39, 60 So. 61. See the title APPEAL AND ERROR, § 914 (1), vol. 1, p. 511.

§ 915. Pleading.

§ 916. — In General.

§ 916 (1) In General.

Issue Joined.—Where a plea of set-off was filed on the day on which a new count was added to the complaint by way of amendment, and the judgment entry recites that on the following day issue was joined, it will be assumed that the issue so joined was on the amended complaint, and the several pleas and the record sufficiently shows that the pleas were interposed to the new count. *Howton v. Mathias*, 197 Ala. 457, 73 So. 92.

§ 916 (2) Existence and Nature of Pleadings.

Proper Plea Filed or Waived.—To avoid imputation of error to court, where it appears that evidence tending to sustain defense appropriate to action, not admissible under general issue, was admitted without objection, presumption will be indulged that proper plea was filed or waived. *Atlantic, etc., R. Co. v. Kelly* (Ala. App.), 77 So. 972.

§ 916 (3) Sufficiency of Pleading.

Cure of Amendable Defects.—A bill without equity will not support an injunction, and, when attacked on appeal from the order granting it, there is no presumption that amendable defects have been cured. *Hamilton v. Alabama Power Co.*, 195 Ala. 438, 70 So. 737.

Issues Made by Bill.—On appeal in action for penalty for failure to enter satisfaction of mortgage, under Code 1907, § 4898, where foreclosure suit had been commenced within two months of the notice, and the bill therein is not set out in the record on appeal, the court must assume in favor of the trial court's affirmative charge for defendant that the issues thereby tendered embraced payment or satisfaction of the mortgage. *Murphree v. Farmers' Sav. Bank* (Ala. App.), 77 So. 934.

§ 917. — Demurrers.

§ 917 (1) In General.

Sufficiency of Demurrer.—*Watts v. Atlanta, etc., R. Co.*, 179 Ala. 436, 60 So. 861. See the title APPEAL AND ERROR, § 917, vol. 1, p. 516.

§ 917 (2) Ruling on Demurrer and Withdrawal or Waiver Thereof.

Where Ruling Not Shown.—Where record does not show ruling on demurrer to amended plea, and trial was had as if plea remained in, it will be presumed that the plea remained in or defendant had benefit of it under general issue. *American Workmen v. James*, 14 Ala. App. 477, 70 So. 976.

Same—Waiver or Abandonment of Demurrer.—Where the record shows no judgment on defendant's demurrer to the complaint, the demurrer will be

treated as abandoned. *Harris Transfer, etc., Co. v. Moor*, 10 Ala. App. 469, 65 So. 416.

Where the record did not affirmatively show that the court had disposed of defendant's demurrer before entering a default judgment, it will be presumed that the demurrer was waived and no ruling was insisted upon. *Southern Indemnity Ass'n v. Ridgway*, 190 Ala. 334, 67 So. 446.

Demurrers to bill in equity, never submitted to chancellor or decreed upon, will be presumed abandoned on appeal. *Prince v. Prince*, 194 Ala. 455, 69 So. 906.

Where Demurrer Sustained.—Rulings sustaining a demurrer held to be sustained on appeal, if the pleading was subject to any ground of demurrer. *Western Union Tel. Co. v. Hughston*, 191 Ala. 424, 67 So. 670.

If demurrers were sustained, and are not shown in the record, it must be presumed that any tenable ground of objection was taken thereby. *Vogler v. Manson (Ala.)*, 76 So. 117.

On appeal from the sustaining of a demurrer to a complaint which made a bill of lading part thereof, where the bill does not appear in the record, the ruling must be affirmed on the presumption in favor of its correctness. *National Park Bank v. Louisville, etc., R. Co. (Ala.)*, 74 So. 69.

Where Demurrer Overruled.—Though defendant's plea was subject to demurrer on one ground, the overruling of demurrer will not be held error, where the record did not disclose the demurrer, for it will be presumed in support of the ruling of the court below that it was inapt. *Nicholson v. Killpatrick*, 188 Ala. 258, 66 So. 8.

§ 917 (3) Grounds or Scope of Demurrer or Ruling Thereon.

Where Record Does Not Show Grounds.—Where the record did not show the grounds on which a plea was demurred to, it would be presumed on appeal that the order overruling the demurrers was correct. *Parsons v. Age-Herald Pub. Co.*, 181 Ala. 439, 61 So. 345.

§ 918. — Amendments.

§ 918 (1) In General.

Where Amendments Not Shown by

Record.—Where the appellate record does not show what certain amendments to the pleadings were, the supreme court will indulge all presumptions in favor of the trial court's rulings on the pleadings. *Pacific Mut. Life Ins. Co. v. Shields*, 182 Ala. 106, 62 So. 71.

Where a complaint was amended after the overruling of demurrers, but the record on appeal failed to show how it was amended, it would be presumed that it was so amended as to obviate the objections. *General Acci. Fire, etc., Ins. Co. v. Shields*, 9 Ala. App. 214, 62 So. 400.

Where error is predicated on the overruling of demurrer to amended counts of the complaint, and the amendments do not appear in the record, the ruling is presumptively correct. *Carland & Co. v. Burke*, 197 Ala. 435, 73 So. 10.

Refusal to Amend.—*Dickerson v. Schwabacher*, 177 Ala. 371, 58 So. 986. See the title APPEAL AND ERROR, § 918 (1), vol. 1, p. 519.

Regularity in Giving Notice of Amendment.—Where the record in a chancery case recites that notice of an amendment was given, irregularity in the notice will not be presumed. *Smith v. Lambert*, 196 Ala. 269, 72 So. 118.

§ 918 (3) Amendment at Trial or to Conform to Proofs.

Imposition of Costs—Statute.—Under Code 1907, § 5367, authorizing trial amendments without cost unless in case of injustice to the opposite party, held that, where the bill of exceptions on appeal from allowance of a trial amendment requiring payment of the cost of term did not negative an injustice to the defendant, it would be presumed that conditions justified the imposition of such cost. *Hanchey v. Brunson*, 181 Ala. 453, 61 So. 258.

§. 920. Interlocutory Orders and Proceedings.

§ 920 (2) Dockets, Calendars, and Continuances.

Fixing Time for Final Hearing.—Supreme court must assume trial judge had good reason for bringing cause to final hearing, notwithstanding unreadiness of cross-complainants. *Carson v. Sleight (Ala.)*, 78 So. 229.

To sustain decree below on ground circuit court brought on cause for final hearing at proper time, supreme court may assume that judge made order fixing time for peremptory call of causes within which was included date when cause was brought on, nothing to contrary appearing. *Carson v. Sleigh* (Ala.), 78 So. 229.

§ 920 (4) Attachment or Garnishment.

Claim of Third Person — Notice.—Where plaintiff had an oral examination of the garnishee, not set out by bill of exceptions, the court could not presume that the trial court erred in rendering judgment for plaintiff without notice to a third person to come in and establish his claim. *Prudential Sav. Bank v. Looney*, 187 Ala. 19, 65 So. 770.

Proceeding under Valid Writ—Proof Supporting Judgment.—Where a judgment in garnishment recites the issuance of two writs without indicating that it was rendered on the first, it will be presumed that the court proceeded under the second writ if the first one was without effect, and that the oral answer and proof supported the judgment. *Prudential Sav. Bank v. Looney*, 187 Ala. 19, 65 So. 770.

§ 925. Conduct of Trial or Hearing, and Rulings in General.

Case Tried by Court without Jury.—Where case was tried without jury, every reasonable presumption will be indulged in favor of correctness of rulings of trial court. *Bryan v. Hunnicutt* (Ala. App.), 76 So. 471.

§ 926. Admissibility and Reception of Evidence.

§ 926 (1) In General.

Admission in evidence of note sued on, manner of its claimed alteration not being shown, will not call for reversal, since the court might have found objection was groundless. *Weinstein v. Citizens' Bank* (Ala.), 75 So. 397.

§ 926 (2) Documentary Evidence.

Insurance Policy Not Shown by Record.—Where the bill of exceptions complaining of the exclusion of an applica-

tion for an insurance policy offered in evidence by plaintiff does not set out the application, or its contents, the court on appeal in support of the ruling of the trial court will presume that the application did not tend to support the complaint. *Oliver v. Camp*, 9 Ala. App. 232, 62 So. 469.

Where the bill of exceptions complaining of the exclusion of a policy of insurance offered by plaintiff does not set out the policy nor show to whom it was issued, the court will presume that the exclusion was proper on the ground that the policy had no connection with any issue in the case. *Oliver v. Camp*, 9 Ala. App. 232, 62 So. 469.

§ 926 (3) Admissibility Dependent on Other Evidence.

Proper Predicate for Evidence Presumed.—If the absence of a showing that all the evidence is set out in the bill of exceptions, it will be presumed that a sufficient predicate was laid for the admission of testimony. *Thornhill v. State*, 14 Ala. App. 647, 72 So. 297.

Same—Impeaching Evidence.—Where the bill of exceptions recites only that it contained substantially all of the evidence, and the complaint is of the admission of impeaching evidence, and the question relied upon as a predicate for such impeaching evidence called for a conversation at the same time and place as a preceding question, showing that the witness was put upon notice of the time and place of the conversation, it is not made affirmatively to appear that the court erred in failing to require a proper predicate to be laid, and it will be presumed that the court did its duty; the bill of exceptions being construed most strongly against the party appealing. *Phillips v. State*, 11 Ala. App. 168, 65 So. 673.

Depositions and Exhibits of Former Trial Presumed Identified.—Where the bill of exceptions does not purport to contain all the testimony, the appellate court will presume that there was testimony identifying parts of the depositions and exhibits detached at a former trial of the same case sufficient to justify the admission of the parts in evidence. *Roll v. Howell*, 9 Ala. App. 179, 62 So. 463.

§ 926 (4) Exclusion of or Striking Out Evidence.

Exclusion of Evidence—Presumed Immaterial.—In an action involving the validity of a mortgage, the exclusion of a question asked the mortgagee, whether at the time the mortgage was made the mortgagor owed him anything, was not reversible error, where the contents of the mortgages were not disclosed by the bill of exceptions, since it might have been given for a new debt then created or to secure future advances, and it would be presumed that the consideration recited was such as to render the expected answer immaterial. *Brown v. Loeb*, 177 Ala. 106, 58 So. 330.

Motion to Strike—Presumption of No Objection to Question.—In the absence of any showing to the contrary in the bill of exceptions, it will be presumed on appeal that evidence, which appellant moved to strike out, was given in reply to a question to which no objection was made. *Ryerson Grain Co. v. Moyer*, 9 Ala. App. 254, 63 So. 13.

§ 926 (7) Competency and Examination of Witnesses.

Answer Responsive to Question.—Where the record states the testimony in narrative form, and does not affirmatively show that the testimony volunteered was in answer to a question not calculated to call it forth, this court will presume to support the trial court's ruling that the question called for the testimony. *Allen v. State*, 8 Ala. App. 228, 62 So. 971.

Where the bill of exceptions shows that an objection was made to the witness' answer but the question was not set out, it would be presumed that the answer was responsive, and that the objection was properly overruled. *McCasky Register Co. v. Nix Drug Co.*, 7 Ala. App. 309, 61 So. 484.

§ 927. Dismissal, Nonsuit, Demurrer to Evidence, or Direction of Verdict.**§ 927 (2) Dismissal or Nonsuit in General.**

Recovery for Less than Jurisdictional Amount—Reasons for Not Dismissing.—Where a judgment is not void, although the recovery is less than the jurisdic-

tional amount, it will, in the absence of a bill of exceptions, be assumed that the court had sufficient reason for not dismissing the case, under Code 1907, § 5355. *Black v. Ryan*, 194 Ala. 667, 69 So. 633.

§ 927 (6) Direction of Verdict in General.

Evidence to Sustain Refusal.—*Handley v. Shaffer*, 177 Ala. 636, 59 So. 286. See the title APPEAL AND ERROR, § 927 (6), vol. 1, p. 526.

Where it affirmatively appears that all the evidence is not set out in the record, it will be presumed that there was evidence authorizing a refusal of an affirmative charge. *Consolidated Mercantile Co. v. Warren* (Ala. App.), 74 So. 738.

Where all the evidence was not in the record, the court will presume that the evidence justified refusal of affirmative charge. *Southern R. Co. v. Herron*, 12 Ala. App. 415, 68 So. 551.

Sufficient Evidence to Go to Jury.—In an action for damages for delay in delivery of a car of coal, held that it would be presumed that there was sufficient evidence of negligence to go to the jury. *Central, etc., R. Co. v. Goodwater Mfg. Co.*, 14 Ala. App. 258, 69 So. 343.

§ 927 (7) Effect of Evidence and Inferences Therefrom on Direction of Verdict.

Evidence Regarded Favorably to Defeated Party.—In reviewing the propriety of a general charge for plaintiff, the court will consider only the phases of the evidence and its tendencies which are favorable to defendant. *Cannon v. Prude*, 181 Ala. 629, 62 So. 24.

In determining the propriety of a directed verdict, evidence offered by the defeated party must be accepted as true. *McGowin Lumber, etc., Co. v. McDonald Lumber Co.*, 186 Ala. 580, 64 So. 787.

§ 928. Instructions.**§ 928 (2) Proper Instructions Given and All Issues Submitted.**

All Issues Presumed Submitted.—Court's oral charge not being set out in the record, court of appeals must assume issues were properly and carefully placed before jury by appropriate oral

instruction. *Southern Exp. Co. v. Malone* (Ala. App.), 78 So. 408.

Charge Assuming Fact—Law Presumed Correctly Stated in Other Portions of Charge.—To save an oral charge from being erroneous as assuming as a matter of law a fact in controversy, held, that it would be presumed that in other portions of the charge the court laid down the law on all disputed questions. *Alexander v. Smith*, 180 Ala. 541, 61 So. 68.

Instructions on Particular Issues.—Where a bill of exceptions sent up under certiorari recited that it contained all the evidence, but it affirmatively appeared that certain mortgages offered in evidence had been omitted, it will be presumed that the court's rulings as to instructions in relation to such mortgages was correct. *Jones v. White*, 189 Ala. 622, 66 So. 605.

Where a personal representative in an action under the Employers' Liability Act for wrongful death made it appear that an employers' liability company would be responsible for any judgment against defendant to the extent of \$5,000, it will be presumed that the court instructed that the fact that a liability company had insured defendant should not influence their verdict. *Citizens' Light, etc., Co. v. Lee*, 182 Ala. 561, 62 So. 199.

§ 928 (3) Facts or Evidence Not in Record in General.

Charge Presumed Correct.—Where bill of exceptions shows on its face that it does not contain entire evidence or all court's charge, it will be presumed, upon appeal, that parts of charge excepted to were correct as applied to evidence. *Johnston Bros. Co. v. Washburn* (Ala. App.), 77 So. 461.

Requested Instructions Presumed Properly Given or Refused.—It will be presumed that giving and refusing of requested instructions was warranted by evidence omitted from bill of exceptions. *Johnston Bros. Co. v. Washburn* (Ala. App.), 77 So. 461.

Where the bill of exceptions does not purport to set out all of the evidence, every reasonable presumption will be indulged to support the court's action in

refusing charges. *Boice v. State*, 10 Ala. App. 100, 65 So. 83.

Evidence Justifying Instructions Invading Province of Jury.—The bill of exceptions, in an ejectment action, not purporting to set out all the evidence, it will be presumed there was evidence justifying instructions which, so far as the record shows, invade the province of the jury on certain issues. *Middlebrooks v. Sanders*, 180 Ala. 407, 61 So. 898.

§ 928 (4) Requests and Rulings Thereon.

Presumption of Refusal for Lack of Timely Request.—In the absence of a contrary showing in the bill of exceptions, it will be presumed that the charges refused were not requested until after the jury has retired to consider their verdict. *Staton v. State*, 8 Ala. App. 221, 62 So. 387.

Where it was not shown that charges were requested before the jury retired, it will be presumed in support of the action of the trial court that they were not, and were therefore properly refused. *Patterson v. State*, 8 Ala. App. 420, 62 So. 1023.

Where it nowhere appears from the bill of exceptions that the charges requested and refused were requested before the jury retired, it will be presumed on appeal that the requests were refused, if good, because not requested in time. *Morgan v. State*, 8 Ala. App. 172, 63 So. 21.

Where the bill of exceptions does not show that a request to charge was made before the jury had retired, it will be presumed, in favor of a ruling denying such request, that the charges were refused because not requested in time. *Empire Coal Co. v. Gravlee*, 9 Ala. App. 657, 64 So. 207.

Same—Recital Showing Timely Request.—A recital in a bill of exceptions, following a statement that the foregoing was all the evidence, of a written requested charge which was refused, sufficiently showed that it was presented before the jury retired and there was no presumption that it was not presented at the proper time. *Central, etc., R. Co. v. Courson*, 186 Ala. 155, 65 So. 179.

Under a ruling of the supreme court

that a bill of exceptions sufficiently recites that charges were requested before the jury retired, there is no presumption by the court of appeals that the requested charges were refused because not asked at the proper time. *Central, etc., R. Co. v. Courson*, 10 Ala. App. 581, 65 So. 698.

Evidence to Sustain.—*Handley v. Shaffer*, 177 Ala. 636, 59 So. 286. See the title APPEAL AND ERROR, § 928 (4), vol. 1, p. 528.

Where bill of exceptions does not purport to contain all the evidence upon which the case was tried, the appellate court will presume any reasonable state of evidence to justify trial court's action regarding charges requested. *Southern R. Co. v. Wyley* (Ala.), 75 So. 326.

§ 930. Verdict.

§ 930 (1) In General.

On appeal, all reasonable presumptions of the correctness of the verdict will be allowed. *Hall v. Gordon*, 189 Ala. 301, 66 So. 493.

Support in Evidence.—It will not be assumed that a verdict was rested on any act of which there was no evidence. *Borok v. Birmingham*, 191 Ala. 75, 67 So. 389.

Change of Rule—Act of 1915—When Applicable.—Acts 1915, p. 722, providing that no presumption shall be indulged in favor of judgment of trial court on appeal, applies only where evidence is all written and documentary, and where appellate court has same opportunity to weigh the evidence as the trial court, and does not affect presumption where evidence is ore tenus, or partly so. *Adams Hdw. Co. v. Wimbish* (Ala.), 78 So. 901.

§ 930 (2) Instructions Understood or Followed.

Corrections Heeded by Jury.—It can not be assumed that the jury failed to properly heed the corrections which the court undertook to make in the charge, on exceptions thereto being taken. *Birmingham R., etc., Co. v. Mayo*, 181 Ala. 325, 61 So. 289.

§ 930 (4) Issues Decided and Theory of Verdict.

General Verdict—Affirmative Charge

Refused as to One Count.—Where verdict is general, not stating the count of the complaint upon which it was found, error in refusing the affirmative charge as to a single count requires reversal. *Nashville, etc., Railway v. Farrell*, 14 Ala. App. 380, 70 So. 986.

General Verdict Referred to Counts Supported by Evidence.—A general verdict will be referred to the court or counts of the complaint supported by the evidence. *Pensacola, etc., Co. v. Brooks*, 14 Ala. App. 364, 70 So. 968.

§ 931. Findings of Court or Referee.

§ 931 (1) In General.

Findings Presumed True.—*Mower v. Shannon*, 178 Ala. 469, 59 So. 568. See the title APPEAL AND ERROR, § 931 (1), vol. 1, p. 529.

Presumption on appeal is in favor of correctness of ruling of trial court on issue of fact. *Price v. Price* (Ala.), 74 So. 381.

Ruling by Judge—Testimony before Commissioner.—Presumption in favor of ruling of lower court has no application where testimony is taken before commissioner appointed by court, and not in open court before judge who renders the decision. *State v. Mattox Cigar, etc., Co.* (Ala.), 77 So. 755.

Rule Not Changed by Acts 1915, p. 722.—The rule that the presumption on appeal is in favor of the correctness of the finding of the trial court on an issue of fact has not been changed by Acts 1915, p. 722, providing that no presumption in favor of the correctness of a judgment granting or refusing new trial shall be indulged by the appellate court. *Price v. Price* (Ala.), 74 So. 381.

Chancery Appeals — Statutes.—Under Code 1907, § 5955, subsec. 1, providing that in deciding appeals from the chancery court no weight shall be given the decision of the chancellor upon the facts, but the supreme court shall weigh the evidence and give judgment as they deem just, and § 6072, providing that any action or conclusion of the register in proceedings relating to express trusts for the security of debts may be reviewed by the chancellor without any presumption in favor of such action or conclusion, on appeal from a decree of

the chancellor finding that an assignee for the benefit of creditors was not guilty of fraud or gross negligence which deprived him of his right to compensation, which finding was contrary to the finding of the register, the facts are to be determined by the supreme court without any presumption as to the correctness of the findings of either the register or chancellor. *Horst v. Pake*, 195 Ala. 620, 71 So. 430.

Same—Acts 1915, p. 705.—In equity case where there was no testimony taken orally in open court, no presumptions are indulged as to findings of fact on which a decree is based, under Code 1907, § 5955, subd. 1; Acts 1915, p. 705. *Blair v. Jones* (Ala.), 78 So. 69.

The legislature intended by enactment of Gen. Acts 1915, p. 705, providing for the taking of oral testimony before chancellor, the same presumption by supreme court in favor of chancellor's findings as are accorded to those of a register under construction of Code 1907, § 5955, subd. 1. *Andrews v. Grey* (Ala.), 74 So. 62.

The rule as to weight given to chancellor's findings under Gen. Acts 1915, p. 705, where oral testimony is taken before him, has no application to a case submitted to judge of circuit court on testimony taken orally in open court before chancellor, in which decree is rendered by judge who did not hear such evidence. *Manchuria, etc., Co. v. Donald & Co.* (Ala.), 77 So. 12.

No Presumption under Local Statute — Ore Tenus Evidence.—Under Loc. Acts 1907 (Sp. Sess.) p. 33, the supreme court in appeals from Franklin circuit court will review the evidence without any presumption in favor of the findings, except where the evidence is ore tenus. *Shotts v. Scott*, 192 Ala. 173, 68 So. 325.

§ 931 (5) Evidence Considered in General.

Presumption that Register Considered All Evidence.—Unless a register's report affirmatively shows that he did not consider all the evidence, whether specifically noted or not, and does not negative the fact that other evidence included in an agreement as to the facts was not considered, it will be assumed

that he considered all the evidence. *O'Kelley v. Clark*, 184 Ala. 391, 63 So. 948.

§ 931 (6) Incompetent Evidence Disregarded.

On review of a finding of fact by the court, it will be presumed that the court considered only the competent evidence. *International Agr. Corp. v. Southern R. Co.*, 188 Ala. 354, 66 So. 14.

When trial is had without the intervention of a jury, an error in the admission of evidence will not authorize reversal if the judgment rendered is sustained by legal evidence. *Pensacola, etc., Co. v. Brooks*, 14 Ala. App. 364, 70 So. 968.

§ 931 (7) Issues Decided and Relation of Findings Thereto.

General Finding Referred to Counts Supported by Evidence.—A general finding will be referred to the count or counts of the complaint supported by the evidence. *Pensacola, etc., Co. v. Brooks*, 14 Ala. App. 364, 70 So. 968.

§ 931 (10) Findings by Referee, Commissioner, or Auditor.

See ante, "Evidence Considered in General," § 931 (5).

Evidence Consisting of Opinions as to Value of Property.—The rule that the presumptions on appeal are in favor of finding of register on questions of fact, when witnesses were orally examined before him, loses much of its force when the evidence was merely that concerning the opinion of the witnesses as to value of property. *Van Heuvel v. Long* (Ala.), 75 So. 339.

§ 932. Amount of Recovery.

Proper Evidence Presumed.—In absence of contrary showing, court of appeals will presume, in action on account, there was proper evidence on file authorizing court to ascertain amount plaintiff was entitled to recover. *Florida Nursery, etc., Co. v. Watson* (Ala. App.), 75 So. 875.

§ 933. Order Granting or Refusing New Trial.

§ 933 (1) In General.

Error must be affirmatively shown to authorize a reversal for refusal to grant

a new trial for insufficiency of the evidence. *Cash v. Smith*, 10 Ala. App. 417, 65 So. 193.

Effect of Acts 1915, p. 722.—Acts 1915, p. 722, providing that no presumption in favor of correctness of judgment granting or refusing new trial shall be indulged by appellate court, has not changed rule that presumption is in favor of correctness of ruling of trial court denying motion for new trial after verdict on conflicting evidence. *Hatfield v. Riley* (Ala.), 74 So. 380.

Denial of motion for new trial because verdict was against evidence will not be reviewed where jury was correctly instructed and there was evidence to sustain verdict; the presumption of correctness in trial court's rulings not being changed by Acts 1915, p. 722, providing that no presumption of correctness of the judgment of the lower court shall be indulged in upon appeal. *Cole v. Alabama, etc., R. Co.* (Ala.), 77 So. 719.

§ 933 (4) Grounds of Decision on Motion.

Grant of New Trial.—The appellate court must presume that the grant of a new trial generally was upon the ground that would justify it, that is, that the verdict was contrary to the evidence. *Wood v. Empire Laundry Co.*, 14 Ala. App. 144, 68 So. 584.

Where bill of exceptions does not purport to set out all of evidence on a motion for new trial on ground of presence on panel of jurors stricken at defendant's request and does not show any negligence by defendant, it will be presumed that the trial court had cognizance of facts which would justify its ruling granting a new trial. *Greer v. Malone-Beall Co.*, 196 Ala. 401, 72 So. 28.

Denial of New Trial.—Where all the evidence was not in the record, the court will presume that the evidence justified denial of new trial after adverse verdict. *Southern R. Co. v. Herron*, 12 Ala. App. 415, 68 So. 551.

Unless the bill of exceptions complaining of the denial of a new trial for newly discovered evidence purports to contain all of the evidence offered on the hearing of the motion, it will be presumed on appeal that there was evidence before the lower court sustaining the

denial of the motion. *Atlantic, etc., R. Co. v. Jones*, 9 Ala. App. 499, 63 So. 693.

§ 934. Judgment.

§ 934 (1) In General.

Caption of Judgment.—Where the summons ran against "R, receiver," and the caption of the judgment entry was in the transcript, it would be presumed that it followed the summons in this respect. *Ferrell v. Ross* (Ala.), 75 So. 466.

Probate Court Judgment—Statute.—Under Code 1907, § 5361, a decree of the probate court is without presumption as to its correctness, but it will not be disturbed on appeal, unless a verdict of the jury on similar evidence would be set aside. *Allen v. Scruggs*, 190 Ala. 654, 67 So. 301.

§ 934 (2) Pleadings and Issues, Evidence, and Verdict or Findings to Sustain Judgment, and Conformity Thereto.

Intendments Resolved in Favor of Complaint.—Under Code 1907, § 4143, providing that no judgment can be arrested, annulled, or set aside for any matter not previously objected to, if the complaint contains a substantial cause of action, where the sufficiency of a complaint as stating a case of unlawful detainer was not appropriately questioned in the trial court, on appeal all intendments are resolved in favor of the pleading to support the judgment on appeal. *Lessley v. Prater* (Ala.), 75 So. 355.

Plea to Merits Filed before Plea to Jurisdiction.—Where appellant claimed that jurisdiction over him was never acquired by the trial court, and the bill of exceptions stated merely that appellant did "file a plea," but the nature of the plea was not shown, it was presumed, in support of the ruling of the trial court, that appellant filed a plea on the merits in advance of his plea to the jurisdiction. *Cooper v. Lake Wood Co.* (Ala.), 75 So. 307.

Evidence Supporting Judgment.—All reasonable presumptions in favor of the finding of the court on the evidence will be allowed on appeal. *Hagin v. Shoaf*, 9 Ala. App. 300, 63 So. 764, certiorari

denied in *Ex parte Shoaf*, 186 Ala. 394, 64 So. 615.

Same—Default Judgment.—See post, "Judgment by Default," § 934 (3).

§ 934 (3) Judgment by Default.

Summons and Process.—*Henderson v. Jackson Woolen Mills*, 7 Ala. App. 199, 60 So. 965. See the title APPEAL AND ERROR, § 934 (3), vol. 1, p. 533.

Denial of Motion to Annul or Vacate.—On an appeal from a default judgment, after a motion to annul, arrest, or vacate has been denied, no presumption need be indulged as to the correctness of the court's ruling where the record fails to show a judgment thereon. *Hall v. First Bank*, 196 Ala. 627, 72 So. 171.

Support by Evidence.—Upon an appeal from a default judgment in the absence of a bill of exceptions, the evidence is presumed to support the judgment. *Hall v. First Bank*, 196 Ala. 627, 72 So. 171.

§ 936. Costs and Allowances.

Recovery under Twenty Dollars — Court's Certificate.—Under Code 1907, § 3663, authorizing judgment against plaintiff in tort cases for residue of costs over amount of damages recovered under \$20, unless court certifies he should have recovered more damages, in the absence of such certificate the supreme court will not presume that it was made. *Danforth v. McClellan*, 196 Ala. 567, 72 So. 104.

Retaxation of Witness Fees.—It will be presumed, in support of the trial court's decision as to the retaxation of the fees of witnesses not examined by the successful party, that there was no abuse of discretion or erroneous action, unless the complaining party shows the contrary by the record. *Porter v. Tennessee Coal, etc., R. Co.*, 13 Ala. App. 632, 68 So. 808, certiorari denied in *Ex parte Porter*, 193 Ala. 679, 69 So. 1019.

(F) DISCRETION OF LOWER COURT.

§ 944. Power to Review.

§ 946. — Abuse of Discretion.

Unless there is an abuse, an order of the court made in the exercise of its judicial discretion will not be reviewed. *Ex*

parte Jonas, 186 Ala. 567, 64 So. 960.

Rulings of a court resting largely in its discretion are not reviewable, except for abuse of discretion. *Hayes v. Hayes*, 192 Ala. 280, 68 So. 351.

§ 950. Provisional Remedies.

§ 953. — Attachment and Garnishment.

Where a motion was made to show cause why attachment should not be vacated, the proper proceedings being by plea in abatement, the discretion of the court in overruling it is not subject to review. *Wilson v. Callan*, 9 Ala. App. 265, 63 So. 27.

§ 954. — Injunction.

On bill to enjoin defendant from turpentine on plaintiff's land, held that the refusal below to dissolve the temporary injunction would be affirmed, where the reviewing court could not say that that course would do more damage than the other. *Yarbrough v. Taylor*, 191 Ala. 109, 67 So. 990.

§ 956. Extension of Time, and Proceedings Out of Time and Nunc Pro Tunc.

Receiving Plea in Abatement Not Filed in Time.—Even if the trial court has power to receive a plea in abatement not filed within the prescribed time, such reception is a matter of discretion which is not reviewable. *Wilson v. Callan*, 9 Ala. App. 265, 63 So. 27.

§ 957. Opening Default.

Discretion of the circuit court to set aside a default judgment is not reversible on appeal unless abused. *Ex parte Doak*, 188 Ala. 406, 66 So. 64.

Refusal to set aside a judgment by default will not be disturbed, unless the discretion reposed in the trial court in such matters was abused. *Robinson v. Newton Grocery Co. (Ala.)*, 76 So. 854.

§ 959. Amended and Supplemental Pleadings.

Permitting Filing of Plea.—The exercise of the trial court's discretion in permitting the defendant to file a plea is not reviewable. *Outcault Advertising Co. v. Hooten & Co.*, 11 Ala. App. 454, 66 So. 901.

Denial of Leave to File Plea after Close of Evidence.—The denial of leave

to file a plea presenting a new defense, after the close of the evidence, will not be reviewed, in the absence of a clear abuse of the discretion of the trial court. *Union Marine Ins. Co. v. Charlie's Transfer Co.*, 186 Ala. 443, 65 So. 78.

The refusal of the court to allow defendant to file special plea after the conclusion of the evidence will not be reviewed unless its discretion was abused. *Bixby-Theisen Co. v. Evans*, 186 Ala. 507, 65 So. 81.

In action on note, an amendment of complaint held not to authorize defendant, as a matter of right, to file additionally a proffered plea of nonclaim, and its rejection within discretion of the trial judge is not reviewable. *Lampkin v. Rose* (Ala.), 73 So. 896.

Refusal at the close of the evidence to allow defendant to file sworn plea denying plaintiff's ownership of the note sued on as required by Code 1907, § 3967, held discretionary and not reviewable. *Sample v. Tennessee Valley Bank* (Ala.), 76 So. 936.

Additional or Supplemental Pleadings.—*Craig & Co. v. Pierson Lumber Co.*, 179 Ala. 535, 60 So. 838. See the title APPEAL AND ERROR, § 959, vol. 1, p. 538.

Amendment to Complaint in Ejectment.—An amendment allowed in ejectment after closing testimony and making arguments, permitting a different description to be added to complaint and allowing further testimony thereon, was within court's discretion, which, not shown to have been abused, will be conclusive. *Pennington v. Mixon* (Ala.), 74 So. 238.

§ 961. **Depositions, Affidavits, or Discovery.**

Evasiveness of Answers to Interrogatories.—It is within the discretion of the trial court to determine whether answers by the plaintiff to interrogatories are evasive, and, where the record does not show that the court did not find the answers were not evasive, an assignment of error to its ruling is not well taken. *Roll v. Howell*, 9 Ala. App. 179, 62 So. 463.

§ 966. **Continuance.**

The discretion of the trial court in

granting or refusal of a continuance is not reviewable in the absence of a showing of abuse thereof. *Pensacola, etc., Co. v. Brooks*, 14 Ala. App. 364, 70 So. 968.

§ 969. **Conduct of Trial or Hearing in General.**

Allowing Jury to View Premises.—Allowing the jury, in proceedings to test the validity of a betterment assessment, to view the premises, being within the discretion of the trial court, is not reviewable in the absence of gross abuse. *Tuscaloosa v. Hill*, 14 Ala. App. 541, 69 So. 486, certiorari denied in *Ex parte Hill*, 194 Ala. 559, 69 So. 598.

Refusal to Suspend Trial on Excluding Evidence.—The refusal to suspend a trial on exclusion of evidence was a matter of discretion with the trial court that will not be reviewed. *Peterman v. Southern Cotton Oil Co.* (Ala. App.), 73 So. 991.

§ 970. **Reception of Evidence.**

Refusal to Exclude Answer to Irrelevant Question.—The discretion of the court in refusing a motion to exclude an answer responsive to an irrelevant question not objected to will not be reviewed on appeal. *Central, etc., R. Co. v. Teasley*, 187 Ala. 610, 65 So. 981.

Relaxation of Best Evidence Rule.—When best evidence rule as relaxed should be accorded application held a matter of judicial discretion, reviewable only for abuse. *Alabama Fidelity, etc., Co. v. Alabama Penny Sav. Bank* (Ala.), 76 So. 103.

§ 971. **Examination of Witnesses.**

§ 971 (1) **In General.**

Sanity of Witness.—See post, "Competency of Witness," § 971 (2).

§ 971 (2) **Competency of Witness.**

Whether Witness Is Non Compos Mentis.—The reception of testimony by one claimed to be non compos mentis is not error, where it did not appear that the trial judge abused his discretion. *Birmingham, etc., R. Co. v. Williams*, 190 Ala. 53, 66 So. 653.

Competency of Experts.—Competency of expert witnesses and the forms of questions being within the trial court's

discretion, its determination will not be disturbed unless abused. *Southern Bituminous Co. v. Perrine*, 191 Ala. 411, 67 So. 601.

The ruling of the trial court, admitting expert testimony after a preliminary inquiry into the qualifications of the witness, will not be held for error, unless the ruling is plainly erroneous. *Alabama City, etc., R. Co. v. Bessiere*, 197 Ala. 5, 72 So. 325.

Competency to Give Opinion on Sanity.—The competency of a witness, whether expert or not, to give an opinion as to sanity, is for the court, and its decision thereon will not be reviewed unless clearly erroneous. *Woodward Iron Co. v. Spencer*, 194 Ala. 285, 69 So. 902.

Trial court's decision as to whether a nonexpert witness was properly qualified to give an opinion regarding testator's soundness of mind will not be reversed, unless plainly erroneous. *Wear v. Wear* (Ala.), 76 So. 111.

The determination of the competency of a witness as to opinion of one's sanity will not be revised unless clearly erroneous. *Melvin v. Murphy*, 184 Ala. 188, 63 So. 546.

Same—Proper Predicate Laid for Testimony.—Whether a sufficient predicate was established for the testimony of a witness as to the mental capacity of testator was largely discretionary with the trial court and a ruling thereon will not be disturbed unless there is a palpable abuse of the discretion. *Cummings v. McDonnell*, 189 Ala. 96, 66 So. 717.

§ 971 (3) Cross-Examination.

Scope and Extent of Cross-Examination.—The scope of the cross-examination will not be interfered with, unless an abuse of discretion appears. *Aachen, etc., Fire Ins. Co. v. Arabian Toilet Goods Co.*, 10 Ala. App. 395, 64 So. 635.

The discretion of the trial court as to the extent of cross-examination will not be reviewed unless abused. *Meador v. Evans*, 188 Ala. 229, 66 So. 446.

Question Whether Witness Came to Testify.—The extent of cross-examination resting largely in the trial court's discretion, allowing question on cross-examination, if witness came there to

testify, does not call for review. *Hodges v. Davis* (Ala.), 75 So. 300.

Recross-Examination.—In an action against a railroad for personal injury, exclusion of a question on recross-examination held not reviewable, except for abuse of discretion. *Central, etc., R. Co. v. Stephenson*, 189 Ala. 553, 66 So. 495.

Questions to Test Accuracy or Bias.—Refusal to permit a witness to be cross-examined to test the accuracy of his testimony held not to be an abuse of the court's discretion to limit the scope of the cross-examination. *Louisville, etc., R. Co. v. Kay*, 8 Ala. App. 562, 62 So. 1014.

Discretion of court in refusing cross-examination of witness on irrelevant facts to test accuracy or bias will not be disturbed on appeal. *Birmingham R., etc., Co. v. Lipscomb* (Ala.), 73 So. 962.

§ 971 (4) Re-Examination.

Recross-Examination.—See ante, "Cross-Examination," § 971 (3).

§ 971 (5) Leading Questions.

The trial court will not be reversed for allowing leading question and refusing to exclude answer thereto. *Denson v. Acker* (Ala.), 78 So. 76.

§ 976. New Trial or Rehearing.

§ 977. — In General.

New Trial.—The supreme court is averse to reviewing the action of trial courts in granting and refusing new trials. *International Agr. Corp. v. Abercrombie*, 184 Ala. 244, 63 So. 549, 49 L. R. A., N. S., 415.

The trial court's action in overruling a motion for new trial is not reviewable, where it is not made to appear that reversible error was thereby committed. *Fowlkes v. Lewis*, 10 Ala. App. 543, 65 So. 724.

Rehearing.—The granting or denying of a rehearing on a petition filed during the term at which the decree was rendered under chancery practice rule 81 (Code 1907, p. 1553) is within the unreviewable discretion of the chancellor. *Cox v. Brown* (Ala.), 73 So. 964.

§ 978. — For Errors or Irregularities.

Misleading Instructions.—Where the instructions were calculated to mislead the jury, the grant of a new trial will not

be reviewed. *Montgomery Light, etc., Co. v. Riverside Co.*, 188 Ala. 380, 66 So. 459.

§ 979. — For Insufficiency of Evidence.

Grant of New Trial.—A decision granting a new trial on the facts will not be reversed, unless the evidence plainly and palpably supports the verdict. *Harrison v. Birmingham Water Works Co.*, 9 Ala. App. 605, 64 So. 164.

Where the evidence for plaintiff was largely circumstantial, an order granting defendant a new trial will not be reversed. *Anderson v. Southern R. Co.*, 184 Ala. 468, 63 So. 473.

Upon appeal from order granting a new trial, the order will not be reversed, unless the evidence plainly and palpably supports the verdict. *Mallory, etc., Co. v. Druhan* (Ala. App.), 78 So. 636.

Evidence being conflicting, granting new trial for insufficient evidence will not be held error where it can not be said that evidence so plainly supported verdict as to put trial court in error. *McCormick v. Badham* (Ala.), 77 So. 736.

Where the lower court grants a new trial, on the ground that the verdict is contrary to the evidence, its determination will not be reviewed, unless the evidence plainly and palpably supports verdict. *Shaw & Son v. Du Bose* (Ala.), 76 So. 925.

§ 984. Costs and Allowances.

Correction on Appeal.—While under Code 1907, § 3222, the question of cost in equity rests largely in the discretion of the chancellor, taxation thereof may be varied on appeal. *Manning v. Carter* (Ala.), 77 So. 744.

(G) QUESTIONS OF FACT, VERDICTS, AND FINDINGS.

§ 981. Questions Involving Issues of Fact.

Disputed questions of fact can not be reviewed or revised on appeal to the supreme court; there being ample evidence to support a verdict for either party. *Windham v. Hydrick*, 197 Ala. 125, 72 So. 403.

§ 984. Credibility of Witnesses.

Presumption on Appeal.—*Birmingham*

R., etc., Co. v. Cockrum, 179 Ala. 372, 60 So. 304. See the title APPEAL AND ERROR, § 994, vol. 1, p. 547.

Questions for Jury.—In an action against a railroad company for the wrongful death of plaintiff's decedent, reasonableness of testimony as to wantonness and its credibility held for the jury, and not for the court on appeal. *Louisville, etc., R. Co. v. Ganter* (Ala. App.), 77 So. 917.

Whether a witness' testimony is true is a question for the jury. *Windham v. Hydrick*, 197 Ala. 125, 72 So. 403.

Testimony Not Conclusive on Court of Appeals.—Testimony of witness that money deposited by him in his wife's name was her money held not conclusive on the court of appeals. *Ex parte Shoaf*, 186 Ala. 394, 64 So. 615, denying certiorari *Hagin v. Shoaf*, 9 Ala. App. 300, 63 So. 764.

§ 987. Dismissal, Nonsuit, Demurrer to Evidence, or Direction of Verdict.

Refusing requested affirmative charge for defendant is not reversible error where evidence presents a jury question. *National Life Ins. Co. v. Hedgecoth* (Ala. App.), 77 So. 422.

§ 988. Verdicts.

§ 989. — Conclusiveness in General.

In General.—The finding of the jury on questions of fact will not be reviewed on appeal. *Alexander v. Fountain*, 195 Ala. 3, 70 So. 669.

Where a fact question is clearly for the jury, the court on appeal is unable to interfere with its finding. *Hood, etc., Furniture Co. v. Royal* (Ala.), 76 So. 965.

The verdict of a jury will not be disturbed on appeal, unless clearly wrong and unjust. *Adams Hdw. Co. v. Wimbish* (Ala.), 78 So. 902.

Questions in Ejectment.—In ejectment the questions whether an unrecorded deed was, in fact, executed, and whether a subsequent purchaser had actual notice of the deed, were for the jury, and their determination will not be reviewed on appeal. *Alexander v. Fountain*, 195 Ala. 3, 70 So. 669.

Verdict Clearly Due to Prejudice or Mistake.—Verdict for plaintiff will not,

on appeal, be allowed to stand, where exculpation of defendant is so overwhelming and complete that verdict could be grounded only on gross prejudice or palpable misunderstanding or ignorance. *Shelton v. Hacelip* (Ala.), 74 So. 950.

§ 1001. — Sufficiency of Evidence in Support.

Consideration of Prejudicial Argument for Plaintiff.—On review of the sufficiency of the evidence to sustain verdict for plaintiff, parts of argument for plaintiff tending to excite prejudice against defendant might be looked to for partial explanation of verdict. *Southern R. Co. v. Grady*, 192 Ala. 515, 68 So. 346.

Judgment Clearly Wrong.—Where it is clear, after making all proper allowances to sustain the judgment of the trial court upon the facts, that the finding and judgment are wrong, the supreme court must reverse the case. *Twin Tree Lumber Co. v. Day*, 181 Ala. 565, 61 So. 914.

Where the court of appeals found that the facts and the inferences deducible therefrom were palpably insufficient to support the judgment of the trial court, it did not err in its legal conclusion that the judgment should be reversed. *Ex parte Shoaf*, 186 Ala. 394, 64 So. 615, denying certiorari *Hagin v. Shoaf*, 9 Ala. App. 300, 63 So. 764.

§ 1002. — On Conflicting Evidence.

General Rule.—A verdict on conflicting evidence, and not the result of bias, passion, or prejudice, will not be disturbed on appeal. *Southern Bitulithic Co. v. Perrine*, 191 Ala. 411, 67 So. 601; *Helms v. Central, etc., R. Co.*, 188 Ala. 393, 66 So. 470; *Bethea-Starr, etc., Co. v. Douglass*, 12 Ala. App. 561, 68 So. 515; *Alexander v. Smith*, 180 Ala. 541, 61 So. 68; *Taxicab, etc., Car Co. v. Cabiness*, 9 Ala. App. 549, 63 So. 774.

Illustrative Cases.—Where, in an action on a note, the evidence as to payment was equally balanced, a verdict for plaintiff will not be set aside. *McDuffie & Sons v. Weeks*, 9 Ala. App. 282, 63 So. 739.

On an issue of payment in a proceeding to quash an execution, a verdict on conflicting evidence will not be set

aside. *Henderson v. Planters', etc., Bank*, 188 Ala. 584, 66 So. 473.

Effect of Acts 1915, p. 722.—The rule that the court on appeal will not reverse for insufficiency of evidence where the evidence was in direct conflict is still in force, and unaffected by Acts 1915, p. 722, providing that no presumption in favor of the correctness of the judgment of the court appealed from shall be indulged by the appellate court. *Jackson Lumber Co. v. Trummell* (Ala.), 74 So. 469.

§ 1003. — Against Weight of Evidence.

Verdict Dependent upon Credence Given Witnesses.—A verdict for damages depending upon the credence given by the jury to the witnesses can not be held to be contrary to the evidence. *Birmingham R., etc., Co. v. Sprague*, 196 Ala. 148, 72 So. 96.

§ 1004. — Amount of Recovery.

Excessive Verdict in General.—To warrant reversal for an excessive verdict, it must be palpably opposed to the weight of evidence. *Birmingham R., etc., Co. v. Frazier*, 14 Ala. App. 269, 69 So. 969.

A judgment will not be reversed, unless the amount of damages is so excessive or so grossly inadequate as to indicate prejudice or corruption on the part of the jury. *Florence Hotel Co. v. Bumpus*, 194 Ala. 69, 69 So. 566.

Jury's award of damages can not be disturbed, unless so excessive or so grossly inadequate as to indicate passion, prejudice, or corruption. *Central, etc., R. Co. v. Sanders*, 9 Ala. App. 632, 64 So. 190.

Where the trial court has refused to disturb a verdict, in an action for assault and battery, on the ground that the damages are excessive, the appellate court must use great caution in substituting its judgment for that of the trial court. *Avondale Mills v. Bryant*, 10 Ala. App. 507, 63 So. 932.

The amount of a verdict did not show such passion and prejudice as to require the annulling of the verdict, where there was credible evidence and reasonable inferences therefrom on which the jury might rest the amount awarded, both as compensation and as exemplary dam-

ages. *Birmingham R., etc., Co. v. Nalls*, 188 Ala. 352, 66 So. 5.

Nominal Damages.—A verdict awarding nominal damages to a passenger induced to leave the train at a siding held conclusive when based on findings justified by evidence. *Hilley v. Central, etc., R. Co.*, 11 Ala. App. 605, 66 So. 883.

The court can not set aside a verdict awarding nominal damages, where the jury, though finding that plaintiff had suffered injuries, found from the evidence that they were so slight that nominal damages were adequate. *Hilley v. Central, etc., R. Co.*, 11 Ala. App. 605, 66 So. 883.

Damages Not Readily Estimated in Money.—Where the quantum of damages is not susceptible of exact pecuniary estimate, the court on appeal will not set aside the verdict because in its opinion the jury gave too much or too little. *Liles v. Montgomery Tract. Co.*, 7 Ala. App. 537, 61 So. 480.

Where damages are not susceptible of pecuniary estimation, verdict held not to be reversed unless the amount was so excessive or inadequate as to indicate prejudice, passion, partiality, or corruption. *Birmingham Waterworks Co. v. Watley*, 192 Ala. 520, 68 So. 330.

Damages for Personal Injuries.—A verdict for injuries to a person will be set aside on appeal as inadequate if the evidence shows that plaintiff suffered damages susceptible of definite pecuniary measurement in an amount in excess of the verdict. *Liles v. Montgomery Tract. Co.*, 7 Ala. App. 537, 61 So. 480.

The verdict awarding damages for personal injuries will not be disturbed except when not supported by evidence or it is plainly the result of passion, or other improper motive. *Birmingham R., etc., Co. v. Torpy*, 14 Ala. App. 320, 70 So. 198.

Refusal to set aside a verdict in a personal injury action because excessive, will not be reviewed. *Huntsville v. Phillips*, 191 Ala. 524, 67 So. 664.

Same—Mental Suffering.—Where the discretion of the jury is abused by awarding excessive damages for physical pain and mental suffering or by awarding no damages, where plaintiff is entitled thereto, the verdict may be set

aside. *Birmingham R., etc., Co. v. Coleman*, 181 Ala. 478, 61 So. 890.

Damages for Killing Animals.—Where there was evidence supporting a verdict for \$400 and interest against the railroad company for killing plaintiff's jack and jennet, the judgment would not be reversed on appeal because of defendant's evidence indicating that they were worth much less. *Nashville, etc., Railway v. Bingham*, 182 Ala. 640, 62 So. 111.

Damages for Misdirecting Passenger.—In an action against a carrier for damages for directing plaintiff, an elderly lady, to take the wrong train, held, that a verdict of \$300 was not so excessive as to indicate passion or prejudice justifying a reversal. *Central, etc., R. Co. v. Sanders*, 9 Ala. App. 632, 64 So. 190.

Punitive Damages.—The imposition of punitive damages is discretionary with the jury and a thing apart from the compensatory damages, and if fixed with due regard to the wrong perpetrated in the light of the evidence, with a view of punishment to prevent similar wrongs, its discretion in determining the amount will not be disturbed. *Nashville, etc., Railway v. Blackmon*, 7 Ala. App. 530, 61 So. 468.

If an award of exemplary damages by a jury is so excessive as to show an abuse of the discretion committed to the jury, the trial judge may set the verdict aside. *Birmingham R., etc., Co. v. Coleman*, 181 Ala. 478, 61 So. 890.

Imposition of punitive damages is discretionary with jury, and, if fixed with due regard to wrong, in light of evidence, with view to punishment to prevent similar wrongs, discretion of jury as to amount should not be disturbed. *Southern Exp. Co. v. Malone* (Ala. App.), 78 So. 408.

§ 1005. — Approval of Trial Court.

In General.—*Girardino v. Birmingham, etc., R. Co.*, 179 Ala. 420, 60 So. 871. See the title APPEAL AND ERROR, § 1005, vol. 1, p. 549.

A verdict sustained by evidence will not be disturbed on appeal after denial of new trial. *Illinois Cent. R. Co. v. Robinson*, 189 Ala. 523, 66 So. 519.

Verdict Imputable Only to Passion or Prejudice.—A verdict imputable only to

prejudice or ignorance of the jury will be set aside, though approved by the trial judge. *Southern R. Co. v. Herron*, 189 Ala. 662, 66 So. 627.

Verdict Dependent on Credibility of Witness.—Whether witness whose testimony supported verdict should be believed held a question for the jury, and denial of new trial will not set aside unless clearly wrong. *Stewart Veneer Co. v. Windham & Co.*, 12 Ala. App. 642, 68 So. 516.

Refusal of a new trial will not be reversed on appeal although the evidence as set out in the transcript preponderates against verdict rendered where it depends upon the credibility of the witnesses. *Watson Bros. v. Davis*, 195 Ala. 158, 70 So. 118.

Sufficiency of Evidence to Sustain Verdict in General.—*Nashville, etc., Railway v. Hinds* (Ala. App.), 60 So. 409. See the title APPEAL AND ERROR, § 1005, vol. 1, p. 549.

Refusal to grant a new trial because evidence was insufficient or verdict contrary to evidence will not be reversed unless court is clearly convinced the verdict was erroneous. *Louisville, etc., R. Co. v. Blankenship* (Ala.), 74 So. 960.

When there is not a palpable failure of evidence to support finding of jury, the trial court's action in upholding the verdict will not be deemed erroneous. *Henderson Land, etc., Co. v. Brown* (Ala. App.), 78 So. 716.

Overruling motion for new trial is not reversible error where evidence presents a jury question. *National Life Ins. Co. v. Hedgecoth* (Ala. App.), 77 So. 422.

Verdict on Conflicting Evidence.—*Empire Life Ins. Co. v. Gee*, 178 Ala. 492, 60 So. 90. See the title APPEAL AND ERROR, § 1005, vol. 1, p. 549.

A verdict on conflicting evidence, not palpably contrary to the weight of evidence, and approved by the trial court, will not be disturbed. *Randman v. Mitchell*, 189 Ala. 412, 66 So. 585; *Atlantic, etc., R. Co. v. Jones*, 9 Ala. App. 499, 63 So. 693; *Cash v. Smith*, 10 Ala. App. 417, 65 So. 193.

The ruling of the lower court on a motion for new trial on the ground of the insufficiency of the evidence will not be reviewed, where the evidence was con-

flicting and irreconcilable. *Chappell v. Falkner*, 11 Ala. App. 382, 66 So. 890; *McCalley v. Penney*, 191 Ala. 369, 67 So. 696; *Stephens v. Pierson*, 8 Ala. App. 626, 62 So. 969; *Sloss-Sheffield Steel, etc., Co. v. Scivally*, 197 Ala. 103, 72 So. 349; *Huntsville Knitting Co. v. Butner* (Ala.), 78 So. 890; *Charlie's Transfer Co. v. Leedy & Co.*, 9 Ala. App. 652, 64 So. 205.

Supreme court will not set aside verdict on conflicting evidence, because it does not correspond with its opinion as to weight of evidence; presumption being in favor of correctness of ruling of trial court denying motion for new trial. *Hatfield v. Riley* (Ala.), 74 So. 380.

Verdict against Weight of Evidence.—The denial of a new trial on the ground of the verdict being contrary to the evidence will not be reversed, unless the preponderance of the evidence against the verdict is so decided as to clearly convince that it is wrong and unjust. *Continental Casualty Co. v. Ogburn*, 186 Ala. 398, 64 So. 619; *Tennessee Coal, etc., R. Co. v. Wiggins* (Ala.), 73 So. 516; *Howton v. Mathias*, 197 Ala. 457, 73 So. 92; *Brotherhood v. Milner*, 193 Ala. 68, 69 So. 10; *Davis v. Clausen*, 7 Ala. App. 381, 62 So. 267.

Denial of a new trial on the ground that the verdict is contrary to the weight of the evidence will not be disturbed on appeal, unless the verdict is plainly contrary to the great weight of the evidence. *Central, etc., R. Co. v. Hingson*, 186 Ala. 40, 65 So. 45; *Kimbrell v. Louisville, etc., R. Co.*, 191 Ala. 392, 67 So. 586.

Refusal to grant new trial for insufficiency of evidence, or because verdict was contrary to evidence, will not be reversed unless, after indulging the presumption of correctness in the verdict, a preponderance of evidence clearly shows it is wrong, while judgment granting new trial will not be reversed unless the evidence plainly supports the verdict set aside. *Nashville, etc., Railway v. Crosby*, 194 Ala. 338, 70 So. 7.

Where it was clear after making all proper allowances to sustain the judgment on the facts that the finding and judgment were wrong, the supreme court must reverse the case. *Southern*

R. Co. v. Grady, 192 Ala. 515, 68 So. 346.

Despite Acts 1915, p. 722, supreme court will not disturb action of trial court in refusing motion for new trial on ground verdict was contrary to weight of evidence, where trial was had on evidence ore tenus or partly so. *Caravella Shoe Co. v. Hubbard* (Ala.), 78 So. 899.

§ 1006. — Successive Verdicts.

The order denying new trial after two trials with the same result will not be reversed unless, after allowing all reasonable presumption of its correctness, the preponderance of evidence against the verdict clearly shows it to be unjust. *Metropolitan Life Ins. Co. v. Goodman*, 196 Ala. 304, 71 So. 409.

Where four juries heard practically the same witnesses for plaintiff, and each jury rendered a verdict for plaintiff, the fourth verdict sustained by evidence and approved by the trial court, giving correct instructions, will not be disturbed. *Long v. Cummings*, 182 Ala. 507, 62 So. 517.

§ 1007. Findings of Court.

§ 1008. — Conclusiveness in General.

Given Weight of Verdict.—Southern *R. Co. v. Foster*, 7 Ala. App. 487, 60 So. 993. See the title APPEAL AND ERROR, § 1008, vol. 1, p. 550.

Where questions properly for the jury are decided by the court sitting without a jury, the judgment based on such findings will be given same force and effect as if rendered upon a verdict or jury, and will not be disturbed on appeal unless plainly erroneous. *Weil v. Centerfit* (Ala.), 78 So. 885; *Smith v. Thomas* (Ala.), 78 So. 820; *Cofield v. McGraw* (Ala. App.), 77 So. 981; *Bell v. Bell*, 183 Ala. 645, 62 So. 833; *Wilkinson v. Flowers* (Ala. App.), 77 So. 982.

Finding of judge of probate on evidence ore tenus is like verdict of jury, and will not be disturbed by reviewing court, except for grounds which would warrant setting aside of verdict of jury. *Darrow v. Darrow* (Ala.), 78 So. 383.

The finding of the city court sitting without a jury upon evidence delivered ore tenus must be treated on appeal like the verdict of a jury on issues of fact.

Burger v. Peerless, etc., Mfg. Co., 197 Ala. 470, 73 So. 77.

Where Trial Court Took Erroneous View of Law on Facts.—If it appears that the trial court, trying the case with witnesses before it, took an erroneous view of the law as applied to the facts, the rule that the judgment of the court in such a trial must have the effect of a verdict of a jury does not apply. *Murphree v. Hanson*, 197 Ala. 246, 72 So. 437.

Finding against Weight of Evidence.—Where a case, properly triable to the court, is tried on written testimony, the court's findings of fact will not be reversed on appeal, unless there is a decided preponderance of the evidence against the conclusion attained. *Bell v. Bell*, 183 Ala. 645, 62 So. 833.

Where evidence was ore tenus or partly so, supreme court will not disturb finding of trial court unless plainly contrary to great weight of evidence. *Finney v. Studebaker Corp.*, 196 Ala. 422, 72 So. 54.

In action on note, whether statute of limitations had perfected a bar held question of fact as to which appellate court can not say that trial court without a jury made mistake. *Wade v. Killen* (Ala.), 75 So. 970.

Documentary or Undisputed Evidence.—The rule that on evidence given ore tenus, the appellate court will not reverse the finding, unless clearly convinced that it is wrong, does not apply where the evidence is documentary and without practical dispute. *Bank v. Elmore Fertilizer Co.* (Ala. App.), 78 So. 648; *Owensboro Banking Co. v. Buck* (Ala. App.), 77 So. 940.

Findings of Court of Appeals.—The finding of facts by the court of appeals is final, and will not be reviewed by the supreme court on certiorari to the court of appeals. *Ex parte Atlantic, etc., R. Co.*, 190 Ala. 132, 67 So. 256.

Sufficiency of Finding to Support Judgment.—In an action tried without a jury, the sufficiency of a special finding of facts made by the court on its own motion to support the judgment will be reviewed when a bill of exceptions is reserved. *Johnson v. McFry*, 13 Ala. App. 619, 68 So. 718.

Sufficiency of special finding made by court on its own motion to support judgment held reviewable. *Johnson v. McFry*, 14 Ala. App. 170, 68 So. 716.

On appeal from a judgment on a special finding of facts in a case tried without a jury, the only question open for consideration is whether the facts found support the judgment. *Johnson v. McFry*, 13 Ala. App. 619, 68 So. 718.

Effect of Laws 1915, p. 824.—Acts 1915, p. 824, merely dispenses with jury trial unless demand is made and does away with necessity of excepting to conclusion upon facts to review it, and does not change rule as to weight given finding of trial court upon the facts. *Finney v. Studebaker Corp.*, 196 Ala. 422, 72 So. 54.

Under Gen. Acts 1915, p. 824, where evidence before trial judge is developed ore tenus, or partly so, appellate court will not disturb findings unless plainly contrary to great weight of evidence. *Ahlich v. Rollo* (Ala.), 76 So. 37.

Laws 1915, p. 824, providing that either party to a cause tried by the court without jury may present for review the finding of the court on the evidence, and the supreme court or court of appeals shall review with no presumption in favor of the findings, and, if there be error, shall render such judgment as the court below should have rendered or reversed or remanded for further proceedings, is not intended to require the supreme court to disregard the finding of the trial court upon facts, when it had better opportunity to pass on the evidence than the appellate court, and, if so intended, it would be an invasion of the judiciary. *Hackett v. Cash*, 196 Ala. 403, 72 So. 52.

A statute providing that on appeal of a case tried by the court without jury the appellate court shall review the same with no presumption in favor of the findings of the trial court on the evidence applies only where the opportunities of the appellate court to consider the evidence is the same as the trial court, as when the evidence is taken by deposition, but when the evidence is ore tenus, or partly so, and the trial court has the advantage of seeing and hearing the witnesses, the supreme court will

not disturb the conclusion, unless it is plainly or palpably contrary to the weight of the evidence. *Hackett v. Cash*, 196 Ala. 403, 72 So. 52.

§ 1009. — Effect in Equitable Actions.

Conclusiveness in General.—Witnesses having been examined orally before trial judge, his conclusion of fact will not be disturbed unless plainly erroneous. *Hess v. Hodges* (Ala.), 78 So. 85.

In suit of landowner against mine operator, where decree dissolving temporary injunction against excavating under complainant's property recited that it was based upon affidavits of both parties and a personal investigation of the property and respondent's operations, trial judge's conclusion upon the facts will not be disturbed on appeal, the appellate court not having before it the full evidentiary data the trial court had. *Faught v. Leith* (Ala.), 78 So. 830.

Statutory Provisions.—In a suit to foreclose a vendor's lien, a denial of indebtedness by one to whom the purchaser has transferred the property raises an issue of fact to be determined by the appellate court on consideration of the evidence, under Code 1907, § 5955. *Thornton v. Esco*, 181 Ala. 241, 61 So. 255.

Code 1907, § 5955, subd. 1, providing that on chancery appeal, no weight shall be given chancellor's decision upon facts, but supreme court shall weigh the evidence, applies only where the judge trying the issue had not the advantage of seeing the witnesses. *Andrews v. Grey* (Ala.), 74 So. 62.

Where evidence is ore tenus before chancellor, findings of fact will be treated like verdict unless plainly erroneous, regardless of Code 1907, § 5955, subd. 1, providing on appeal that no weight shall be given decision of a chancellor upon facts. *Fitzpatrick v. Stringer* (Ala.), 76 So. 932.

Sufficiency of Evidence in Support.—Where the supreme court are persuaded that disputed facts on the whole were found correctly, a decree of a chancellor will be affirmed, although some of the evidence might have supported a different finding. *Caldwell v. Caldwell* (Ala.), 76 So. 928.

On Conflicting Evidence.—*Faulk & Co. v. Hobbie Grocery Co.*, 178 Ala. 254, 59 So. 450. See the title APPEAL AND ERROR, § 1009, vol. 1, p. 553.

The findings of the chancellor on conflicting evidence, and supported by the evidence, will not be disturbed. *Joiner v. Watkins*, 186 Ala. 211, 65 So. 135.

§ 1010. — Sufficiency of Evidence in Support.

Findings of trial court supported by substantial evidence will not be disturbed on appeal. *Tennessee River Nav. Co. v. Jacobs Banking Co.* (Ala. App.), 77 So. 438; *Dixie Fertilizer Co. v. Teasley*, 14 Ala. App. 283, 69 So. 988.

A judgment in a trial by the court, will not be disturbed when supported by ample evidence. *Enslin Develop. Co. v. Barbour Plumbing, etc., Co.*, 189 Ala. 450, 66 So. 514.

The conclusion of the trial court sitting without a jury is in lieu of the verdict, and the judgment will not be reversed unless from the record it plainly appears that the finding was not sustained by legal evidence. *Union Mut. Aid Ass'n v. Carroway* (Ala.), 78 So. 792.

Under Code 1907, §§ 5359-5361, conclusions of the trial court, where there is no special finding of fact or request, have the effect of a verdict, and, if supported by evidence, are not subject to review. *Pinckard v. Cassels*, 195 Ala. 353, 70 So. 153.

When a case is tried without a jury, and there is no special finding made or requested, the trial judge's conclusion has the effect of a verdict, and, if supported by evidence, is not subject to review on appeal. *Reid v. McElderry*, 10 Ala. App. 472, 65 So. 421.

Where there was oral testimony which if accepted warranted the conclusion of the trial court, and the evidence as presented on appeal was in rather a confused state, the conclusion of the trial court would not be disturbed. *Thompson v. Jones* (Ala.), 75 So. 460.

Effect of Erroneous Exclusion of Competent Evidence.—The rule against reversal of the judgment of the trial court sitting without a jury, if sustained by legal evidence, does not apply where

the court has erroneously excluded competent evidence. *Union Mut. Aid Ass'n v. Carroway* (Ala.), 78 So. 792.

Effect of According Illegal Effect to Evidence.—Where the record indicates that the findings of the trial court were based, in whole or in part, on evidence which was accorded an effect to which it was not legally entitled, the judgment will be reversed and the cause remanded for new trial. *Smith v. Allen*, 7 Ala. App. 397, 62 So. 296.

§ 1011. — On Conflicting Evidence.

See post, "Against Weight of Evidence," § 1012.

Effect of Verdict.—*Shannon v. Lee*, 178 Ala. 463, 60 So. 99. See the title APPEAL AND ERROR, § 1011, vol. 1, p. 554.

A judgment for defendant on conflicting evidence in a trial without a jury can not be reversed when not clearly against the great weight of the evidence. *Reid v. McElderry*, 188 Ala. 150, 66 So. 7; *Dees v. People's Bank* (Ala.), 76 So. 901.

Conclusions of fact of the trial court, based on conflicting evidence, will not be disturbed on appeal, although seemingly against the preponderance of the evidence. *Gattis Turpentine Co. v. Russell* (Ala.), 74 So. 231.

A finding of fact by the trial court on conflicting evidence will not be reversed on appeal where it necessitates a weighing of the evidence and the credibility of witnesses. *Lasseter v. Deas*, 9 Ala. App. 564, 63 So. 735; *Stedham v. Robertson*, 14 Ala. App. 619, 71 So. 62.

Particular Findings.—Findings of trial court that codicil was properly executed, based on conflicting evidence, will not be disturbed on appeal. *Kohlenberg v. Shaw* (Ala.), 73 So. 932.

In action for rent, questions of forfeiture of future rent under surrender and abandonment by tenants, and of eviction by landlord, held questions of fact determined by trial court on disputed evidence, and not reviewable. *Penny v. Quinn* (Ala. App.), 77 So. 240.

The evidence being conflicting as to whether an account sued on was an open account or account stated, and part of such evidence being oral, where there

was evidence to sustain the trial court's finding it will not be disturbed on appeal. *McDonough v. Commercial State Bank* (Ala. App.), 73 So. 754.

The finding on conflicting evidence, consisting of affidavits, that a sheriff's failure to return on execution was not induced by plaintiff's attorneys, will not be disturbed. *Spenny v. Sorrell*, 12 Ala. App. 650, 68 So. 547.

Statutory Provision.—A finding of fact by the trial court on conflicting evidence has the effect of a verdict, though the statute requires the court to review such a finding without any presumption in favor of the lower court on the evidence. *Stephenson v. Jebeles, etc., Confectionery Co.*, 10 Ala. App. 431, 65 So. 314.

§ 1012. — **Against Weight of Evidence.**

See ante, "On Conflicting Evidence," § 1011.

General Rule.—The court of appeals will not disturb the finding of the trial court unless the facts plainly and palpably show the conclusion is contrary to the weight of the evidence. *Penny v. Quinn* (Ala. App.), 77 So. 240; *Alabama City, etc., R. Co. v. Chasteen*, 192 Ala. 684, 68 So. 322.

The supreme court can only determine whether there was sufficient evidence to support a fact finding, and will not disturb it, unless it is so manifestly against the evidence that it should have been set aside by the trial judge. *Briel v. Exchange Nat. Bank*, 180 Ala. 576, 61 So. 277.

Where Testimony Is Oral or Partly So.—Where a disputed question is tried by the court without a jury, on testimony given viva voce or ore tenus in the court's presence, or partly so, his finding will not be reversed on appeal, unless it is so manifestly against the evidence that a judge at the trial would set aside a similar verdict of the jury rendered on the same testimony. *Bell v. Bell*, 183 Ala. 645, 62 So. 833; *S. C.*, 196 Ala. 465, 71 So. 465; *Gingold v. Coplon*, 186 Ala. 340, 65 So. 328; *North Ontario Packing Co. v. Napier-McCall Co.* (Ala.), 75 So. 143; *Saibara v. Yokohama Nursery Co.* (Ala.), 76 So. 861.

Statutory Provision.—In cases where the law authorizes disputed questions to be tried by the court without a jury on

testimony given viva voce in the presence of the court, the rule of the supreme court is not to reverse a finding, unless it is so manifestly against the evidence that a judge at nisi prius would set aside the verdict of a jury rendered on the same testimony; and such finding must on appeal be given the force and effect of a verdict, and unless plainly wrong can not be disturbed, although the statute requires the appellate court to review the judgment and finding without any presumption in favor of the court below on the evidence. *Colley v. Atlanta Brewing, etc., Co.*, 196 Ala. 374, 72 So. 45.

Particular Findings.—In an action for rent, whether the premises had been rendered untenable by partial destruction, the lease providing that, if the house should be destroyed, or become untenable by fire, the rent should cease from the date, was a question of fact, a finding on which will not be disturbed unless the facts plainly and palpably show the conclusion is contrary to the weight of the evidence. *Penny v. Quinn* (Ala. App.), 77 So. 240.

In suit on an itemized verified account, under Code 1907, § 3970, where the evidence adduced before the judge trying without a jury was developed ore tenus, or partly so, the findings of the court will not be disturbed unless plainly contrary to the great weight of the evidence, under Gen. Acts 1915, p. 824. *Deal v. Houston County* (Ala.), 78 So. 809.

§ 1013. — **Amount of Recovery.**

In determining the amount of allowances to a receiver, his attorney and the trustee in a deed of trust, a chancellor, when justice so required, could look to the whole record, including the register's report and the evidence taken on the reference, and make such decree as he deemed just in respect to the contested items, and the appellate court has the same right. *Citizens' Light, etc., Co. v. Central Trust Co.* (Ala.), 75 So. 330.

§ 1015. — **Decision on Motion for New Trial.**

In General.—*Southern R. Co. v. Cleveland* (Ala.), 60 So. 799. See the title

APPEAL AND ERROR, § 1015, vol. 1, p. 555.

Judgment granting new trial will not be reversed unless the evidence plainly supports the verdict set aside. *Nashville, etc., Railway v. Crosby*, 194 Ala. 338, 70 So. 7.

An appellate court, in reviewing the grant of a new trial on the ground that verdict was contrary to evidence, will not reverse, unless it is satisfied that the evidence manifestly preponderates for the verdict. *Wood v. Empire Laundry Co.*, 14 Ala. App. 144, 68 So. 584.

The record not showing that the evidence plainly and palpably supported the verdict, despite any infirmities therein which would be obvious only from hearing and seeing the witnesses, the order granting a new trial will not be disturbed. *Peyton v. Lewis*, 10 Ala. App. 360, 64 So. 472.

Statutory Provisions.—Under Acts 1915, p. 722, amending Code 1907, § 2846, providing that, when a motion for a new trial is refused, either party may except and assign error, and giving the appellate court power to grant new trials, that court, in view of the trial court's advantage in having the witnesses before him and the opportunity to observe their demeanor, will not disturb the trial court's ruling unless plainly contrary to the evidence. *Louisville, etc., R. Co. v. Byrd* (Ala.), 73 So. 514.

Regardless of Acts 1915, p. 722, providing that on appeal there is no presumption as to correctness of judgment of trial court on motion for new trial, judgment will not be reversed for insufficiency of evidence although judgment seems against preponderance of evidence. *Veid v. Roberts* (Ala.), 76 So. 934.

Allegations of Motion Denied and No Proof Introduced.—*Yarbrough v. Carter*, 179 Ala. 356, 60 So. 833. See the title APPEAL AND ERROR, § 1015, vol. 1, p. 555.

Conflicting Evidence.—Where the evidence is sharply conflicting, a grant of new trial will not be disturbed. *Austell v. McCampbell* (Ala. App.), 77 So. 238.

In ejectment, where there was a conflict in the evidence as to the defense of

payment of the mortgage debt, through foreclosure of which plaintiff claimed, and defense of adverse possession, the overruling of the motion for new trial after verdict for plaintiff was proper. *Phillips v. Shotts*, 195 Ala. 20, 71 So. 94.

Newly-Discovered Evidence.—*Girardino v. Birmingham, etc., R. Co.*, 179 Ala. 420, 60 So. 871. See the title APPEAL AND ERROR, § 1015, vol. 1, p. 536.

Quotient Verdict — Conflicting Testimony of Jurors.—Where the affidavit supporting motion for new trial strongly showed that the jurors rendered a quotient verdict, but one juror testifying in opposition positively denied an agreement to that effect, the appellate court can not say that the trial court plainly erred in overruling the motion. *Western Union Tel. Co. v. Morrison* (Ala. App.), 74 So. 88.

Denial of a new trial for newly discovered evidence relating to admission made by plaintiff prior to the trial, held not to require a reversal where it appeared that such admission would not necessarily be conclusive against plaintiff. *Hesk v. Ellis* (Ala.), 75 So. 329.

§ 1016. **Findings of Referee, Master, Commissioner or Auditor.**

§ 1017. — **Conclusiveness in General.**

Findings of Register—Force of Verdict.—The findings of a register have the force of a verdict, and should not be disturbed, unless plainly erroneous. *Metcalf v. First State Bank*, 181 Ala. 323, 61 So. 900.

On appeal in suit to enjoin sale of mortgaged property on foreclosure, finding of register will not be disturbed unless plainly wrong. *Luverne Land Co. v. Bank* (Ala.), 75 So. 461.

Finding on Oral Evidence.—Under Code 1907, § 5955, subd. 1, providing that the supreme court shall review the chancellor's decision upon the facts and weigh the evidence, a register's finding on oral examination of witnesses will be presumed correct, on review by the supreme court. *Bidwell v. Johnson*, 195 Ala. 547, 70 So. 685.

Value of Receiver's Services—Inde-

pendent Judgment of Appellate Court.—Although the presumption on appeal is that a register's report is correct, it is competent for the appellate court, in the case of questions as to the value of services rendered by a receiver, his attorney and a trustee in a deed of trust, to exercise its independent judgment and determine the contested items upon consideration of the whole case as developed on the record. *Citizens' Light, etc., Co. v. Central Trust Co. (Ala.)*, 75 So. 330.

When Findings Will Be Disturbed.—On appeal from the chancellor's decree overruling exceptions to the report of a register on matters of account, dependent upon the register's conclusions from the evidence, all reasonable presumptions are indulged to support his rulings, and they will not be disturbed unless shown to be clearly wrong, based on erroneous conclusions of law, on illegal evidence or on manifest error in weighing the testimony. *Gulf Red Cedar Co. v. Crenshaw*, 188 Ala. 606, 65 So. 1010.

§ 1018. — Sufficiency of Evidence in Support.

Where a register's finding has some evidence to support it, it will not be set aside on appeal, unless it is against the preponderance of the evidence. *Gay v. Metcalf*, 189 Ala. 42, 66 So. 668.

§ 1019. — On Conflicting Evidence.

Where the evidence is conflicting, the finding of the register will be given the same weight as the finding of a jury, and will not be disturbed on appeal unless palpably erroneous, or unless it would warrant the judge in setting aside a verdict under the same circumstances. *Gulf Red Cedar Co. v. Crenshaw*, 188 Ala. 606, 65 So. 1010; *O'Kelley v. Clark*, 184 Ala. 391, 63 So. 948.

§ 1022. — Approval or Disapproval of Trial Court.

Approval of Findings.—Findings of fact, on evidence largely *ore tenus*, in report of register, confirmed by chancellor, have force of verdict, and will not be reversed, unless clearly erroneous. *Higdon v. Bradley (Ala.)*, 77 So. 685.

(H) HARMLESS ERROR.

§ 1025. Prejudice to Rights of Party as Ground of Review.

§ 1026. — In General.

Harmless Error No Cause for Reversal.—*Floyd v. State*, 177 Ala. 169, 59 So. 280. See the title APPEAL AND ERROR, § 1026, vol. 1, p. 558.

Where, no matter how many errors may have intervened on the trial, it affirmatively appears that no possible injury could thereby result, the judgment will be affirmed. *De Kalb County v. McClain (Ala.)*, 78 So. 961.

Cure of Rulings Originally Erroneous.

—If rulings were originally erroneous the error was cured where such rulings were subsequently changed so that defendant was given the benefit of everything he sought to obtain through his objections. *Sears v. State*, 10 Ala. App. 76, 65 So. 300.

§ 1027. — Errors Not Affecting Result.

A judgment for defendant will not be reversed for erroneous rulings which neither obstructed the establishment of plaintiff's case nor impaired its weight. *Benson Hdw. Co. v. Wilder Mercantile Co.*, 197 Ala. 703, 73 So. 4.

In detinue by a chattel mortgagee, error in refusing to permit defendant mortgagor to be asked regarding a custom of mortgagee's trade, which could not have affected the result of the litigation, was harmless. *Wertheimer Bag Co. v. Hill*, 14 Ala. App. 623, 71 So. 618.

Other Party Entitled to Affirmative Charge, Regardless of Rulings.—See post, "Errors as Affecting Party Not Entitled to Succeed in any Event," § 1029.

Complainant Not Entitled to Decree in Any Event.—See post, "Errors as Affecting Party Not Entitled to Succeed in Any Event," § 1029.

Rulings Not Affecting Amount of Damages Recoverable.—Where judgment appealed from by plaintiff is for plaintiff, supreme court will not consider as reversible error any rulings merely on naked question of defendant's liability, and not affecting amount of damages recovered. *State v. Montgomery Sav. Bank (Ala.)*, 74 So. 942.

Where, in detinue by a chattel mortgagee based on the failure to pay the debt at maturity, damages were not awarded for detention, the mortgagor could not complain of the failure of the mortgagee to demand possession before bringing suit. *Black v. Slocumb Mule Co.*, 8 Ala. App. 440, 62 So. 308.

Disclaimer in Ejectment—Verdict.—Where defendants in ejectment pleaded not guilty as to part of the land and disclaimed as to the balance, and plaintiff took issue on both, and there was a verdict for him on both issues, defendants can not complain of rulings on the disclaimer; the record showing no judgment against them on that issue. *Swindall v. Ford*, 184 Ala. 137, 63 So. 651.

§ 1028. — Errors in Cases of Decisions Correct on Merits.

Where the undisputed evidence established that judgment for plaintiff was proper, errors in rulings by the trial court were harmless. *Wilson v. Draper*, 9 Ala. App. 585, 63 So. 779.

Other Party Entitled to Affirmative Charge.—See post, "Errors as Affecting Party Not Entitled to Succeed in Any Event," § 1029.

§ 1029. — Errors as Affecting Party Not Entitled to Succeed in Any Event.

General Rule.—*Scoggins v. Atlantic, etc., Cement Co.*, 179 Ala. 213, 60 So. 175; *Key v. Goodall, etc., Co.*, 7 Ala. App. 227, 60 So. 986. See the title APPEAL AND ERROR, § 1029, vol. 1, p. 560.

Judgment will not be reversed for special errors on the trial, if appellant could in no event prevail in the litigation. *Merriweather v. Sayre Min., etc., Co.*, 182 Ala. 665, 62 So. 70.

Where plaintiff in no event could prevail in the litigation, a judgment for defendant will not be reversed because of special errors committed on the trial. *Adams v. Corona Coal, etc., Co.*, 183 Ala. 127, 62 So. 536.

A plaintiff who could not recover under the evidence admitted or offered and excluded is not prejudiced by errors committed at the trial. *Butler-Kyser Mfg. Co. v. Central, etc., R. Co.*, 190 Ala. 646, 67 So. 393; *Christian v. Stith Coal*

Co., 189 Ala. 500, 66 So. 641; *Harris v. Jones*, 195 Ala. 691, 70 So. 640.

Plaintiff Entitled to Affirmative Charge.

—Where plaintiff was entitled to a general charge upon the whole case, no error is prejudicial to defendant. *Western Union Tel. Co. v. Farmers', etc., Bank*, 7 Ala. App. 637, 62 So. 250; *Banks v. Windham*, 7 Ala. App. 616, 62 So. 297.

A judgment for plaintiff would not be reversed for errors occurring at the trial where plaintiff would have been entitled to the affirmative charge had such errors not occurred. *Alexander-City, etc., Co. v. Central, etc., R. Co.*, 182 Ala. 516, 62 So. 745.

Defendant Entitled to Affirmative Charge.—Where defendant was entitled to the general affirmative charge, errors,

if any, otherwise intervening on the trial, were not prejudicial to plaintiff. *Dona-hoo Horse, etc., Co. v. Durick*, 193 Ala. 456, 69 So. 545; *Alabama Red Cedar Co. v. Tennessee Valley Bank (Ala.)*, 76 So. 980.

An error in rulings was harmless, where had they been different defendant would still have been entitled to the general charge. *Travis v. Alabama, etc., R. Co. (Ala.)*, 73 So. 983.

Particular Cases.—In an action for damages from delay in transmitting a telegram, where plaintiff shows no right of recovery, rulings adverse to his contentions held without injury. *McLendon v. Western Union Tel. Co. (Ala. App.)*, 73 So. 120.

Where defendant conceded plaintiff's claim, and failed to establish his counterclaim, any errors during trial which resulted in judgment for plaintiff held harmless. *Crew v. Buckeye Cotton Oil Co. (Ala.)*, 77 So. 23.

§ 1031. Presumption as to Effect of Error.

§ 1031 (2) Pleadings and Rulings Thereon.

Erroneous Construction of Negligence Counts Prejudicial.—Where the trial court erroneously construed counts charging negligence to be counts charging willful and wanton injury, it must be presumed, in the absence of a showing to the contrary, that the error was prej-

udicial. *Central, etc., R. Co. v. Chambers*, 183 Ala. 155, 62 So. 724.

§ 1031 (3) Admission of Evidence.

Illegal Evidence Presumed Considered.

—The jury is entitled to receive the relevant evidence offered by the parties, but the court should not admit any irrelevant or illegal evidence, and where irrelevant evidence offered by a party is admitted it will be assumed that the jurors considered it. *Central, etc., R. Co. v. Teasley*, 187 Ala. 610, 65 So. 981.

Same—Injury Presumed.—Where illegal evidence is allowed to go to the jury against seasonable objection, injury is presumed unless the whole record affirmatively repels such presumption. *Southern Iron, etc., Co. v. Acton*, 8 Ala. App. 502, 62 So. 402.

Where a cause is tried by the court without a jury, the admission of illegal evidence raises the presumption of injury, and requires reversal unless the remaining evidence is without conflict and is sufficient to support the judgment. *Deal v. Houston County (Ala.)*, 78 So. 809.

§ 1031 (6) Instructions.

Refusal of Requested Charge.—*Southern Bitulithic Co. v. Hughston*, 177 Ala. 559, 58 So. 450. See the title APPEAL AND ERROR, § 1031 (6), vol. 1, p. 564.

§ 1032. Burden to Show Prejudice from Error.

§ 1032 (1) In General.

Under rule 45 (175 Ala. xxi, 61 South. ix), in order to require reversal it is not only necessary to show error, but prejudice or injury must also appear. *Knights v. Gillespie*, 14 Ala. App. 493, 71 So. 67.

To succeed the appellant must present a record showing error, and show that such error probably affected his substantial rights. *Walker v. Fletcher (Ala. App.)*, 77 So. 56.

Sustaining Demurrers.—On the appellee rests the burden of showing that error in sustaining a demurrer to a count of complainant did not prejudicially affect plaintiff. *Alabama Fuel, etc., Co. v. Alabama Fidelity, etc., Co.*, 197 Ala. 669, 73 So. 374.

Where the record contains no bill of exceptions, and no charges are set out therein, and the only errors assigned are those in sustaining demurrers to certain special pleas, the showing is insufficient to require reversal, since under supreme court rule 45 (175 Ala. xxi, 61 South. ix) it must appear that the error was probably injurious to defendant. *Wilson v. Owens Horse, etc., Co.*, 14 Ala. App. 467, 70 So. 956.

Overruling Demurrers.—Where the cause is tried on its merits, the burden is on the appellant to show probable prejudice in overruling his demurrers, failing which reversal is prohibited by rule 45 (61 So. ix). *Sovereign Camp, W. O. W. v. Ward (Ala.)*, 78 So. 824.

§ 1032 (3) Instructions.

Abstract Instruction.—The trial court will not be put in error for a charge which, as an abstract statement of the law, was correct, where it was not shown that the party complaining was prejudiced. *Mulder v. Stokes*, 184 Ala. 195, 63 So. 563.

§ 1033. Errors Favorable to Party Complaining.

§ 1033 (1) In General.

An appellant can not complain of error in his favor. *Douglass v. Central, etc., R. Co. (Ala.)*, 78 So. 457; *McLendon v. Rubenstein*, 180 Ala. 615, 61 So. 902; *Vessel v. Seaboard, etc., R. Co.*, 182 Ala. 589, 62 So. 180.

§ 1033 (2) Pleadings and Rulings Thereon.

Striking Out Adversary's Pleading.—A party can not complain on appeal of the striking out of a pleading filed to his pleading. *Drew v. Fort Payne Co.*, 186 Ala. 285, 65 So. 71.

Overruling Demurrer to Complaint.—On plaintiff's appeal, error in overruling a demurrer to the complaint will not be considered. *Thompson v. Alexander City Cotton Mills Co.*, 190 Ala. 184, 67 So. 407.

§ 1033 (3) Rulings as to Evidence.

Admission of Evidence.—*Birmingham R., etc., Co. v. Saxon*, 179 Ala. 136, 59 So. 584. See the title APPEAL AND ERROR, § 1033 (3), vol. 1, p. 566.

In ejectment the admission of evidence tending to show that defendant exercised acts of ownership over the land was harmless as to him. *Phillips v. Shotts*, 195 Ala. 20, 71 So. 94.

In an action by a passenger hurt in alighting, where the carrier contended that she was drunk, it can not complain of the receipt of testimony that the passenger did not know what she was talking about. *Central, etc., R. Co. v. Mathis*, 196 Ala. 32, 71 So. 674.

Admission of Incompetent Evidence.—Defendant can not complain of the admission of incompetent testimony which was favorable to it. *Bullock v. Mason*, 194 Ala. 663, 69 So. 882.

Admission of Hearsay.—Admission of hearsay testimony favorable to appellant is harmless error. *Webb v. Gray*, 181 Ala. 408, 62 So. 194.

Admission of Favorable Answer.—Appellant can not complain of a question where the answer was favorable to him. *Roden Grocery Co. v. Gipson*, 9 Ala. App. 164, 62 So. 388.

In trover for mules, answer to a question that their value was not much because they were unbroken, and not able to work, held favorable to defendants, and they could not assign error on its admission. *Jones v. White*, 189 Ala. 622, 66 So. 605.

The overruling of valid objection to question that was answered favorably to party objecting is not prejudicial error. *Huntsville Knitting Mills v. Butner* (Ala.), 76 So. 54.

Showing that Witness Related to Appellee.—While a party may not be entitled to show that a witness was related to him, the other party can not complain. *Tennessee Coal, etc., R. Co. v. King* (Ala.), 76 So. 982.

Exclusion of Evidence.—Exclusion of evidence which would have tended to establish appellee city's hypothesis of assessable value of appellant's property was not harmful to appellant landowner. *Sloss-Sheffield Steel, etc., Co. v. Birmingham* (Ala.), 78 So. 896.

Rejecting Declaration against Complainant's Interest.—The error, if any, in rejecting evidence amounting to a declaration against interest of a party, is

not prejudicial to him. *Potter v. Shauf*, 187 Ala. 128, 65 So. 778.

§ 1033 (4) **Submission of Issues or Questions to Jury.**

§ 1033 (5) **Instructions in General.**

Explanation of Charge Given.—Defendants could not complain of explanation by court of his given charge, which was not a qualification thereof, and possibly more favorable to defendants than they could have asked. *Greenwood Café v. Lovinggood*, 197 Ala. 34, 72 So. 354.

Directing Amount of Verdict.—In view of Code 1907, § 4273, fixing the damages for the unlawful detention of land at double the amount of the annual rent agreed upon by the parties, the defendant in unlawful detainer action can not complain that the court instructed the jury to find \$100 for the detention, where the agreed annual rent was \$100, and the jury found less than double the same. *Archer v. Sibley* (Ala.), 78 So. 849.

Particular Instances.—Where the complaint in an action for injuries to a child struck by a street car alleged wanton negligence or willful injury, an instruction that plaintiff did not contend that the servants of the street railway company intentionally injured plaintiff was favorable to the company. *Sheffield Co. v. Harris*, 183 Ala. 357, 61 So. 88.

In detinue to recover mules, both parties claiming solely as mortgagees, where charge requested by defendant required higher degree of proof from him was legally necessary, error in giving it was harmless as to plaintiff. *Neely v. Reynolds*, 196 Ala. 581, 72 So. 124.

In action for breach of covenant of seisin, instructions held too favorable to the grantor by hypothesizing needless facts, as the grantor was bound in law by the description in the deed and the number of acres sold. *Garner v. Morris*, 187 Ala. 658, 65 So. 1000.

In an employee's action for injuries caused by a wheel running off of a car, the court told the jury that it had already charged them that if they found from the evidence that the car was defective, and that such defect arose from or was not discovered or remedied owing to the negligence of defendant or

some person in its service intrusted with that duty, they might infer negligence in that fact, if it was a fact, and that the court had also charged them that the mere fact that the wheel that struck plaintiff came off of one of defendant's cars which was being operated by defendant in its mines, would not, in itself without more, authorize the jury to infer that defendant was negligent. Held, that such instruction, if faulty at all, was faulty because it was too favorable to defendant, in that it merely authorized the jury to infer negligence from facts which authorized them to fasten negligence on defendant. *Sloss-Sheffield Co. v. Ross* (Ala.), 77 So. 686.

§ 1033 (6) Rulings on Requests for Instructions.

Where plaintiff's requested instruction, hypothesizing a fact favorable to him, stated "that if you believe from the evidence," instead of "if you are reasonably satisfied from the evidence," any error was harmless to defendant, since, if there is a difference in the quoted terms, the one used requires a greater degree of belief or conviction than the words "reasonably satisfied." *Farmers', etc., Bank v. Hollind* (Ala.), 76 So. 287.

§ 1033 (7) Verdict, Findings, or Judgment in General.

Judgment.—The entry of a judgment in favor of plaintiff for the amount of a verdict rendered in favor of defendant on his counterclaim could not be complained of by plaintiff. *Tilley v. Bartow*, 8 Ala. App. 639, 62 So. 330.

§ 1033 (8) In Form of Recovery or Extent of Relief in General.

Cancellation of Interest with Payments Shown.—In action on note, where it appeared that at least principal of the debt evidenced by note was due and unpaid, it can not be held reversible error prejudicial to defendant that trial court allowed payments shown to cancel claim for interest. *Wade v. Killen* (Ala.), 75 So. 970.

Error in allowing attorney's fees for foreclosing a mortgage, in an action brought by the mortgagor as for money had and received to recover the excess

of the mortgagee's bid above the sum to which mortgagee was entitled, was not reversible on the mortgagee's appeal, being favorable to him. *Perry v. Seals*, 186 Ala. 514, 65 So. 151.

§ 1038. Pleading.

§ 1039. — In General.

§ 1039 (1) In General.

Where defendant had the benefit of all meritorious defenses, rulings on the pleadings were not prejudicial. *Staples v. City Bank, etc., Co.*, 194 Ala. 687, 70 So. 115.

Limiting Claim to General Statement—Theory Fully Presented.—Error in limiting one's pleading of his claim to a general statement was harmless; he being allowed to fully present his theory of the facts on the trial. *Schrader Co. v. Bailey Grocery Co.* (Ala. App.), 74 So. 749.

Where the pleadings as a whole disclosed a lack of right in plaintiffs to maintain the action, they were not prejudiced by any rulings made on the pleadings. *Minge & Co. v. Barrett Bros. Shipping Co.*, 10 Ala. App. 592, 65 So. 671.

Evidence Showing No Right of Action.

—The evidence in a servant's action for injury showing, without dispute, that his act in knowingly and deliberately removing the support of a stone, in mining the coal under it, caused his injury, no negligence of the master contributing, any error in rulings on pleadings was not prejudicial to plaintiff. *Merriweather v. Sayre Min., etc., Co.*, 182 Ala. 665, 62 So. 70.

Where a note and mortgage were void, errors, in an action thereon, in rulings on the pleadings, are harmless to plaintiff. *Hartsell v. Roberts*, 185 Ala. 201, 64 So. 90.

Overruling Oral Demurrers and Denying Time for Written Pleas.—In a lessee's action for damages for lessor's breach of covenant to maintain premises in repair, the action of the court in refusing defendant time to prepare demurrers, and in overruling them when orally stated, and in denying time to prepare written pleas compelling defendant to plead in short by consent, while

irregular, held not injurious to defendant; he not having shown diligence in preparing pleadings and having had every advantage he could have had if the pleadings had been written out in full. *Kelley Realty Co. v. Botsford* (Ala.), 78 So. 860.

Reversal on Other Grounds.—*State v. Phil Campbell*, 177 Ala. 204, 58 So. 905. See the title APPEAL AND ERROR, § 1039 (1), vol. 1, p. 570.

§ 1039 (2) Declaration, Complaint, Petition, or Bill, and Rulings Thereon in General.

Counts Subsequently Eliminated by Plaintiff.—The elimination by plaintiff of counts of a complaint rendered harmless any errors committed in rulings as to such counts. *Age-Herald Pub. Co. v. Waterman*, 188 Ala. 272, 66 So. 16.

Construction of Counts—Issues Submitted—Verdict.—Where the court submitted to the jury the question of wanton injury with a charge that contributory negligence was no answer thereto, and the verdict was such as to indicate that punitive damages were awarded, the record shows that the error in construing a count charging simple negligence as one charging wanton injury was prejudicial. *Central, etc., R. Co. v. Chambers*, 183 Ala. 155, 62 So. 724.

Omitted Allegations in Complaint—Proof Required by Instructions.—Under Practice Rule No. 45 a judgment can not be reversed because of omitted allegations in the complaint, where the instructions specifically required proof thereof. *Best Park, etc., Co. v. Rollins*, 192 Ala. 534, 68 So. 417.

Suits to Cancel Mortgage—Failure to Allege Misdescription.—In a suit to cancel a mortgage as executed by wife to secure husband's debt in violation of Code, § 4497, which contained an admitted mistake in describing the land as being in lot 22 instead of lot 32, in which the bill correctly described the land, as the proof otherwise establishes complainant's right to lot 32, the failure of the bill to allege the misdescription in the mortgage did not constitute reversible error. *Cudd v. Reynolds* (Ala.), 73 So. 373.

Sustaining Pleas to Counts Unsupported by Evidence.—Error in sustaining pleas to counts charging negligence by the defendant subsequent to plaintiff's contributory negligence is harmless, where there was no evidence to support those counts. *Hilton v. Birmingham R., etc., Co.*, 192 Ala. 474, 68 So. 343.

Effect of Trial—Cure by Verdict.—In a broker's action for a commission, where the verdict in his favor was rested upon the common counts, an erroneous ruling as to a count upon a written contract was without injury. *Kellar v. Jones*, 196 Ala. 417, 72 So. 89.

§ 1039 (5) Plea, Answer, and Cross-Complaint, and Rulings Thereon.

Plea of Usury—Interest Eliminated.—Whether a plea of usury was sufficient or not was immaterial where the interest was eliminated and all payments credited on the principal of the debt. *McCall v. Hall*, 182 Ala. 191, 62 So. 68.

No Cross-Bill Filed—Affirmative Relief Granted.—Where cross-bill could serve no efficient purpose, cause will not be reversed for failure to file cross-bill, where decree gave affirmative relief desired. *Farmers' State Bank v. Kirkland* (Ala.), 75 So. 894.

Effect of Trial—Failure to Establish Right.—Assuming that ruling on pleas was erroneous, plaintiff would not be prejudiced, where he failed to establish his cause of action. *Clark v. Choctaw Min. Co.* (Ala.), 78 So. 372.

§ 1039 (7) Special Pleadings.

Defenses Available under General Issue and Other Pleas.—Where the trial of an action for death under the Employers' Liability Act was had on a general issue and upon pleas of assumption of risk and of contributory negligence pleaded by consent, and under which any defenses were availing on the same degree of proof as would have availed under the special pleas, error, if any, in the rulings on the special pleas was harmless. *Citizens' Light, etc., Co. v. Lee*, 182 Ala. 561, 62 So. 199.

No Cure by Act of Opposing Counsel.—On appeal in suit, under Code 1907, §

4295, to have mortgage declared a general assignment, no act of counsel for complainants, not consented to by respondents, after appeal taken, can cure trial court's error in holding insufficient respondents' special plea for stay for pendency of bankruptcy proceedings, or give cause for dismissing appeal. *Anders Bros. v. Latimer* (Ala.), 73 So. 925.

§ 1039 (11) Replication or Reply.

Facts Admissible under Issues Made by Pleas.—Where the facts set up by replication were admissible under the issues made by the pleas, there was no reversible error in allowing their unnecessary reiteration in the form of replications. *Buck Creek Lumber Co. v. Nelson*, 188 Ala. 243, 66 So. 476.

Defendant can not complain that plaintiff was permitted in replication to set up subsequent negligence, which could have been proven without replication. *Gardiner v. Solomon* (Ala.), 75 So. 621.

§ 1039 (13) Variance.

Variance between pleading and proof as to ownership of land on which mortgaged crops were grown is not reversible error, where complainants' rights were based on their interest in the crops and not in the land, and where appellants were not surprised by such variance. *Butler & Co. v. Henry & Co.* (Ala.), 78 So. 912.

§ 1040. — Demurrers or Exceptions.

§ 1040 (1) In General.

Sustaining demurrers to defendant's rejoinders is not reversible error; the facts there set up, if available, being provable under his general rejoinder. *Neill v. Central Nat. Bank* (Ala.), 78 So. 73.

Sustaining of demurrers to special rejoinders which were no more than pleas of the general issue and set up matters provable under the general issue held not prejudicial. *Sample v. Tennessee Valley Bank* (Ala.), 76 So. 936.

Overruling Demurrer to Deficient Motion—Trial on Merits.—Although a motion to set aside a sale of movant's land under an execution for court costs was technically deficient for not showing the grossness of the price inadequacy com-

plained of, by averring the value of the property sold, the overruling of a demurrer thereto was not prejudicial error, where the motion was tried on its merits. *Danforth v. Burchfield* (Ala.), 78 So. 904.

§ 1040 (3) Sustaining Demurrer to Declaration, Petition or Complaint.

Evidence Showing No Recovery under Count Possible.—Where the evidence showed that there could have been no recovery under a count of the complaint, the erroneous sustaining of a demurrer thereto was harmless. *Wilkinson v. Birmingham*, 193 Ala. 139, 68 So. 999.

Benefit of Averments Received under Amended Complaint.—Plaintiff was not prejudiced by the sustaining of demurrers to counts of his original complaint where his amended complaint contained every averment of the original complaint and entailed no additional burden on him in presenting his case for trial. *McNeil v. Munson S. S. Line*, 8 Ala. App. 610, 62 So. 459, judgment reversed for error in giving affirmative charges in 184 Ala. 420, 63 So. 992.

§ 1040 (4) Sustaining Demurrer to Part of Declaration, Petition or Complaint.

Same Question Presented by Other Counts.—*Scoggins v. Atlantic, etc., Cement Co.*, 179 Ala. 213, 60 So. 175; *Black v. Smith, etc., Co.*, 179 Ala. 397, 60 So. 154. See the title APPEAL AND ERROR, § 1040 (4), vol. 1, p. 574.

The improper sustaining of a demurrer to counts of a complaint is harmless, where the plaintiff had the benefit of the same matters under other counts. *Walker v. Alabama, etc., Railway*, 194 Ala. 360, 70 So. 125; *Pencé v. Mutual Ben. Life Ins. Co.*, 180 Ala. 583, 61 So. 817; *Ex parte Bricken*, 194 Ala. 148, 69 So. 425; *Liverett v. Nashville, etc., Railway*, 186 Ala. 111, 65 So. 54; *Rothrock v. Alabama, etc., R. Co.* (Ala.), 78 So. 84.

Sustaining a demurrer to several counts of a complaint is not prejudicial to plaintiff where the resulting amendment did not materially change the complaint, and the original counts were insufficient. *North Ontario Packing Co. v. Napier-McCall Co.* (Ala.), 75 So. 143.

Particular Instances.—Sustaining of demurrer to counts for conversion held not prejudicial to plaintiff because under a count as to which a demurrer was overruled he had the benefit of the claims based upon the conversion alleged in the counts as to which the demurrer was sustained. *McAdams & Co. v. Smith*, 8 Ala. App. 515, 62 So. 1000.

The overruling of demurrers to complaint in an action against a carrier for damages caused by an illegal search held harmless where other counts of the complaint were sufficient and the instructions properly applied the law. *Nashville, etc., Railway v. Crosby*, 183 Ala. 237, 62 So. 889.

In a personal injury action by a servant, where the case was submitted on two counts, one alleging defective appliances and the other the negligence of the master's superintendent, and the count alleging the superintendent's negligence was insufficient, the overruling of a demurrer thereto can not be held harmless in view of the verdict; there being no showing that the issues raised by the improper count were in any way eliminated. *Woodward Iron Co. v. Marbut*, 183 Ala. 310, 62 So. 804.

In an action for personal injuries, it is harmless error to sustain demurrer to certain counts in the complaint, where by amended counts plaintiff had the same issues submitted to the jury. *Wilson v. Gulf States Steel Co.*, 194 Ala. 311, 69 So. 921.

Same Evidence Admissible — Other Counts.—Action of court in sustaining demurrer to proper count of complaint held harmless, where other counts to which demurrers were overruled permitted the introduction of all the evidence which might have been introduced under it. *Bricken v. Sikes*, 14 Ala. App. 187, 68 So. 801, certiorari denied in *Ex parte Bricken*, 194 Ala. 148, 69 So. 425; *Anderson v. Robinson*, 182 Ala. 615, 62 So. 512.

Error Rendered Harmless by Verdict.—Where the jury by their verdict found that plaintiff took nothing except under the first and second counts, erroneous rulings by the court on demurrers to the other counts are harmless. *Greek-Amer-*

ican Produce Co. v. Pappas, 9 Ala. App. 311, 63 So. 799.

The sustaining of a demurrer to one count of a complaint held harmless, in view of the determination of the jury as to the other count. *Kimbrell v. Louisville, etc., R. Co.*, 191 Ala. 392, 67 So. 583.

Evidence Inadmissible under Remaining Counts.—*Bieker v. Cullman*, 178 Ala. 662, 59 So. 625. See the title APPEAL AND ERROR, § 1040 (4), vol. 1, p. 574.

Count Containing Averments Not in Other Counts.—*Appel v. Selma Street, etc., R. Co.*, 177 Ala. 457, 59 So. 164. See the title APPEAL AND ERROR, § 1040 (4), vol. 1, p. 574.

Error Not Cured by Proving Allegations of Another Count.—*Quinn v. Pratt Consol. Coal Co.*, 177 Ala. 434, 59 So. 49. See the title APPEAL AND ERROR, § 1040 (4), vol. 1, p. 574.

Additional Burden of Proof Placed on Plaintiff.—Error in sustaining a demurrer to a count of the complaint alleging a balance due, at the termination of a contract of agency, at invoice prices for coal shipped to an agent, is not rendered harmless by the fact that the plaintiff had the benefit of counts alleging that the plaintiff had shipped to the agent specific quantities of coal which remained on hand and specific quantities which had been sold and for which the agent had not accounted, since the burden was thereby placed on plaintiff of proving the amount of the sales by the agent. *Alabama Fuel, etc., Co. v. Alabama Fidelity, etc., Co.*, 197 Ala. 669, 73 So. 374.

§ 1040 (6) Sustaining Demurrer or Exceptions to Plea or Answer.

Matters Available under General Issue.

—The error, if any, in sustaining demurrers to special pleas, is not prejudicial where the defendant has the benefit of the defenses under the general issue or general denial. *Baker v. Lehman, etc., Co.*, 186 Ala. 493, 65 So. 321; *American Workmen v. James*, 14 Ala. App. 477, 70 So. 976; *Western Union Tel. Co. v. Sledge*, 7 Ala. App. 650, 62 So. 390; *Tallapoosa County Bank v. Salmon*, 12 Ala. App. 589, 68 So. 542; *Strain v. Irwin*, 195 Ala. 414, 70 So. 734; *Corry v.*

Sylvia y Cia, 192 Ala. 550, 68 So. 891; *Parker v. Law & Sons*, 194 Ala. 693, 69 So. 879; *Tillis v. Smith Sons Lumber Co.*, 188 Ala. 122, 65 So. 1015; *Connors-Weyman Steel Co. v. Kilgore*, 189 Ala. 643, 66 So. 609; *Padgett v. Gulfport Fertilizer Co.*, 11 Ala. App. 366, 66 So. 866; *Sloss-Sheffield Steel, etc., Co. v. Smith*, 185 Ala. 607, 64 So. 337; *Woodward Iron Co. v. Finley*, 189 Ala. 634, 66 So. 587; *Tri-City Gas Co. v. Connelly Boiler Works*, 8 Ala. App. 650, 62 So. 333; *Louisville, etc., R. Co. v. Turney*, 183 Ala. 398, 62 So. 885; *Maybank v. Lumpkin*, 189 Ala. 559, 66 So. 584; *Central, etc., R. Co. v. Campbell*, 10 Ala. App. 288, 64 So. 540; *Camp Transfer, etc., Co. v. Bonham*, 10 Ala. App. 258, 64 So. 649; *Louisville, etc., R. Co. v. Mason*, 10 Ala. App. 263, 64 So. 154; *Southern R. Co. v. Hayes*, 183 Ala. 465, 62 So. 874; *Barney Coal Co. v. Davis*, 9 Ala. App. 235, 62 So. 985.

Particular Instances.—In an action on an oral agreement modifying a written contract, a plea alleging fraud in the procurement of the written agreement, and denying the making of the oral agreement, amounted to no more than the general issue, and its elimination was not prejudicial. *Hoffman v. Moreman*, 184 Ala. 220, 63 So. 942.

Where a written contract for the sale of peach trees was admitted in evidence under the general issue, defendant held not prejudiced by the sustaining of a demurrer to a plea alleging that the contract required delivery by a specified date, and, plaintiff not having complied, defendant refused to receive the trees. *Copeland v. Union Nursery Co.*, 187 Ala. 148, 65 So. 834.

Where plaintiff in an action of trover was not entitled to recover as against defendants' plea of general issue, rulings on demurrers to special pleas, if erroneous, were harmless. *Smith v. Davenport & Co.*, 12 Ala. App. 456, 68 So. 545.

The defendant in an action of trover can not complain of error in sustaining a demurrer to a plea where the general issue was joined, since in trover that plea puts in issue every matter which might be pleaded in bar except a release. *Stamps v. Thomas*, 7 Ala. App. 622, 62 So. 314.

In a servant's action for compensation after wrongful discharge, where matter of reduction of recovery on account of the possibility of having obtained other employment was litigated under general issue, error in sustaining demurrer to plea setting up such matter was harmless. *People's Shoe Co. v. Skally*, 196 Ala. 349, 71 So. 719.

In an action against a street railway for injuries caused by tripping over a projecting rail, the fact that defendant was repairing the street as required by ordinance and the obstruction was unavoidable, being admissible under the general issue also pleaded, sustaining a demurrer to the plea thereof, was harmless. *Birmingham R., etc., Co. v. Donaldson*, 14 Ala. App. 160, 68 So. 596.

In a father's action for injuries to his son, it was harmless error to sustain demurrers to pleas setting up plaintiff's negligence, where the facts available in defense were available under the general issue. *Huntsville Knitting Mills Co. v. Butner*, 194 Ala. 317, 69 So. 960.

Matters Not Available under General Issue.—Where defendant offered no evidence, the erroneous sustaining of a demurrer to special pleas, of which he could not have the benefit under the general issue, is reversible error. *George v. Roberts*, 186 Ala. 521, 65 So. 345.

Pleas Not Supported by Proof.—Where the evidence shows that a plea could not have been established, error in sustaining demurrer thereto was harmless. *McCarver v. Griffin*, 194 Ala. 634, 69 So. 920.

In an action for wrongful death, the overruling of a demurrer to defendant's special pleas setting up subsequent or concurrent contributory negligence, if error, was harmless, where there was no proof thereof, and the verdict could not have been predicated thereon. *Hoffman v. Birmingham R., etc., Co.*, 194 Ala. 30, 69 So. 551.

Pleas Not Available as Defense to Count.—In action against street railway for injuries in collision, where railway's special pleas of contributory negligence, eliminated on demurrer, were not available in defense of count for subsequent negligence, ruling on demurrers was

harmless to railroad. Alabama City, etc., R. Co. v. Lee (Ala.), 76 So. 908.

Ruling Harmless in View of Allegations in Counts.—Sustaining demurrers to pleas asserting right of defendants peaceably to retake property upon plaintiff's default in payment held not prejudicial error, where the counts to which such pleas were addressed averred facts negating a peaceable retaking. Crews v. Parker, 192 Ala. 383, 68 So. 287.

Plea of Implied Warranty—Express Warranty Proved.—Any error in overruling demurrers to pleas of implied warranty of quality is harmless; express warranties pleaded being proven. Grasselli Chemical Co. v. City Ice Co. (Ala.), 75 So. 920.

Special Plea—Nonsuit Suffered—Prejudice.—The ruling in sustaining demurrers to special pleas in confession and avoidance pleaded with the general issue reserved for review by suffering a nonsuit under Code 1907, § 3017, is not error without injury. Bush v. Russell, 180 Ala. 590, 61 So. 373.

Demurrer Not Specifying Defect—Plea Amendable—Prejudice.—Where a demurrer which failed to point out the only defect in a plea of recoupment was improperly sustained, the error can not be considered harmless, because the appellate court can not assume that the plea, even though before amended, was not capable of further amendment avoiding the defect. Central Lumber, etc., Co. v. McClure Lumber Co., 180 Ala. 606, 61 So. 821.

Amended Plea Not Presenting Same Issues—Variance—Prejudice.—Where the issues under the plea as amended a second time were not identical with those as originally amended, the improper sustaining of a demurrer can not be held harmless error because there was a variance or failure of proof upon the evidence taken under the issues made by the plea as first amended. Central Lumber, etc., Co. v. McClure Lumber Co., 180 Ala. 606, 61 So. 821.

Evidence Showing Variance from Complaint.—In a personal injury action, where the evidence constituted a fatal variance from the complaint, errors based on rulings upon demurrers to the pleas

and the giving of special charges are harmless. Newberry v. Atkinson, 184 Ala. 567, 64 So. 46.

Where General Charge for Defendant Authorized as to Counts Pleaded to.—

In action against street railway company for collision damages, rulings upon appellant's demurrer to defendant's special pleas as applicable to counts charging subsequent negligence and willful or wanton negligence, if erroneous, were without injury where, on the evidence, the general charge for defendant on such counts was authorized. Hambright v. Birmingham R., etc., Co. (Ala.), 77 So. 702.

Ruling Not Rendered Harmless by Instructions.—Sustaining a demurrer to valid plea of defendant employer to count of servant suing for injuries under Employers' Liability Act (Code 1907, § 3910, subd. 1) held not rendered harmless by instructions that plaintiff must recover, if at all, only for the negligence of a superintendent. Warrior River Coal Co. v. Thompson, 193 Ala. 639, 69 So. 76.

Ruling Cured by Verdict.—The elimination of a special plea, asking attorney's fees as special damages for ejection of a passenger, is harmless, where the jury found for defendant. Kimbrell v. Louisville, etc., R. Co., 191 Ala. 392, 67 So. 586.

Rulings Held Prejudicial.—Error in sustaining demurrer to plea presenting a good defense in an action on notes was harmful. Tatum v. Commercial Bank, etc., Co., 193 Ala. 120, 69 So. 508.

Where a miner was injured by a fall of rock, and the evidence showed that it was caused either by a defect in the props of the track or a defect in a car which struck a prop, the sustaining of a demurrer to the master's plea setting up the miner's failure to promptly notify it of the defect in the track can not be held harmless. Sloss-Sheffield Steel, etc., Co. v. Webster, 183 Ala. 322, 62 So. 764.

§ 1040 (7) Sustaining Demurrer to Part of Several Pleas or Part of Answer.

Receiving Benefit under General Issue.

—See ante, "Sustaining Demurrer or Exceptions to Plea or Answer," § 1040 (6).

Receiving Benefit under Other Pleadings.—Birmingham R., etc., Co. v. Simp-

son, 177 Ala. 475, 59 So. 213; Louisville, etc., R. Co. v. Dilburn, 178 Ala. 600, 59 So. 438; Empire Life Ins. Co. v. Gee, 178 Ala. 492, 60 So. 90; Southern R. Co. v. Foster, 7 Ala. App. 487, 60 So. 993. See the title APPEAL AND ERROR, § 1040 (7), vol. 1, p. 577.

Sustaining of demurrers to certain pleas is rendered harmless by overruling demurrers to other pleas giving defendant benefit of everything in pleas to which demurrers were sustained; the same evidence being admissible under the remaining pleas. *Southern Indemnity Ass'n v. Hoffman* (Ala. App.), 77 So. 424; *Twin Tree Lumber Co. v. Day*, 181 Ala. 565, 61 So. 914; *Vogler v. Manson* (Ala.), 76 So. 117; *Birmingham R., etc., Co. v. Johnson*, 183 Ala. 352, 61 So. 79; *Stadt v. State*, 13 Ala. App. 275, 62 So. 254; *National Life Ins. Co. v. Hedgcoth* (Ala. App.), 77 So. 422; *United States Health, etc., Ins. Co. v. Goin*, 197 Ala. 584, 73 So. 117; *Louisville, etc., R. Co. v. Turney*, 183 Ala. 398, 62 So. 885; *Birmingham R., etc., Co. v. Donaldson*, 14 Ala. App. 160, 68 So. 596; *Southern R. Co. v. Hayes*, 194 Ala. 194, 69 So. 641; *Eminent Household v. Gallant*, 194 Ala. 680, 69 So. 884; *Mutual Life Ins. Co. v. Witte*, 190 Ala. 327, 67 So. 263; *Massachusetts Mut. Life Ins. Co. v. Crenshaw*, 186 Ala. 460, 65 So. 65; *Eason Drug Co. v. Montgomery Showcase Co.*, 186 Ala. 454, 65 So. 345; *Sloss-Sheffield Steel, etc., Co. v. Reid*, 184 Ala. 647, 64 So. 334; *Sovereign Camp v. Jones*, 11 Ala. App. 433, 66 So. 834; *Hagin v. Shoaf*, 9 Ala. App. 300, 63 So. 764, certiorari denied in *Ex parte Shoaf*, 186 Ala. 394, 64 So. 615; *Central, etc., R. Co. v. Broda*, 190 Ala. 266, 67 So. 437; *United States Health, etc., Ins. Co. v. Hill*, 9 Ala. App. 222, 62 So. 934; *Mobile, etc., R. Co. v. Burch*, 12 Ala. App. 421, 68 So. 509; *Jones v. Dunn Hdw. Co.*, 192 Ala. 95, 68 So. 811; *Birmingham R., etc., Co. v. Ayer*, 192 Ala. 593, 69 So. 56; *Ewart Lumber Co. v. American Cement Plaster Co.*, 9 Ala. App. 152, 62 So. 560; *Long-Lewis Hdw. Co. v. Ewing*, 8 Ala. App. 657, 62 So. 341; *S. C.*, 13 Ala. App. 435, 68 So. 794; *Western Assur. Co. v. Hann* (Ala.), 78 So. 232.

Sustaining demurrers to special pleas

was harmless error, where all the evidence which could have been offered under them was admitted, and where the court charged that plaintiff could not recover if facts set up in such pleas existed. *Wheat v. Union Springs Guano Co.*, 195 Ala. 180, 70 So. 631.

Where Defendant Entitled to Judgment if Any Plea Good.—Where, under the pleadings, any one of defendant's special pleas filed to the complaint, if found good, would entitle defendant to judgment, any error of the court on other pleadings was error without injury. *Hertz v. Montgomery Journal Pub. Co.*, 9 Ala. App. 178, 62 So. 564.

Sustaining demurrer to a plea of general issue was not prejudicial to defendant, where the general issue was otherwise pleaded. *Western Union Tel. Co. v. Hughston*, 191 Ala. 424, 67 So. 670.

Particular Instances.—In an action against a railroad for personal injury, any error in sustaining demurrers to defendant's pleas held not injurious, where the demurrer to other pleas setting up the same defense was overruled. *Central, etc., R. Co. v. Chambers*, 194 Ala. 152, 69 So. 518.

In action on guaranty given as collateral to mortgage, rejection of plea held harmless, as the same defense might have been made under the plea upon which the case went to the jury. *Norvell v. Gilreath*, 189 Ala. 452, 66 So. 635.

In an action on a note, error in sustaining a demurrer to defendant's plea setting up failure of consideration was not rendered harmless because the demurrer was overruled as to one plea which also contained the averment as to failure of consideration; such plea being broader than the others. *Tatum v. Commercial Bank, etc., Co.*, 185 Ala. 241, 64 So. 561.

In motorman's action for injury by collision, defendant, under plea of his failure to stop the car until too late, held to receive full advantage of subsequent pleas of violation of rule and as to speed of car, to which demurrers were sustained. *Birmingham R., etc., Co. v. Colbert*, 190 Ala. 229, 67 So. 513.

Error, if any, in sustaining a demurrer

to pleas setting up the defense of contributory negligence was harmless, where by other pleas the defense was presented in as favorable a light as possible. *Cedar Creek Store Co. v. Steadham*, 187 Ala. 622, 65 So. 984.

Sustaining demurrers to pleas of contributory negligence was not reversible error, where defendant received under another plea the benefit of the legal effect of the pleas demurred to. *Birmingham v. Muller*, 197 Ala. 554, 73 So. 30.

Sustaining a demurrer to a plea of justification was harmless it being substantially the same as another, not supported by evidence, and it not appearing how the ruling could have deterred defendant from any proof he had of the other. *Empire Improv. Co. v. Lynch*, 181 Ala. 473, 62 So. 16.

In action for slander, where defendant, under special plea, had benefit of defense of privilege, erroneous rulings on demurrers to other pleas setting up defense were without injury to him. *Donaldson v. Roberson* (Ala. App.), 73 So. 223.

Where Issue Contested and Evidence Taken.—Sustaining demurrers to portions of an answer and cross-bill, alleging the lessors' waiver of their right to cancel the lease for nonpayment of rent, is not prejudicial error, where this defense was a contested issue on which evidence was taken. *Eagle Coal Co. v. Gravlee*, 196 Ala. 188, 72 So. 30.

Benefit Not Received under Other Pleas.—In an action on a note given for the price of land, error in sustaining, as against defendant's plea setting up that consideration had failed, in that plaintiff had no title and failed to deliver possession, demurrer invoking the doctrine that the purchaser can not resist an action at law on a note given for the purchase money so long as he remains in possession under the contract, was not harmless to defendant on the ground that under another plea, alleging that the note sued on was without consideration, defendant, had he gone to trial on the facts, would have had the full benefit of all evidence under the plea demurrer to which was sustained. *Gidley v. Gidley* (Ala.), 78 So. 861.

§ 1040 (8) Sustaining Demurrer to Replication or Reply.

Matters Available under Other Replications.—The sustaining of demurrers to special replications was not prejudicial, where the matters therein set up were available under a replication to which no demurrer was sustained. *Moore v. Whitmire*, 189 Ala. 615, 66 So. 601.

Where plaintiff's special replications merely traversed some of the averments of the plea, and the facts averred were admissible under the general traverse of the general replication, the sustaining of demurrers to such special replications was not prejudicial error. *Clancy v. Taylor*, 12 Ala. App. 557, 68 So. 522.

Replications Constituting Mere Denials of Pleas.—It was not prejudicial error to eliminate by demurrer replications invoking the principle that a separate demand against one plaintiff can not be set off against a joint demand, which were in effect mere denials of pleas predicated upon claims against the plaintiffs jointly. *McRight v. Farned* (Ala.), 76 So. 975.

Where Another Plea Constituted Complete Answer to Complaint.—Error, if any, in sustaining a demurrer to a replication as to one plea, was harmless where the undisputed evidence sustained another plea constituting a complete answer to the complaint. *Whitehead v. Coker* (Ala. App.), 76 So. 484.

Question Contested and Evidence Taken.—Sustaining demurrer to replication was harmless to plaintiff, where question to which replication was addressed was fully contested in evidence, without any objection that evidence was without issues. *Davis v. Findley* (Ala.), 78 So. 869.

Issue Joined on Pleas—Failure of Proof.—The overruling of demurrers to special replications to pleas by way of set-off was not prejudicial, where issue was joined on the pleas, but defendant failed to prove them. *Jones v. Dunn Hdw. Co.*, 192 Ala. 95, 68 So. 811.

Cure by Trial of Issue and Instruction.—In a landlord's action for rent, where the parties tried the case on the theory that it was an issue whether the rent was reduced in lieu of plaintiff's obligation to repair, and an instruction on the point

was given, plaintiff could not complain that the issue was eliminated by the ruling of the court on demurrers; any error in the ruling being cured by the charge. *Buerger v. Mabry* (Ala. App.), 73 So. 135.

Plea of Statute of Frauds—Evidence Showing Statute Inapplicable.—Where a reply setting up the statute of frauds was erroneously eliminated by demurrer, it was not prejudicial where the evidence showed the statute was not applicable. *McRight v. Farned* (Ala.), 76 So. 975.

§ 1040 (9) Error in Sustaining Demurrer Cured by Amendment.

Amended Complaint.—See ante, "Sustaining Demurrer to Declaration, Petition or Complaint," § 1040 (3).

Amended Special Plea.—Defendant can not predicate reversible error upon court's sustaining demurrer to his special plea before amendment, where demurrer was overruled after amendment which placed no additional burden on defendant. *Gardiner v. Solomon* (Ala.), 75 So. 621.

§ 1040 (10) Overruling Demurrer or Exceptions to Declaration, Petition, Complaint or Bill.

See post, "Overruling Demurrer or Exception to Part of Declaration, Petition or Complaint," § 1040 (11).

Surplus Allegations as to Attorney's Fees.—*Smith v. Witcher*, 180 Ala. 102, 60 So. 391. See the title APPEAL AND ERROR, § 1040 (10), vol. 1, p. 580.

Error Cured by Decree Granting Relief.—On a bill to foreclose a mortgage and to enforce a vendor's lien, the chancellor's error in overruling a demurrer on the ground that the bill was solely to foreclose the mortgage held harmless, where the final decree established the mortgage and upon the evidence properly granted relief by foreclosure. *Hunter v. Taylor*, 189 Ala. 104, 66 So. 671.

Harmless Error.—In an action for personal injuries caused by defendant's automobile, where a verdict of \$250 was given on count of simple negligence, and punitive damages were not awarded, error in overruling a demurrer to a count on willful and wanton injury by a servant, which did not allege that it was done

in the course of his employment, was harmless. *Morrison v. Clark*, 196 Ala. 670, 72 So. 305.

Prejudicial Error.—In action against receiver of railroad for maintaining a nuisance, action of trial court, in overruling demurrer to complaint on ground that it failed to allege the defendant had any notice or knowledge of the nuisance, or had been requested to abate it, was not harmless error. *Lamb v. Roberts*, 196 Ala. 679, 72 So. 309.

§ 1040 (11) Overruling Demurrer or Exception to Part of Declaration, Petition or Complaint.

Affirmative Charge for Defendant on Counts Involved.—Where the court subsequently gave the affirmative charge for defendant as to each of several counts to which demurrer had been interposed and overruled, the overruling of such demurrers was harmless. *Hancock v. State*, 14 Ala. App. 91, 71 So. 973.

The error, if any, in overruling a demurrer to a count in the complaint was harmless, where the court gave the general affirmative charge for defendant as to that count. *Central, etc., R. Co. v. Hingson*, 186 Ala. 40, 65 So. 45.

Where Evidence Supported Other Sufficient Counts.—*Shannon v. Lee*, 178 Ala. 463, 60 So. 99. See the title APPEAL AND ERROR, § 1040 (11), vol. 1, p. 581.

No Evidence Supporting Counts in Question.—In an action tried to the court, where no evidence in support of counts 1 and 2 was introduced, and plaintiff did not seek to sustain the judgment on them, the overruling of demurrers to such counts, if erroneous, was harmless. *Loy v. Reid*, 11 Ala. App. 231, 65 So. 855.

Cure by Instruction Withdrawing Counts.—See post, "Error in Overruling Demurrer or Exceptions Cured by Amendment, Withdrawal or Abandonment," § 1040 (16).

Withdrawal by Court of Evidence under Count.—Any error in overruling a demurrer to a count of the complaint is not reversible, where the court withdraws from the jury the evidence under the count. *Ballenger v. Shumate*, 10 Ala. App. 329, 65 So. 416.

Harmless Error.—In an action by a

general insurance agent to recover on contract with subagent, where complaint contained the common counts, and the only issue was as to the amount due, the overruling of demurrers to defective special counts, in view of Practice Rule 45, (175 Ala. xxi, 61 South ix) was not prejudicial. *Barnes v. Marshall*, 193 Ala. 94, 69 So. 436.

Prejudicial Error.—Error in overruling demurrer to a count of the complaint in assumpsit which did not show with certainty whether plaintiff relied on warranty of a buggy and breach thereof or on a contract to give a warranty and breach of such contract was not harmless to defendant, where evidence was offered by plaintiff tending to support both theories stated in the count, and one of such theories, that defendant contracted to furnish a five-year written warranty, but broke its contract, was not covered by any other count of the complaint. *Spalding Mfg. Co. v. Larren* (Ala. App.), 77 So. 971.

Error in overruling a demurrer to a count on the ground of repugnancy in joining charges of wanton and simple negligence was not rendered harmless by the fact that the complaint contained two good counts charging simple negligence alone, while the bad count only charged wanton negligence, and was submitted to the jury as a good count based on wanton negligence. *Central, etc., R. Co. v. Mathis*, 9 Ala. App. 643, 64 So. 197.

Error in overruling a demurrer to a count in a complaint alleging a willful injury on which the court submitted only plaintiff's right to recover punitive damages was not harmless, because it may have been good as a count in simple negligence. *Southern R. Co. v. Jarvis*, 11 Ala. App. 635, 66 So. 936.

§ 1040 (13) Overruling Demurrer to Plea or Answer.

Matters Available under General Issue.—Wrongful overruling of demurrers to pleas is harmless where under the complaint all matters of defense could be presented under general issue. *Southern Indemnity Ass'n v. Hoffman* (Ala. App.), 77 So. 424.

Where General Issue Is Only Valid Plea.—In action for damages in highway collision, where demurrer to plea of contributory negligence was erroneously overruled, but the only valid plea was the general issue, and there was evidence tending to show that defendant was guilty of negligence, the erroneous ruling could not be said to be error without injury. *Cook v. Standard Oil Co.* (Ala. App.), 73 So. 763.

Where No Proof Offered under Pleas.—*Bowen v. Pennsylvania Coal Co.*, 179 Ala. 410, 60 So. 835. See the title APPEAL AND ERROR, § 1040 (13), vol. 1, p. 582.

Overruling Insufficient Plea — Issue Raised by Replication.—Where defendant's plea, setting up cancellation of the fire policy in suit, was insufficient, it can not, after demurrer overruled, complain that a proper issue was raised by the replication. *Farmers' Mut. Ins. Ass'n v. Tankersley*, 13 Ala. App. 524, 69 So. 410.

Ruling Harmless under Instruction.—The overruling of demurrers to pleas in answer for insufficient statement of the character of contributory negligence that would bar recovery is immaterial, where the court instructed that plaintiff could not recover, unless defendant's driver was guilty of simple negligence after discovery of the peril of plaintiff's intestate. *Renfroe v. Collins & Co.* (Ala.), 78 So. 395.

Where judgment was for plaintiff, and he appeals from an insufficient award, he can not complain of the overruling of a demurrer to a plea purporting to set up a complete defense, for such ruling was harmless. *Morris v. Bragan*, 195 Ala. 372, 70 So. 717.

§ 1040 (14) Overruling Demurrer or Exceptions to Part of Several Pleas or Answers.

Receiving Benefit under General Issue.—See ante, "Overruling Demurrer to Plea or Answer," § 1040 (13).

Receiving Benefit under Other Pleas.—In action against street railway company for collision damages, error in overruling appellant's demurrer to some of defendant's special pleas to count charging negligence was without injury where

some of the pleas were good and were proven without dispute. *Hambright v. Birmingham R., etc., Co. (Ala.)*, 77 So. 702.

Defendant Entitled to General Charge on Other Pleas.—*Bason v. Alabama, etc., R. Co.*, 179 Ala. 299, 60 So. 922. See the title APPEAL AND ERROR, § 1040 (14), vol. 1, p. 584.

No Offer of Proof to Support Pleas.—Any error in overruling demurrers to special pleas was harmless; no evidence to sustain them being offered. *Rawleigh Medical Co. v. Hooks (Ala. App.)*, 73 So. 310.

Undisputed Evidence Disproving Count Pleaded to.—Error in sustaining pleas of contributory negligence to a count alleging wanton injury is harmless, where the undisputed evidence shows that there was no wanton injury. *Walker v. Smith (Ala.)*, 74 So. 451.

§ 1040 (15) Overruling Demurrer to Replication or Reply or Subsequent Pleading.

Overruling Demurrer to Replication.—Although a replication was disorderly in repeating allegations of complaint, error in overruling demurrer was harmless, where it sufficiently answered the plea and raised a meritorious issue. *Weinstein v. Citizens' Bank (Ala.)*, 75 So. 397.

Error in overruling demurrer to replication to plea of non est factum in action by holder of note held harmless, in view of defendant's admission that he signed the note. *Weinstein v. Citizens' Bank (Ala.)*, 75 So. 397.

Special Replication Amounting to General Replication.—Overruling of demurrer to special replication, which in effect was a general replication, held not to injure defendant. *National Life, etc., Ins. Co. v. Singleton*, 190 Ala. 84, 69 So. 80.

Special Replication Merely Denying Averments of Plea.—The counts of a complaint, averring the relationship of passenger and carrier, between plaintiff and defendant, charged that after plaintiff had reached her destination defendant's train on which she was being carried did not stop a reasonably sufficient length of time for her to alight, and that

while she was near the steps of the coach one of defendant's servants recklessly, wantonly, and intentionally injured plaintiff by taking hold of her and pulling her off the train while it was in motion. The defendant pleaded contributory negligence, in that the train stopped a sufficient length of time at plaintiff's station to allow passengers to embark or debark; that plaintiff failed to get off of the train at her destination, though she knew it had been reached, but after the train was put in motion she ran out of the train and jumped from the steps, falling and receiving injuries. A second plea averred the same facts, and that, though warned, plaintiff jumped from the train. A special replication to the two pleas alleged that plaintiff's acts were done as a result of the invitation, direction, or request of defendant's servants. Held, that it was not reversible error to overrule the demurrer to the replication, which merely denied the special averments in the second plea, although plaintiff might have had the benefit of such matters under a general replication, the replication being good as to the first plea. *Central, etc., R. Co. v. Mathis*, 196 Ala. 32, 71 So. 674.

Replication in Several Counts Partly Good.—Error, if any, in overruling demurrers to a replication which was made in a number of counts, is harmless where some portion of the replication was valid, and plaintiff could have recovered under it. *Knights v. Gillespie*, 14 Ala. App. 493, 71 So. 67.

Where Proper Issues Were Submitted to Jury.—Error in overruling demurrer to replication was harmless where true issue was submitted to jury in view of Supreme Court rule 45 (175 Ala. xxi, 61 South. ix) confining reversals to error probably injuriously affecting substantial rights. *Clinton Min. Co. v. Bradford (Ala.)*, 76 So. 74.

Proof Showing Plaintiff Entitled to Recover under Another Replication.—Error in overruling demurrers to some of the replications is harmless where the proof established beyond dispute another replication which entitled plaintiff to recover. *United States Health, etc., Ins. Co. v. Goin*, 197 Ala. 584, 73 So. 117.

Overruling Demurrer to Rejoinder—Decision on Another Ground.—In *assumpsit*, where defendant's rejoinder to replication to his answer and set-off was insufficient and was demurred to, error in overruling the demurrer was harmless, where the court did not find for defendant on the plea of set-off, but only because plaintiff on the evidence was not entitled to recover. *Traweek v. Hagler* (Ala.), 75 So. 152.

Rejoinder Containing Plea Already Interposed.—In action on note, though defendant's rejoinder contained plea of payment which had been interposed, overruling demurrer to rejoinder on that ground was harmless to plaintiff. *Manson v. Sutterer* (Ala.), 77 So. 375.

§ 1040 (16) Error in Overruling Demurrer or Exceptions Cured by Amendment, Withdrawal or Abandonment.

Withdrawal of Counts from Jury.—The overruling of demurrers to defective counts is harmless, where they were charged out of the case. *Birmingham Bottling Co. v. Morris*, 193 Ala. 627, 69 So. 85.

Where the court in its oral charge affirmatively excluded first count of complaint from jury's consideration, error in overruling demurrer thereto was harmless to defendant. *Northern Alabama R. Co. v. Foster, etc., Co.* (Ala.), 76 So. 979.

Withdrawal of Evidence under Count.—See ante, "Overruling Demurrer or Exception to Part of Declaration, Petition or Complaint," § 1040 (11).

§ 1041. — Amendments and Supplemental Pleadings.

§ 1041 (1) Amendment in General.

Quo Warranto—Jury Trial—Statutes.—An objection to an amendment to the information in quo warranto that it made Code 1907, § 5450, the basis of the information, instead of § 5453, and that under the latter section a jury trial may be demanded, while the trial is by the court under § 5450, was purely technical, where no jury had been demanded at the time of the amendment, and especially where the information before such amendment also stated a case under § 5450. *State v. Birmingham Waterworks Co.*, 185 Ala. 388, 64 So. 23.

§ 1041 (2) Of Declaration, Petition or Complaint.

Where the complaint for breach of an agreement to repurchase corporate stock at a specified price supported a default judgment for the agreed price, an amendment after service on defendant to allege that plaintiff thereby tendered the stock to defendant did not prejudice defendant. *McGowin v. Dickson*, 182 Ala. 161, 62 So. 685.

Requiring Amendment Not Increasing Plaintiff's Burden.—In a passenger's action for damages in being ejected from defendant's waiting room, a ruling requiring an amendment to the complaint to meet a demurrer, which added nothing to its legal effect, nor increased plaintiff's burden, was harmless error. *Widener v. Alabama, etc., R. Co.*, 194 Ala. 115, 69 So. 558.

§ 1042. — Striking Out or Dismissing.

§ 1042 (1) Sustaining Motion to Strike Out or Dismiss.

Where Demurrer Proper.—The fact that a plea was erroneously disposed of on motion to strike, rather than on demurrer, is not sufficient, under Supreme Court Rule 45, to require a reversal, no substantial rights of the party complaining having been affected thereby. *Sherrod v. State*, 14 Ala. App. 57, 71 So. 76.

Receiving Benefit of Matters in Pleadings Stricken.—The error in striking out a plea is, without injury to defendant, permitted to prove the facts set up in the plea. *Garner v. Morris*, 187 Ala. 658, 65 So. 1000.

While not approving the practice of testing the sufficiency of pleas by motion to strike, it is unnecessary to decide whether so striking defendant's pleas constituted reversible error, where defendant was permitted to have the full benefit of the defenses outlined in such pleas. *Stewart v. Smith* (Ala. App.), 78 So. 724.

Where question of consideration was the subject of a great part of testimony and defendant had the benefit of his pleas as to consideration of guaranty in issue, striking such pleas was not reversible error. *Dillworth v. Holmes Furniture, etc., Co.* (Ala. App.), 73 So. 288.

Receiving Benefit of Matters in Pleading Dismissed.—*Albritton v. Lott-Black-shear Com. Co.*, 180 Ala. 33, 60 So. 148. See the title APPEAL AND ERROR, § 1042 (1), vol. 1, p. 588.

Matters Available under General Issue.—Error in striking special pleas is harmless when the matters contained therein are available under the general issue. *People's Shoe Co. v. Skally*, 196 Ala. 349, 71 So. 719.

Action of trial court in striking pleas is not reversible error, where no facts are alleged in such pleas which are not available under general issue. *Huntsville Knitting Mills v. Butner* (Ala.), 76 So. 54.

Where part of a plea is good only in reduction of damages, but not as a defense in bar, the matter is available under the general issue, and its elimination from the plea by motion to strike is harmless. *People's Shoe Co. v. Skally*, 196 Ala. 349, 71 So. 719.

The defendant in an action of trover can not complain of error in striking a plea where the general issue was joined, since in trover that plea puts in issue every matter which might be pleaded in bar except a release. *Stamps v. Thomas*, 7 Ala. App. 622, 62 So. 314.

Striking Amendable Pleas.—It can not be said that striking out defective pleas, which were capable of amendment, is not prejudicial to a defendant, and for error in so doing, and not putting plaintiff to demurrer, thereby withholding opportunity to amend to meet the valid objections, a judgment for plaintiff must be reversed. *Ashurst v. Arnold-Henegar-Doyle Co.* (Ala.), 78 So. 386.

Striking Pleas Not Amendable.—In an action against a railroad for negligently firing property, pleas of contributory negligence being incapable of amendment, error in striking such pleas was not so prejudicial to defendant as to work a reversal of judgment. *Southern R. Co. v. Slade*, 192 Ala. 568, 68 So. 867.

Striking Complaint on Garnishment Bond—Amendment.—Error in striking a complaint on a garnishment bond for defective assignment of breach is not cured by permitting the plaintiff to file an amended count, which is also stricken upon the same ground. *Nelson v. Rothschild*, 7 Ala. App. 390, 62 So. 288.

Where a complaint for breach of a garnishment bond has been stricken on the ground of defective assignments of breach, the court can not assume that the plaintiff could not amend the complaint to cure the defect, so as to render the striking harmless error. *Nelson v. Rothschild*, 7 Ala. App. 390, 62 So. 288.

Replication Merely Denying Necessary Averment of Plea.—A replication to a plea of privilege, in an action for libel, that defendant's comment was not reasonable or fair, etc., held a mere denial of one of the necessary averments of the plea, so that plaintiff was not prejudiced by its elimination as a special reply. *Parsons v. Age-Herald Pub. Co.*, 181 Ala. 439, 61 So. 345.

Harmless Error.—Where the court struck out defendant's plea of nul tiel corporation, filed without leave and after demurrer to complaint, and amendment of complaint rendered the ruling harmless, there was no reversible error. *McDonough v. Commercial State Bank* (Ala. App.), 73 So. 754.

Prejudicial Error.—The striking of plaintiff's replication in a suit to recover upon notes was reversible error, where the only issue left was that of payment, and not whether payment was made to the holder of the note sued on, and where it prevented plaintiff from showing that he was the holder in due course. *Oneonta Trust, etc., Co. v. Box* (Ala. App.), 73 So. 759.

§ 1042 (2) Striking Out Part of Pleading.

Matters Available under Other Counts in Complaint.—Plaintiff can not complain that the counts in the complaint were stricken, where those remaining were amply sufficient to present any theory of the case supported by the evidence. *Helms v. Central, etc., R. Co.*, 188 Ala. 393, 66 So. 470.

Matters Available under Traverse to Counts.—Where evidence that buyers returned engine to defendants as agents for manufacturer rather than as sellers was admissible under a general traverse to counts, alleged error in striking pleas setting up this theory was harmless. *O'Rear v. Walker* (Ala.), 75 So. 353.

Different Issues or Causes of Action in Remaining Counts.—Error in striking a count of a complaint for trespass to lands

and cutting timber therefrom was not cured by the retention of another count for the penalty imposed by Code, § 6035, for cutting trees on plaintiff's land, the causes of actions stated not being the same. *Corona Coal, etc., Co. v. Moore Stave Co.*, 186 Ala. 593, 65 So. 51.

Where the issues presented were materially different, the fact that the first and second counts were submitted did not render harmless court's striking the fourth count based on willful and wanton misconduct. *Sington v. Birmingham R., etc., Co. (Ala.)*, 76 So. 48.

Matters Available under General Issue.—See ante, "Sustaining Motion to Strike Out or Dismiss," § 1042 (1).

Matters Available under Other Pleas.—Any error in striking out pleas on motion was without injury, where they set up the same defense as that set up in another plea which was not stricken. *Baker v. Britt-Carson Shoe Co.*, 188 Ala. 225, 66 So. 475.

Part of Answer Stricken Included in Others.—*Louisville, etc., R. Co. v. Morris*, 179 Ala. 239, 60 So. 933. See the title APPEAL AND ERROR, § 1042 (2), vol. 1, p. 588.

§ 1042 (4) Denial of Motion to Strike Out Part of Pleading.

Not Ground for Reversal.—Even if motions to strike from the complaint a claim for damage be well grounded, refusal thereof is not ground for reversal. *Birmingham Transfer, etc., Co. v. Still*, 7 Ala. App. 556, 61 So. 611.

Remedies to Avoid Injurious Effect of Ruling.—Error may not be predicated on rulings on motions to exclude, since defendant may protect himself against injurious results, in case of error, by objections to the evidence, by exceptions to the court's oral charge authorizing recovery, and by special charges. *Brookside-Pratt Min. Co. v. McAlister*, 196 Ala. 110, 72 So. 18.

The rule of the Supreme Court is not to predicate reversible error on the action of the court against motion to strike the allegation of special damages which are not recoverable, since defendant may protect himself against injurious consequences in case of error by objections to the evidence, by exceptions to the court's

oral charge allowing recovery, and by request for special instructions. *Roddam v. Brown (Ala.)*, 77 So. 403.

Refusal to strike allegations of evidential matters from a complaint for assault and battery is harmless; they being descriptive of a particular assault and battery. *Singer Sewing Mach. Co. v. Methvin*, 184 Ala. 554, 63 So. 997.

Refusal to Strike Claims for Damages Not Recoverable.—Refusal to strike from the complaint allegations of damages, for which the law allows no recovery, is not reviewable error. *Western Union Tel. Co. v. Hughston*, 191 Ala. 424, 67 So. 670.

Where Same Evidence Admissible under Other Pleadings.—Erroneous refusal of trial court to strike plea on demurrer is harmless, where the same evidence was admissible under another plea, good as against demurrer. *Martin v. Walker*, 196 Ala. 469, 71 So. 667.

§ 1042 (5) Effect on Error of Trial or Determination.

Cure by Verdict.—A verdict for defendant, in an action for setting fire to plaintiff's property near its right of way, determined that none of plaintiff's property was destroyed by a fire due to defendant's negligence, so that elimination of one count of declaration was harmless error. *McCary v. Alabama, etc., R. Co.*, 182 Ala. 597, 62 So. 18.

§ 1043. Interlocutory Proceedings.

Security for Costs.—Error, if any, in allowing a nonresident plaintiff to give security for costs after the filing of the complaint was without injury, where there was no dispute but that defendant owed the amount claimed and the only dispute was as to credits on which the case was tried. *Colley v. Atlanta Brewing, etc., Co.*, 196 Ala. 374, 72 So. 45.

§ 1046. Conduct of Trial or Hearing in General.

Refusal of Instructions—Understanding of Jury as to Correctness.—A statement disclosing previous refusal of instructions given at defendant's request held not to require a reversal, where the jury may have understood that the court was persuaded that such instructions were correct. *Louisville, etc., R. Co. v. Bouchard*, 190 Ala. 157, 67 So. 265.

Remarks of Court Subsequently Withdrawn.—Where the court subsequently withdraws from the jury and directs them not to consider remarks previously made by the court, any error in such remarks is cured. *Henderson v. State*, 11 Ala. App. 37, 65 So. 721.

§ 1047. Rulings as to Evidence in General.

Striking Out or Withdrawal.—Where evidence inherently illegal is excluded on motion, it is of no consequence that the motion did not point out the true ground of objection. *O'Neal v. Lovett*, 197 Ala. 628, 73 So. 329.

Where witness testified that "we had been telling everybody for months we were moving," it was not reversible error that the court did not use emphasis in excluding the statement "it was publicly known," immediately following. *Bell v. Seals Piano, etc., Co.* (Ala.), 78 So. 806.

Where, in an action for the death of a passenger, witnesses testified that the car in which she was riding received a mighty jar, while other witnesses testified that there was no unusual jar, the error in refusing to strike out testimony as to a freight train breaking open a box car some time during the summer during which the accident occurred was prejudicial. *Central, etc., R. Co. v. Teasley*, 187 Ala. 610, 65 So. 981.

Order of Proof.—In trover, wherein plaintiff claimed title under a mortgage, the court will not be put in error for permitting proof of the execution of the mortgage and amount due before the paper was produced, when the mortgage was immediately thereafter produced, identified, and introduced in evidence. *Butler Cotton Oil Co. v. Campbell & Son* (Ala. App.), 78 So. 643.

Reopening Case.—In suit for partition permitting note of testimony to be materially amended without first setting aside submission of cause for final decree on pleadings and proofs as noted by the register was not harmless error. *Darling v. Hanlon*, 197 Ala. 455, 73 So. 20.

Production of Documents—Second Offer.—Where documents have been introduced in evidence without objection, a second offer is superfluous, and hence not prejudicial. *National Surety Co. v. Citizens' Light, etc., Co.* (Ala.), 78 So. 834.

§ 1048. Rulings on Questions to Witnesses.

§ 1048 (1) Examination of Witnesses in General.

Exclusion of Question—Statement Already in Evidence.—Refusal to permit question to witness which had already been answered, and the answer not denied by any witness, was harmless. *Gloss-Sheffield Steel, etc., Co. v. Birmingham* (Ala.), 78 So. 896.

The exclusion of a question which required a repetition of a statement to which witness had already deposed was not prejudicial. *Jefferson Fertilizer Co. v. Burns*, 10 Ala. App. 301, 64 So. 667.

Where such part of question as called for legal evidence had been previously testified to, sustaining objection thereto, which specified no ground for exclusion, was not prejudicial error. *Wells v. Parker* (Ala.), 75 So. 914.

Exclusion of Questions Not Eliciting Desired Testimony.—Where defendant in a line of questions totally failed to bring out the testimony he desired, the error, if any, in ruling out the questions was harmless, since defendant was denied nothing. *Hudson v. Repton State Bank* (Ala. App.), 75 So. 695.

Opinion of Expert—Facts Elicited on Cross-Examination.—Where an expert testified that an engineer's conduct was careful, but did not give the facts on which he based his opinion, the error was harmless, where they were brought out on cross-examination. *Knowlton v. Central, etc., R. Co.*, 192 Ala. 456, 68 So. 281.

Harmless Error.—It is not reversible error to allow plaintiff, suing a railroad company for loss by fire, set by sparks from a locomotive, to ask a witness whether he had ever heard of a locomotive setting fire to a building 110 feet from the track. *Louisville, etc., R. Co. v. Stanley*, 186 Ala. 95, 65 So. 39.

§ 1048 (4) Refreshing Memory of Witness.

Prejudicial Error.—In an action against a carrier for failure to deliver freight, error in sustaining an objection to a question asked the agent on redirect examination whether he knew the facts contained in a memorandum when he made it, after he had testified that he could not

remember the facts even after referring to the memorandum, held prejudicial. *Southern Railway v. Caldwell-Spence Co.*, 8 Ala. App. 583, 62 So. 975.

Harmless Error.—That witness was permitted to refresh his recollection by referring to a bill would be harmless; it not appearing that he thereafter testified to anything shown by bill, though he did say that he was sure bill was reasonable. *Denson v. Acker* (Ala.), 78 So. 76.

§ 1048 (5) Error in Question Cured by Answer or Failure to Answer.

See post, "In General," § 1050 (1).

Erroneous Question Cured by Answer.—Error, if any, in allowing question to nurse as to whether patient knew leg had been amputated held rendered harmless by her answer stating only cognizable facts. *Barfield v. South Highland Infirmary*, 191 Ala. 553, 68 So. 30.

Relevant Answer to General Question.—That a question was so general that it might have elicited an irrelevant answer was not reversible error where the answer was in fact relevant and material. *Rogers v. Smith*, 184 Ala. 506, 63 So. 530.

Exclusion of Question Cured by Answer.—Error cannot be predicated on sustaining objection to question asked witness, where the witness answered the question. *Thompson v. Alexander City Cotton Mills Co.*, 190 Ala. 184, 67 So. 407.

Where a witness answered questions to the best of his ability, a party can not complain that objections were sustained thereto. *Knowlton v. Central, etc., R. Co.*, 192 Ala. 456, 68 So. 281.

Failure to Answer.—Error in overruling defendant's objection to a question asked plaintiff's witness is harmless, where the question was never answered. *Corry v. Sylvia y Cia*, 192 Ala. 550, 68 So. 891.

Error can not be predicated on ruling of court overruling objection to improper question where no answer was made to the question. *Shepherd v. Butcher Tool, etc., Co.* (Ala.), 73 So. 498.

The overruling of valid objection to question that was not answered is not prejudicial error. *Huntsville Knitting Mills v. Butner* (Ala.), 76 So. 54.

Answer Merely Amounting to Refusal to Answer.—In action for conversion of cotton, it was error not to sustain objection to a question to plaintiff by her at-

torney, as to a witness testifying for defendant, whether he had "ever done anything, in any way, to show he had bad feelings towards, or felt good towards, you;" but such ruling did not call for reversal of the judgment, where plaintiff's answer was: "I can't do that. I won't expose myself"—since it amounted to a refusal to answer and was not responsive, so that it could have been excluded on motion, and it appeared that the only fact testified to by defendant's witness, referred to, was a conversation embodied in a predicate laid to impeach another witness. *Kelly v. Cook* (Ala. App.), 73 So. 220.

§ 1048 (6) Cross-Examination.

Prejudicial Error.—Although, where the data are all clearly before the jury, the mere calculation of interest may be made by it and the exclusion of a witness' calculation can not be prejudicial, where in a suit on a note and merchandise account the rate of interest was in dispute, the intention of the parties was material, and the record does not indicate that the data on which plaintiffs' calculations were based were before the court, the exclusion of the testimony of plaintiffs' president on cross-examination as to how he had calculated interest was prejudicial error. *Dominy v. Dowling-Martin Grocery Co.*, 197 Ala. 685, 73 So. 381.

Harmless Error.—In an action on notes defended on the ground of breach of plaintiffs' agreement to pay for Mitchell automobiles as ordered by defendant, question to a plaintiff on cross-examination whether he ever offered, after the notes were given, to pay for cars was harmless error. *Lehman v. Austin*, 195 Ala. 244, 70 So. 653.

Defendant employer can not complain on its appeal that it was not permitted to cross-examine the injured servant as to his reasons for making affidavit that he was over 21 years of age, he having testified that he was under 21; the affidavit that he was over 21 having been introduced to establish and having established the contradiction, which it was necessary for plaintiff, and not for defendant, to explain or reconcile. *Caravella Shoe Co. v. Hubbard* (Ala.), 78 So. 899.

Error Cured by Subsequent Evidence.—Erroneous sustaining of objection to

question on cross-examination, whether plaintiff's hand was so numb that he could not feel a pick handle if he was working with it, was cured by a later statement of the witness that he could feel a pick handle if he put his hand around it. *Tennessee Coal, etc., R. Co. v. King* (Ala.), 76 So. 982.

Error Not Cured Where Other Evidence Not Offered.—The error in denying right to cross-examine plaintiff in a personal injury case, who has testified to diminished earning capacity, as to his subsequent earnings, is not cured by the fact that it could have made the pay roll evidence. *South Brilliant Coal Co. v. McCollum* (Ala.), 76 So. 901.

§ 1048 (7) Credibility, Impeachment, Contradiction and Corroboration of Witnesses.

Question to Show Bias—Facts Otherwise Apparent.—In an action for unlawful arrest and false imprisonment, refusal to allow defendant to show plaintiff's bias and prejudice as a witness by showing that he had prosecuted defendant for trespass, and had sued him civilly, was not prejudicial error, since bias was otherwise apparent. *Rhodes v. McWilson*, 192 Ala. 675, 69 So. 69.

Impeaching Evidence without Proper Predicate—Testimony Previously Given.—Admission of impeaching testimony, without proper predicate having been laid, held not to require a reversal, where it appeared that the substance of such impeaching testimony had previously been given by the impeaching witness without objection. *Hesk v. Ellis* (Ala.), 75 So. 329.

Cure by Subsequent Testimony—Question to Show Contradiction.—Where defense to ejectment was deed from plaintiff claimed by plaintiff to be forged, sustaining objection to question to plaintiff whether she told a third person that she had deeded land to defendant was not prejudicial error, where defendant later was permitted to contradict by such third person the expected, but excluded answer. *Qualls v. Qualls*, 196 Ala. 524, 72 So. 76.

Same—Question as to Plaintiff's Character.—Error in sustaining plaintiff's objection to defendant's question to a witness as to plaintiff's general character, instead of character for truth and veracity,

held harmless, where witness subsequently testified that he did not know plaintiff's reputation. *Brown v. Moon*, 196 Ala. 391, 72 So. 29.

§ 1049. Admission of Evidence.

§ 1050. — Prejudicial Effect in General.

§ 1050 (1) In General.

Matters Previously Shown without Objection.—See post, "Facts Otherwise Established," § 1051.

Answer to Question Not Objectionable.

—Where the answer of a witness to a question calling for a conclusion was entirely unobjectionable, and was not objected to, any error in overruling an objection to the question itself was harmless. *Swain v. State*, 8 Ala. App. 26, 62 So. 446.

The overruling of an objection to a question is rendered harmless where the answer thereto was not prejudicial. *Minto v. State*, 8 Ala. App. 306, 62 So. 376.

Any error in admitting evidence regarding testator's ability to transact business is harmless, where witness stated he hardly knew, but supposed it would depend on kind of business. *Wear v. Wear* (Ala.), 76 So. 111.

Negative Answer Where Only Affirmative Objectionable.—Where a question to a witness, as to whether he had any conversation with the defendant since being summoned, was answered in the negative, no harm resulted to the defendant. *Maxwell v. State*, 12 Ala. App. 212, 67 So. 772.

Where the defendant answered the question in the negative, any error in overruling his objection to the question, which if answered in the affirmative, would have raised an undesirable inference, is rendered harmless. *Smith v. State*, 13 Ala. 399, 69 So. 402.

Evidence to Show Title.—*Lay v. Fuller*, 178 Ala. 375, 59 So. 609. See the title APPEAL AND ERROR, § 1050 (1), vol. 1, p. 597.

Evidence of Disputed Fact.—*Southern R. Co. v. Stonewall Ins. Co.*, 177 Ala. 327, 58 So. 313. See the title APPEAL AND ERROR, § 1050 (1), vol. 1, p. 595.

Evidence Admissible Only in Rebuttal or Cross-Examination.—Admission of evidence on its face objectionable, but admissible because brought out in rebuttal

or cross-examination, held not prejudicial. *Saxon v. Davie*, 192 Ala. 10, 68 So. 253.

Testimony for Plaintiff Not Defeating Defendant's Right to General Charge.—

Error in the admission of testimony for plaintiff which did not defeat defendant's right to the general charge held harmless. *Warten v. Weatherford*, 191 Ala. 31, 67 So. 667.

Conclusion of Witness Followed by Statement of Facts.—In an action for injuries to property, the error in admitting a witness' testimony that the property was damaged was harmless, where such testimony was followed by a statement of the actual conditions. *Sloss-Sheffield Steel & Iron Co. v. Mitchell*, 181 Ala. 576, 61 So. 934, 938.

Same—Witness' Conclusion as to Another Witness' Knowledge.—To permit a witness to testify as to his conclusion as to whether a witness does or does not know certain facts, while ordinarily reversible error, will not necessitate a reversal where the witness has stated the facts upon which his conclusion is based. *Louisville, etc., R. Co. v. Williams*, 183 Ala. 138, 62 So. 679.

Instances of Prejudicial Error.—Error, in an action for injuries to an employee in admitting hearsay evidence that the derrick operator stated when the accident happened that "the damn thing was about wore out anyhow, and they would keep running until they killed somebody," was prejudicial to defendant. *Illinois Cent. R. Co. v. Lowery*, 184 Ala. 443, 63 So. 952, 49 L. R. A., N. S., 1149.

Error, in an action by the owner for himself and the insurance company to recover from a railroad company damages for the destruction of property by fire, in admitting in evidence an indemnity agreement, by which the insurance company agreed to indemnify the owner for the costs of the suit, held prejudicial. *Coffman v. Louisville, etc., R. Co.*, 184 Ala. 474, 63 So. 527.

In an action on account for goods, where the books of defendant were in such condition that the jury might infer that the account showing payments had been falsified, it was prejudicial error to allow testimony that defendant had never taken a business course. *Dothan Grocery Co. v. White Bros.*, 14 Ala. App. 405, 69 So. 992.

In an action for the conversion of property which defendant took under a chattel mortgage, the erroneous admission of evidence held prejudicial. *Steagall-Cheairs Fertilizer Co. v. Kennedy*, 192 Ala. 548, 68 So. 862.

In an action for damages for being carried past plaintiff's destination, held, that the admission of hearsay testimony as to the material point in dispute was prejudicial to defendant. *Louisville, etc., R. Co. v. Cornelius*, 183 Ala. 203, 62 So. 710.

In an action by a wife for injuries received, the admission of the husband's testimony that she was of no account to him as before, and that he had to help her wash and cook, which he never had to do before, was prejudicial error. *Alabama, etc., Railway v. Foley*, 195 Ala. 391, 70 So. 726.

Error in admission on defendant's cross-examination of testimony tending to show that defendant was indemnified against liability by an insurance company was highly prejudicial. *Watson v. Adams*, 187 Ala. 490, 65 So. 528.

In an action for the balance due for work on defendant's house in which defendant pleaded recoupment, error in permitting a question as to what in his judgment he had been damaged by the defective condition in which the guttering was left was reversible error. *Troy Lumber, etc., Co. v. Boswell*, 186 Ala. 409, 65 So. 141.

Error in permitting a stockholder in the employing corporation to testify that he told deceased to keep away from a stack of slate slabs is not rendered harmless by the fact that two other witnesses had already testified that the witness had warned all the men, since there is a substantial difference between a general instruction and a specific personal order. *Buye v. Alabama Marble Quarries (Ala.)*, 75 So. 9.

Instances of Harmless Error.—In an action against a street railway for injuries sustained in a collision, where a witness testified that when he first looked at the motorman the latter was looking at the courthouse, and was not winding up the wheel or shutting off the power, and that plaintiff was under the platform when he first started winding up the wheel, the admission of his testimony that the mo-

torman was not trying to stop the car when the witness first looked at him was harmless to the railway. *Alabama City, etc., R. Co. v. Lee* (Ala.), 76 So. 908.

The exclusion of the opinion of a witness as to the rate of speed of a train at the time it struck and killed plaintiff's mule was not prejudicial to plaintiffs, where defendant's engineer and conductor testified to a rate of speed in substantial accord with the opinion sought to be proved. *Brown v. Central, etc., R. Co.*, 185 Ala. 659, 64 So. 581.

In proceedings to incorporate a municipality where there was no latent ambiguity in the attached plat, but simply an error on its face, which was self-correcting by resort to common knowledge, admission of parol evidence to explain the plat was error without injury. *Foshee v. Kay*, 197 Ala. 157, 72 So. 391.

In a suit to determine a boundary line, plaintiff held not prejudiced by evidence that when K., a surveyor, had previously run the line, he was working for three people. *Ward v. Lane*, 189 Ala. 340, 66 So. 499.

Error, in any, in allowing plaintiff in forcible entry and detainer, in which the real dispute was as to a boundary fence, to testify that he advised with his attorney about the differences between the parties, and then gave defendant notice to quit building a fence, was harmless. *Shelton v. Larkin* (Ala.), 74 So. 971.

In a suit for loss of goods by carrier, the admission in evidence of the declaration of a depot agent that the goods were short and would arrive held not reversible error. *Louisville, etc., R. Co. v. Lynne*, 196 Ala. 21, 71 So. 338.

In an action for damages for failure to furnish a barge for transportation of stay bolts, evidence that plaintiff shipper offered to turn bolts over to defendant carrier for purpose of disposing of them, offered on theory that it was plaintiff's duty to minimize damages, could not have prejudiced defendant. *Tennessee River Nav. Co. v. Jacobs Banking Co.* (Ala. App.), 77 So. 438.

In an action for compensation for boring a well, where the original contract was modified, and its terms, as modified, were in dispute, the erroneous admission

of testimony to show the value of the mule which defendant originally agreed to pay for the work did not justify the court of appeals in reversing, under Rule 45 of the Supreme Court (175 Ala. xxi). *Dunaway v. Roden*, 14 Ala. App. 501, 71 So. 70.

Alleged error in the admission in evidence of an article of the constitution and by-laws of the defendant organization in an action on a life insurance policy was harmless, where the jury could not have been misled thereby. *United Brothers v. Kelly* (Ala.), 75 So. 312.

Where the insurer had waived all questions as to the fact and sufficiency of the proofs of loss, secondary evidence by the insured as to the contents of the proofs of loss, if erroneously admitted, is harmless. *Union Marine Ins. Co. v. Charlie's Transfer Co.*, 186 Ala. 443, 65 So. 78.

In an action on a fire policy, refusal to exclude testimony as to statements by insured's counsel who represented him in the adjustment proceedings, made to defendant's agents, held not prejudicial error. *Southern States Fire Ins. Co. v. Kronenberg* (Ala.), 74 So. 63.

In action on fire insurance policy, testimony of plaintiff that when he notified the former agent of the loss he did not know of the change of agents held harmless, where no question was raised as to the notice of loss. *Pennsylvania Fire Ins. Co. v. Draper*, 187 Ala. 103, 65 So. 923.

In action on accident policy, it was proper for jury to know weight and size of sticks used in assault on insured, and sticks, produced and identified, would have been admissible, so that ruling permitting plaintiff to offer evidence accounting for their absence was harmless. *Maryland Casualty Co. v. McCallum* (Ala.), 75 So. 902.

In action on accident policy, admission of evidence that none of customary precautions against communication of insured's alleged disease were taken, etc., held not reversible error. *Maryland Casualty Co. v. McCallum* (Ala.), 75 So. 902.

In trover for mules, defendants held not prejudiced by a question calling for the opinion of a witness as to whether

the mules were large enough to work when they were purchased by plaintiff's mortgagor from defendants. *Jones v. White*, 189 Ala. 622, 66 So. 605.

In an action involving a book account, wherein a witness used a memorandum of items taken from plaintiff's book, which was in evidence, the witness not claiming to have any knowledge of the original entry of such items, the evidence of the witness was not prejudicial, being in the nature of expert opinion evidence both as to pointing out of relevant items, and calculating interest as to the entries which were before the jury. *Dominey v. Dowling-Martin Grocery Co. (Ala.)*, 76 So. 977.

In action for failure to deliver telegraphed ticket promptly, admission of testimony that witness caused his stenographer to inquire at different railroad offices whether the transportation had arrived did not prejudice defendant, where the telegraphed ticket was delivered four days after it was contracted for. *Southern R. Co. v. Rowe (Ala.)*, 73 So. 634.

Error in permitting a chattel mortgagor to prove that third persons executed the mortgage as comortgagors held harmless. *Baker v. Lauderdale*, 14 Ala. App. 224, 69 So. 299.

Admission of certain documentary evidence, if error, held harmless, where it did not appear that any substantial rights were injuriously affected thereby. *Tyson v. Thompson*, 195 Ala. 230, 70 So. 649.

Any error in an action for a broker's commissions in permitting the purchaser to state that his motive in going to see the property was to buy it if it suited him was harmless, where that was in fact his purpose, and the issue was whether he was induced by plaintiff to view the property. *Davis v. Clausen*, 7 Ala. App. 381, 62 So. 267.

In action for damages to a yacht, error in allowing a question as to what repairs were necessary held not prejudicial. *American Oak Leather Co. v. Atwood*, 191 Ala. 450, 67 So. 663.

Evidence by the attending physician, in a personal injury action, who was asked whether he did not diagnose the case at the time as a broken bone, that

he told plaintiff that it might be such, and thought probably it might, and "that is what I still think," was not prejudicial to defendant, if erroneous, on the ground that the physician's opinion at the time of the accident was immaterial. *Empire Coal Co. v. Gravlee*, 9 Ala. App. 657, 64 So. 207.

In an action for failure to deliver cotton seed, admission of evidence that, after defendant had refused to deliver the seed, his agent stated that it would be delivered, if error, was harmless. *Ward v. Cotton Seed Products Co.*, 193 Ala. 101, 69 So. 514.

On the issue of benefit from a municipal improvement, held, that error in allowing defendant's witnesses to state whether his property had been enhanced in value thereby was harmless, where they stated such conclusion with specific reference to antecedent and subsequent values, or where the question and answer spoke solely to the absence of any damage or benefit. *Huntsville v. Pulley*, 187 Ala. 367, 65 So. 405.

§ 1050 (2) Evidence Irrelevant to Issue.

Evidence Not Affecting Decision.—

Hall v. Santangelo, 178 Ala. 447, 60 So. 168. See the title APPEAL AND ERROR, § 1050 (2), vol. 1, p. 598.

The admission of immaterial evidence which could not have affected the case in any way held not reversible error. *Gilley v. Denman*, 185 Ala. 561, 64 So. 97.

That defendant was allowed to have a question as to an immaterial matter answered was harmless error; it not appearing how, under the answer, plaintiff could be injured. *Southern States Co. v. Long (Ala. App.)*, 73 So. 148.

Illustrative Case.—Judgment for plaintiff in detinue will not be reversed for immaterial, but nonprejudicial, testimony that witness did not know where boy went with property involved. *Farrow Mercantile Co. v. Davidson (Ala.)*, 77 So. 45.

Previous Facts and Circumstances.—*Louisville, etc., R. Co. v. Bogue*, 177 Ala. 349, 58 So. 392. See the title APPEAL AND ERROR, § 1050 (2), vol. 1, p. 598.

Surrounding Facts and Circumstances.—*Louisville, etc., R. Co. v. Bogue*, 177

Ala. 349, 58 So. 392. See the title APPEAL AND ERROR, § 1050 (2), vol. 1, p. 598.

Pertinency of Evidence Not Clear.—In an action on a guaranty, some question having arisen as to a credit which plaintiff had at one time agreed to give defendants in consideration that an injunction suit should be dismissed, plaintiff was allowed to ask one of the defendants whether the injunction had not been dissolved and an appeal taken to the supreme court, and whether the contract in suit was not then made, to which he replied that such was his recollection. Held, that while the pertinency of this evidence was not clear, its admission was not reversible error. *Norvell v. Gilbreath*, 189 Ala. 452, 66 So. 635.

§ 1050 (3) Evidence of Fact Unnecessary to Issue.

Mortgage to Compromise Prosecution—Evidence of Innocence of Offense.—Where defendant pleaded that mortgage was given to compromise prosecution, admission of evidence that defendant was not guilty of offense charged was not injurious to plaintiff. *Weil v. Teabo*, 14 Ala. App. 575, 70 So. 957.

Agreement under Which Nothing Was Done.—Any error in admitting in evidence agreement between plaintiff and defendant under which nothing was done, held harmless. *Wertheimer Bag Co. v. Hill*, 14 Ala. App. 623, 71 So. 618.

§ 1050 (4) Evidence Admitted without Preliminary Proof.

Cure by Subsequent Evidence—Introduction of Telegram.—Admission of telegram, without preliminary proof that it was sent by adverse party, held cured by subsequent evidence, especially where, by reason of a subsequent break in the negotiations, the telegram did not control plaintiff's rights. *Rike v. McHugh*, 188 Ala. 237, 66 So. 452.

Same — Introduction of Record.—Questions preliminary to introduction of record in evidence, though not carefully framed to avoid infringement of the parol evidence rule, held harmless, where the record was introduced and showed the same facts as the oral evidence. *Norvell v. Gilbreath*, 189 Ala. 452, 66 So. 635.

§ 1051. — Facts Otherwise Established.

§ 1051 (1) By Other Evidence in General.

Matters Previously Shown without Objection.—It is not prejudicial error to allow the same fact to be again shown against objection when it has already been shown without objection. *McNeil v. Munson S. S. Line*, 8 Ala. App. 610, 62 So. 459, judgment reversed for error in giving affirmative charge in 184 Ala. 420, 63 So. 992; *Boshell v. Cunningham* (Ala.), 76 So. 937; *Tennessee Coal, etc., R. Co. v. King* (Ala.), 76 So. 982.

Admission of testimony, which was but repetition of what witness had testified without objection, is not subject of complaint. *Birmingham R., etc., Co. v. Hunt* (Ala.), 76 So. 918; *Briel v. Exchange Nat. Bank*, 180 Ala. 576, 61 So. 277.

Where there was testimony admitted without objection as to certain matter about which there was no conflict at that time, the admission of testimony of substantially the same facts subsequently, was harmless. *Knott v. State*, 10 Ala. App. 77, 65 So. 83.

In the absence of a motion to exclude the previous statement of a witness, the error, if any, in permitting the witness to repeat such previous statement, was not prejudicial. *Rector v. State*, 11 Ala. App. 333, 66 So. 857.

In an employee's action against a railroad for personal injuries, allowance of plaintiff's question to a witness eliciting repetition of former testimony, admitted without objection, held harmless to defendant. *Alabama, etc., R. Co. v. Taylor*, 196 Ala. 37, 71 So. 676.

In action against a street railway for injuries sustained in a collision, defendant railway's motorman's testimony, on cross-examination, being repetition of previous statement, unobjected to, that 1½ miles an hour was not as slow as he could run car, was harmless to railway, if erroneous. *Alabama City, etc., R. Co. v. Lee* (Ala.), 76 So. 908.

Erroneously permitting party to testify to agreement with other party's deceased husband was harmless, where same testimony had previously gone in without objection. *Baker v. Shoemaker* (Ala.), 78 So. 826.

Where an entire document is admitted in evidence, any error in subsequently admitting a part of it over objection is harmless. *Tarpey v. State*, 8 Ala. App. 432, 63 So. 17.

In action on injunction bond, where the record of the injunction suit was admitted without objection, showing that two injunctions had been issued, admission of testimony that another injunction besides the one covered by the bond had been issued held not prejudicial. *National Surety Co. v. Citizens' Light, etc., Co. (Ala.)*, 78 So. 834.

In action on protested check, executed in part performance of agreement under which defendant was to pay notes of a corporation of which he was president sustaining objection to question to defendant on cross-examination, as to who owned stock of corporation, was not reversible error, where ownership had been shown. *Gale-Hooper Co. v. Rice (Ala.)*, 75 So. 963.

Same—Testimony of Opposing Party.—Error in the admission of testimony for defendant is harmless, where plaintiff had previously testified to the same facts. *Park-Robertson Hdw. Co. v. Copeland*, 11 Ala. App. 447, 66 So. 880.

Errors Cured by Subsequent Introduction of Evidence.—Where a record of proceedings for an assessment against property benefited by a municipal improvement was introduced in evidence, and showed the publication of notice to property owners, and the character and time of publication, an objecting property owner was not prejudiced by the proof of the publication and contents of such notice aliunde the record. *Pierce v. Huntsville*, 185 Ala. 490, 64 So. 301.

The erroneous admission of plaintiff's testimony that he owned the land damaged by a nuisance is harmless, where subsequent proof established a record title or showed adverse possession. *Stouts Mountain Coal, etc., Co. v. Tedder*, 189 Ala. 637, 66 So. 619.

In an action for damages for the removal of a house from the lands of plaintiff, errors in the admission of evidence as to his possession or title held cured or rendered harmless by the introduction in evidence of a judgment in ejectment

showing his rights to the possession of the land. *Snead v. Patterson*, 190 Ala. 43, 66 So. 664.

In a switch engine conductor's action for injuries under Federal Employers' Liability Act, admission of hearsay testimony as to statements made by three members of crew operating the engine which injured plaintiff held harmless, where these men were witnesses and testified to substantially the same effect. *Southern Ry. Co. v. Fisher (Ala.)*, 74 So. 580.

Plaintiff's Case Established by Other Evidence.—Where the legal evidence abundantly established plaintiff's case, errors in the admission of evidence were harmless as to defendant. *Garrow v. Toxey*, 188 Ala. 572, 66 So. 443.

Where material allegations of bill are supported by competent and sufficient evidence, apart from evidence improperly admitted by the chancellor, supreme court will affirm decree for complainants. *Manegold v. Beaven (Ala.)*, 77 So. 695.

Fact Itself Obvious to Jury.—A defendant is never prejudiced by allowing a witness to testify to what the jury can see for themselves, and hence, it is not error to reversal to permit a physician to testify that the two holes made in the shirt of the deceased were not made by the same instrument. *Olden v. State*, 176 Ala. 6, 58 So. 307.

Where Fact Proved Was Necessary Conclusion from Other Evidence.—The erroneous admission of evidence is harmless, where the fact sought to be proven was a necessary conclusion from other competent evidence received without objection. *American Automobile Ins. Co. v. Watts*, 12 Ala. App. 518, 67 So. 758, certiorari denied in *Ex parte American Automobile Ins. Co. (Ala.)*, 67 So. 1017.

Plaintiff's testimony that news of her sister's death made her sad held harmless; the matter of mental anguish being collateral and inferable from relationship and circumstances. *Western Union Tel. Co. v. Hughston*, 191 Ala. 424, 67 So. 670.

Statute Making Prima Facie Case.—Any error in admitting evidence to prove the payment of the purchase money by

the holder of land certificates was harmless, in view of Acts 1911, p. 192, making patents prima facie evidence of the sale of the land and the payment of the purchase money therefor. *Turner v. Davis*, 186 Ala. 77, 64 So. 958.

Secondary Evidence.—The erroneous admission of secondary evidence of the contents of a letter held harmless, where the facts sought to be elicited were proven by competent evidence. *Farmers' Mut. Ins. Ass'n v. Tankersley*, 13 Ala. App. 524, 69 So. 410.

Book Entry—Independent Recollection of Correctness.—Where a witness testified as to a fact recollected apart from a book entry, and that the entry was correct, the admission of the entry was harmless evidence. *Herring v. State*, 11 Ala. App. 202, 65 So. 707.

§ 1051 (2) By Undisputed Facts or Evidence Thereof.

Execution of Will.—Where execution of the will was proved and not contradicted, contestant was not prejudiced by a refusal to exclude an answer to an improper interrogatory, which was merely corroborative and cumulative. *Lockridge v. Brown*, 184 Ala. 106, 63 So. 524.

Execution of Chattel Mortgage.—Error in permitting a witness to testify to the execution of a chattel mortgage held harmless, where a competent witness proved the execution and the fact was not in dispute. *Baker v. Lauderdale*, 14 Ala. App. 224, 69 So. 299.

Cow Killed by Street Car.—In action for value of cow, admission of evidence that street car motorman after the accident remarked, "I got her all right," held not prejudicial; the undisputed facts showing that his car killed the cow. *Mobile, etc., R. Co. v. Portiss*, 195 Ala. 320, 70 So. 136.

Plaintiff's Injuries Received on Train.—Any error in permitting the attending physician to state, after describing plaintiff's symptoms, that plaintiff "said he received the injuries on the train" was harmless where that fact was not disputed. *Empire Coal Co. v. Gravlee*, 9 Ala. App. 657, 64 So. 207.

Conclusion of Witness.—Where the facts testified to by witness showed con-

clusively that his presence was unknown to the husband or wife, it was not prejudicial error to permit him to answer a question as to whether they knew he was there although it called for a conclusion. *Phillips v. State*, 11 Ala. App. 168, 65 So. 673.

Subsequent Undisputed Proof of Character of Instrument.—If it was error to permit witnesses to designate a lost instrument as a deed, the error was cured by subsequent undisputed proof of its contents, showing that it was a deed. *Carter v. Tennessee Coal, etc., R. Co.*, 180 Ala. 367, 61 So. 65.

Admission of evidence as to an immaterial fact held not prejudicial, where the fact otherwise appeared, and was not controverted. *Moore v. Whitmire*, 189 Ala. 615, 66 So. 601.

§ 1051 (3) By Admission of Facts in Pleadings or Otherwise.

General Rule.—*Watters v. Brown*, 177 Ala. 78, 58 So. 291. See the title APPEAL AND ERROR, § 1051 (3), vol. 1, p. 602.

Where facts are admitted by a defendant, in a criminal case, it is harmless error to receive evidence of such facts. *Ragland v. State*, 178 Ala. 59, 59 So. 637.

Illustrative Cases.—Defendant was not injured by improper introduction of ledger into evidence, where he admitted every debit and credit, but claimed additional credits. *White v. Bean & Co. (Ala. App.)*, 77 So. 924.

In an action for injuries from collision with automobile, error in admitting copy of defendant's application for automobile license was harmless, where defendant testified and admitted he was using automobile on own account and had full control. *Winham v. Newton (Ala.)*, 75 So. 24.

In unlawful detainer action, where defendant admitted that he received all notices required, it was harmless, if error, to permit plaintiff's son to testify that he made a demand on defendant as agent for plaintiff. *Archer v. Sibley (Ala.)*, 78 So. 849.

§ 1051 (6) Evidence Admitted without Preliminary Proof.

See ante, "Evidence Admitted without

Preliminary Proof," § 1050 (4).

§ 1052. — Defect Supplied or Objection Removed Subsequently.

§ 1052 (3) By Evidence Subsequently Admitted.

Subsequent Explanation of Testimony.

—The admission of evidence erroneously is rendered harmless, where the witness subsequently states the facts constituting and leading up to the transaction in question. *Herring v. State*, 14 Ala. App. 93, 71 So. 974.

In an action on fire policy, use of the word "think" by witness, instead of "best judgment," in connection with the amount of loss, held harmless, where subsequently explained as meaning best judgment. *Exchange Underwriters' Agency v. Bates*, 195 Ala. 161, 69 So. 956.

Refusal to exclude a witness' statement of his "opinion" in a personal injury case held harmless, where the witness immediately thereafter stated that this was his best judgment of the matter. *Taxicab, etc., Car Co. v. Cabiness*, 9 Ala. App. 549, 63 So. 774.

Secondary Evidence — Best Evidence Subsequently Introduced.—The admission of secondary evidence is harmless, where the best evidence is subsequently introduced. *Birmingham Bottling Co. v. Morris*, 193 Ala. 627, 69 So. 85.

Same—Proof of Recrd.—Error in permitting a witness to testify, over objection, that the record was the best evidence was cured by the introduction of the record in evidence immediately thereafter. *Cummings v. McDonnell*, 189 Ala. 96, 66 So. 717.

Subsequent Evidence Not Curing Error.—Plaintiff's testimony that her husband got mixed up with some D. woman, or some other woman, and that plaintiff could not love him any more, that she did not leave on that occasion on account of any woman, that she stayed away from him for six months, that he came after her, and that she did not send for him, did not cure the error in sustaining an objection to plaintiff's testimony as to her statements of her husband's relations with Mrs. A. Parker *v. Newman* (Ala.), 75 So. 479.

§ 1052 (3) Evidence Made Admissible Subsequently.

In General.—Where evidence, original admission of which was erroneous, was subsequently rendered admissible, error in its admission was harmless. *Page v. Barry*, 197 Ala. 449, 73 So. 22.

Evidence Rendered Admissible by Injection of General Issue.—The erroneous admission in ejectment upon disclaimer of evidence, admissible only to show adverse possession, was cured by the subsequent injection of the general issue. *First Nat. Bank v. Johnson*, 190 Ala. 566, 67 So. 234.

Evidence as to Bill of Sale.—The admission of evidence in detinue to shed light upon a bill of sale before introduction of the bill of sale, if error, was harmless where the bill of sale was subsequently introduced. *Page v. Haas Bros. Packing Co.*, 9 Ala. App. 445, 63 So. 691.

Evidence as to Cost of Repairs—Reasonableness of Amount.—In action for damages to automobile, objectionable feature of question as to cost of repairs held cured by testimony as to whether the amount paid was a reasonable amount. *Hill v. Condon*, 14 Ala. App. 332, 70 So. 208.

Evidence as to Demand—Facts of Demand Subsequently Shown.—In an action for conversion, where the answer to a question calling for a conclusion as to demand was followed by a statement of facts which showed a demand, error in permitting the question to be answered is harmless. *Stamps v. Thomas*, 7 Ala. App. 622, 62 So. 314.

§ 1052 (4) Evidence Admitted without Preliminary Proof.

Book Memorandum—Delivery of Goods.

—If the court committed error in allowing a witness to refer to a memoranda in a book made by a third person, indicating as to the deliveries of goods to defendant of which witness had no personal knowledge, such error was cured by the action of the court in suspending the trial, and allowing the production of witnesses who made the deliveries disclosed by the memoranda, and who testified as to such delivery. *Stokes v. State*, 13 Ala. App. 294, 69 So. 303.

§ 1052 (5) Effect of Determination in General.

Testimony Unnecessary to Decree for Successful Party.—Failure of the chancellor to rule on objections to testimony was harmless error, where it did not appear that a consideration of the testimony was necessary to a decree for the successful party. *Sewell v. Holley*, 189 Ala. 121, 66 So. 506.

Plaintiff Not Entitled to Recover.—In action to recover damages to property, rulings on admission of evidence concerning value of the property can not be made the basis of reversal, where the verdict was against plaintiff's right to recover at all. *Hamilton v. Cranford Mercantile Co.* (Ala.), 78 So. 401.

§ 1052 (6) Evidence on Issue Found for Party Complaining.

Value of Property—Verdict Accepting Defendants' Valuation.—Error, if any, in overruling an objection to a question calling for the value of property sued for, was not prejudicial to defendants, where the jury fixed the value at the sum shown by defendants' testimony. *Logan v. Smith Bros. & Co.*, 9 Ala. App. 459, 63 So. 766, certiorari denied in *Ex parte Logan*, 185 Ala. 525, 64 So. 570.

Where, in trover for the conversion of mules, the jury accepted defendants' estimate of the value of the mules, defendants were not prejudiced by the court's rulings on the evidence relating to such question. *Jones v. White*, 189 Ala. 622, 66 So. 605.

Extent of Injuries—Verdict for No Damages.—Error relating to evidence as to the extent of plaintiff's injuries is harmless, where the jury found for defendant and awarded no damages whatever. *Walker v. Smith* (Ala.), 74 So. 451.

§ 1052 (7) Evidence as to One Issue Made Immaterial by Finding on Another.

Authority to Make Bond—Finding of Ratification.—Where the court of appeals held a corporation liable on a bond made by its agent on the theory of ratification and not original authorization, rulings on evidence relating to original authority, if erroneous, were harmless. *Alabama Fidelity, etc., Co. v.*

Jefferson County Sav. Bank (Ala.), 73 So. 918.

Extent of Injuries—Verdict Denying Any Recovery.—See ante, "Evidence on Issue Found for Party Complaining," § 1052 (6).

Value of Property—Plaintiff Not Entitled to Recover.—See ante, "Effect of Determination in General," § 1052 (5).

§ 1052 (8) Appellant Not Entitled to Favorable Decision in Any Event.

See ante, "Effect of Determination in General," § 1052 (5).

§ 1053. — Error Cured by Withdrawal, Striking Out, or Instructions to Jury.

§ 1053 (1) By Withdrawal or Striking Out.

Delicacy of Function in Withdrawing Evidence—Duty of Other Party.—Care and caution is to be exercised in the delicate, difficult, and important matter of removing the prejudicial effect of evidence improperly admitted, the burden of which rests upon the party causing its admission, and no duty rests upon the other party in that connection after seasonably and properly reserving his exception to its admission. *Watson v. Adams*, 187 Ala. 490, 65 So. 528.

General Rule.—Where error has been committed by the admission of evidence, such error is cured by a proper subsequent withdrawal of such evidence. *Benjamin v. State*, 12 Ala. App. 148, 67 So. 792; *Wise v. State*, 11 Ala. App. 72, 66 So. 128; *Brantley v. State*, 11 Ala. App. 144, 65 So. 678.

Particular Instances.—If error was committed in admitting testimony as to handwriting, the error was cured where subsequently it was plainly and unequivocally excluded from the jury. *Newsum v. State*, 10 Ala. App. 124, 65 So. 87.

In action for balance due under cropping contract, original admission of plaintiff's testimony as to value of his work, if erroneous, became harmless when such testimony was later ruled out. *Farabee v. Wade* (Ala.), 76 So. 941.

In an action for being carried beyond plaintiff's station, the admission of evidence of undue haste in the operation of the train, when subsequently taken out

of the case, held harmless. *Louisville, etc., R. Co. v. Cornelius*, 183 Ala. 203, 62 So. 710.

Insufficient Withdrawal Not Waived.—The insufficiency of an attempt to exclude evidence that had been erroneously admitted, so as to remove its prejudicial effect, was not waived by the excepting party's failure to deny its sufficiency, upon the party causing the admission of the evidence stating that, if the other was not satisfied with the exclusion, he would not have the questions and answers read by the stenographer. *Watson v. Adams*, 187 Ala. 490, 65 So. 528.

§ 1053 (2) By Withdrawal and Instructions to Disregard.

General Rule.—Where the court has committed an error unfavorable to defendant in the admission of evidence, such error is cured by the subsequent exclusion thereof and a clear and explicit instruction to the jury to disregard it. *Hill v. State*, 194 Ala. 11, 69 So. 941.

Where evidence has been improperly admitted, the error is cured by the action of the court in later excluding such evidence, and directing the jury not to consider it. *Brand v. State*, 13 Ala. App. 390, 69 So. 379.

Error in the admission of evidence may be cured by an instruction withdrawing it from the jury. *Birmingham Ledger Co. v. Buchanan*, 10 Ala. App. 527, 65 So. 667.

Illustrative Case.—Any error in admitting testimony as to bad timber at other places in the mine than the place where deceased was injured is cured by specific instructions that the existence of bad timber at other places should not be considered. *Empire Coal Co. v. Goodhue (Ala.)*, 76 So. 31.

§ 1053 (3) By Instructions in General.

Correct Instructions on Matter Involved Not Sufficient.—Error in the admission of illegal evidence is not rendered harmless by correct instructions as to the matter to which the evidence related. *Southern Iron, etc., Co. v. Acton*, 8 Ala. App. 502, 62 So. 402.

Instructions Showing Evidence Immaterial.—Error in admission of evidence held harmless, where the instructions

given made it plain that it was immaterial. *Western Union Tel. Co. v. Holland*, 11 Ala. App. 510, 66 So. 926.

Errors Cured.—*Loyal v. Wolf*, 179 Ala. 505, 60 So. 298. See the title APPEAL AND ERROR, § 1053 (3), vol. 1, p. 607.

Error, if any, in admitting evidence which should have been excluded was neutralized by affirmative instruction denying plaintiff's right to recover for losses sustained in the transaction covered by the erroneously admitted evidence. *Berry v. Woody (Ala. App.)*, 77 So. 942.

In action for failure to furnish electric service, court having instructed that there could be no recovery for loss of time in trying to get the installation consummated, no reversal should be had for admission of evidence that plaintiff had lost three days' time in effort to get light installed. *Birmingham R., etc., Co. v. Littleton (Ala.)*, 77 So. 565.

Error Not Cured.—Tendency of evidence of wife's acts and conduct after assault to arouse jury's sympathy because of separation from husband and home, held not cured by instruction that she could not recover damages for such separation. *Johnson v. Johnson (Ala.)*, 77 So. 335.

§ 1053 (4) Sufficiency of Instructions Relating Expressly to Improper Evidence Admitted.

Mere Formal Direction by Court.

Where plaintiff's attorney suspected the correctness of rulings in his favor on questions impeaching defendant's witness, and moved that the impeaching evidence be excluded, and the trial court responded, "Let the record show that that part of the testimony with reference to the knife * * * on motion of the plaintiff is excluded before the case goes to the jury," the error was not cured; the effort made having been a mere formality, directed to the record rather than to the effect of the evidence on the jury. *Maryland Casualty Co. v. McCallum (Ala.)*, 75 So. 902.

Prejudicial error in the admission of evidence that counsel appearing for defendant represented an indemnity insurance company was not cured by plaintiff's counsel stating, at the close of

the evidence that he wanted defendant's testimony (on cross-examination) that certain counsel appearing for him represented an indemnity insurance company, excluded, upon which the court said, "That will not be before you for consideration." *Watson v. Adams*, 187 Ala. 490, 65 So. 528.

Charge Leaving Jury to Determine What Evidence Objectionable.—The reception of improper evidence is not reversible error where the jury are clearly and unequivocally charged to disregard it, although the practice is not to be commended; but the erroneous admission of testimony from a number of witnesses is not cured by a charge that the court sustained the objections to the testimony, and excluded that objected to, since the charge leaves the jury to decide what evidence was objectionable. *Hicks v. State*, 11 Ala. App. 290, 66 So. 873.

§ 1054. — On Trial without a Jury.

Harmless Error.—In action on indemnity bond, admission of evidence of custom prevailing in banks of type in question to have only one active man in its service was not prejudicial to the defendant in trial without a jury. *Alabama Fidelity, etc., Co. v. Alabama Penny Sav. Bank (Ala.)*, 76 So. 103.

Prejudicial Error.—Plaintiff, president of a corporation, brought assumpsit for the price of goods sold to defendant, who, under the general issue, raised the question whether he was indebted to the plaintiff individually or the corporation. It appeared that the goods purchased by defendant originally belonged to the corporation and that the plaintiff, acting as president, sold the goods to himself to pay an indebtedness due him on his salary, and shortly thereafter sold the goods to the defendant. Subsequently the plant and machinery of the corporation, which had become insolvent, were turned over to a creditor in satisfaction of his debt. It was admitted in evidence such creditor had agreed that the plaintiff could have an account against the defendant for the goods in question. Held, that the admission of such evidence, in a trial by the court without a jury, having the tendency to show that the court was influenced thereby in de-

termining the issues of the case, was prejudicial. *Bowdon Lime Work v. Moss*, 14 Ala. App. 433, 70 So. 292.

§ 1055. Exclusion of Evidence.

§ 1056. — Prejudicial Effect in General.

§ 1056 (1) In General.

Where Plaintiff Had No Right of Action.—The exclusion of evidence, in an action where plaintiff had no right of action whatever, is harmless. *Armstrong v. Sellers*, 182 Ala. 582, 62 So. 28.

Evidence Not Influencing Verdict.—Excluding testimony which could not have influenced the verdict is harmless. *Hurst v. Fitz Water Wheel Co.*, 197 Ala. 10, 72 So. 314.

Excluding Question to Expert Declining to Express Opinion.—Error in sustaining an objection to a question put to an expert held not reversible, where the expert declined to express an opinion when all the facts were hypothesized. *Southern Bitulithic Co. v. Perrine*, 191 Ala. 411, 67 So. 601.

Where a witness showed that he did not know a fact sought to be proved by him as of his own knowledge, exclusion of questions was not prejudicial. *Hubbard v. Coffin*, 191 Ala. 494, 67 So. 697.

Where the witness answered in effect that the witness did not know, the defendant is not injured by the sustaining of an objection to the question and the exclusion of the answer. *Lambert v. State*, 13 Ala. App. 289, 69 So. 261.

Where plaintiff in detinue action claimed property by purchaser in consideration of debt owed to him, there was no prejudice in excluding testimony as to whether witness knew if plaintiff received payment of the debt by delivery of cotton, there being no suggestion that such witness knew the fact. *Dickey v. Vaughn (Ala.)*, 73 So. 507.

Color of Title Excluded—No Evidence of Adverse Claim.—In trespass for cutting timber, where there was no evidence of defendant's intention to hold the land adversely, the exclusion of evidence showing color of title was harmless, if erroneous. *Williams v. Lyon*, 181 Ala. 531, 61 So. 299.

Prejudicial Error. — *Henderson v. Planters, etc., Bank*, 178 Ala. 420, 59 So.

493. See the title APPEAL AND ERROR, § 1056 (1), vol. 1, p. 609.

In action for death of one killed on defendant's track, exclusion of evidence as to the defects in the car brakes which would have corroborated plaintiff's witness held prejudicial to plaintiff. *Manley v. Birmingham R., etc., Co.*, 191 Ala. 531, 68 So. 60.

In an administrator's action, the exclusion from evidence, before conclusion of plaintiff's case, of his letters of administration, on the ground that his appointment by a court of probate was invalid, was not harmless, where, on the other proof offered on the point of due appointment, the plaintiff was not entitled to recover. *Enzor v. Rushton*, 13 Ala. App. 550, 69 So. 909.

In a statutory action of ejectment, where the court improperly excluded a deed from evidence on the ground of uncertainty in the description of the land, the error was not harmless, though the proof as made failed to show that the grantor in the conveyance was ever in possession of the property or had title. *Reynolds v. Trawick*, 197 Ala. 165, 72 So. 378.

Defendant having the right of way by ordinance, to exclude statement by plaintiff, who saw defendant's car 10 or 15 feet before plaintiff reached the intersecting street, that he could not see or estimate its position when he first saw it coming, was prejudicial error. *Ray v. Brannan*, 196 Ala. 113, 72 So. 16.

Where insured denied signing the application alleged to contain false representations, it was reversible error for the court not to permit an expert to give his opinion whether the signature and insured's name, written by him in open court, were written by the same person. *United States Health, etc., Ins. Co. v. Hill*, 9 Ala. App. 222, 62 So. 954.

Harmless Error.—In action for brakeman's wrongful death, exclusion of evidence for defendant as to whether its conductor was laid off on the morning of the accident held not reversible error. *Southern R. Co. v. Harrison*, 191 Ala. 436, 67 So. 597.

In an action for disturbing and humiliating a guest in a hotel, exclusion of evidence that the manager of the hotel

had had the house detective hunting for plaintiff was harmless error, where the manager had stated without objection that he had made all reasonable efforts to locate plaintiff. *Florence Hotel Co. v. Bumpus*, 194 Ala. 69, 69 So. 566.

In an action against a hotel keeper for disturbing and humiliating a guest, exclusion of a letter intended by the hotel keeper for the guest, but which was never received or opened by him, was harmless error. *Florence Hotel Co. v. Bumpus*, 194 Ala. 69, 69 So. 566.

Although as a general rule matter may be elicited on cross-examination to show the nature and extent of the witness' bias or interest as to the parties or as to the issue, in an action for the alienation of the affections of plaintiff's husband, where a witness' testimony that defendant and plaintiff's husband had been together was but corroborative of disinterested witnesses, and he admitted his interest in plaintiff's behalf, the exclusion of a letter written by the witness to plaintiff's husband, which tended to show bias on part of witness only if plaintiff's husband made the statement inquired of, was not reversible error. *Parker v. Newman (Ala.)*, 75 So. 479.

Same—Evidence of Inadvertent Omission of Words from Letter.—*Cook, etc., Contracting Co. v. Bell*, 177 Ala. 618, 57 So. 273. See the title APPEAL AND ERROR, § 1056 (1), vol. 1, p. 611.

§ 1056 (2) Evidence Immaterial to Issue.

Rulings excluding immaterial testimony will not be reviewed. *Green v. Stephens (Ala.)*, 73 So. 532.

Particular Instance of Harmless Error.—*Brown v. Loeb*, 177 Ala. 106, 58 So. 330. See the title APPEAL AND ERROR, § 1056 (2), vol. 1, p. 612.

Where a passenger, suing because induced to leave the train at a siding, testified as to the condition of her health at the time, error in excluding evidence that she had recently been in a sanitarium was not prejudicial. *Hilley v. Central, etc., R. Co.*, 11 Ala. App. 605, 66 So. 883.

In an action for wrongful death, where one of plaintiff's witnesses admitted a personal difficulty between himself and defendant's master mechanic, the refusal

of the court to permit proof of the details of such difficulty, and of the fact of an indictment against such witness, was not reversible error. *Sloss-Sheffield Steel, etc.*, | *Co. v. Scivally*, 197 Ala. 103, 72 So. 349.

§ 1056 (4) Effect of Determination.

Verdict for Plaintiff—Excluded Evidence Not Increasing Damages.—Errors in rulings on evidence adverse to plaintiff obtaining a verdict are not prejudicial unless they resulted in the exclusion of evidence which, if admitted, would have justified greater damages than those awarded. *Hilley v. Central, etc.*, R. Co., 11 Ala. App. 605, 66 So. 883.

Where verdict for wrongful arrest was only \$19 and a few cents, exclusion of testimony that defendant, a police officer, had consulted an attorney as to his right to make arrest was harmless, if erroneous. *Rhodes v. McWilson* (Ala. App.), 77 So. 465.

Wrongful Death — Excluding Deceased's Age—Verdict for Defendant.—In an action for wrongful death where the verdict was for defendant, no error can be predicated by the plaintiff upon rulings on the question of the deceased's age. *Helms v. Central, etc.*, R. Co., 188 Ala. 393, 66 So. 470.

§ 1057. — Facts Otherwise Established.

§ 1057 (1) By Other Evidence.

General Rule.—The exclusion of evidence is not prejudicial, where the matters excluded are otherwise established. *Portsmouth Cotton Oil Refin. Corp. v. Madrid Cotton Oil Co.* (Ala.), 77 So. 8; *Brown v. Central, etc.*, R. Co., 185 Ala. 659, 64 So. 581; *Bricken v. Sikes*, 14 Ala. App. 187, 68 So. 801, certiorari denied in *Ex parte Bricken*, 194 Ala. 148, 69 So. 425; *Francis v. State*, 188 Ala. 39, 65 So. 969.

Particular Instances.—Exclusion of evidence to show that note had been changed held not prejudicial; the change being otherwise shown and admitted, and the controversy being as to the time it was made and defendant's connection therewith. *McKinney v. Darden*, 192 Ala. 369, 68 So. 269.

Where defendants, after exclusion of paper writing, connected themselves with title from government through another channel, exclusion was harmless, and not

ground for reversal of judgment for plaintiff based on adverse possession. *Aiken v. McMillan* (Ala.), 78 So. 56.

In ejectment, where the undisputed evidence showed that defendant was in possession of land other than that in dispute at a particular time, the exclusion of evidence, relating to his possession of such other land, if erroneous, was harmless, as merely cumulative on a fact not in dispute. *Phillips v. Shoots*, 195 Ala. 20, 71 So. 94.

In detinue exclusion of testimony as to whether defendant claimed lumber when levied on under execution held not prejudicial because other evidence clearly showed that defendant all along was claiming the lumber. *Dees v. People's Bank* (Ala.), 76 So. 901.

In an action for trespass against the board of commissioners of roads and revenue of a county by cutting a fence erected by plaintiff across a road under authority of defendants, which was afterwards rescinded, where the undisputed evidence showed that the board acted officially in ordering plaintiff's fence across the old road removed, error in sustaining objection to testimony that the commissioners so acted was harmless. *Jackson v. Bohlin* (Ala. App.), 75 So. 697.

Where a witness, sought to be impeached, is impeached by his own testimony, the exclusion of impeaching evidence is harmless. *Posey v. State*, 12 Ala. App. 193, 67 So. 737.

§ 1057 (2) By Admission of Facts.

Where facts are subsequently proven without objection, or are admitted by the other party, any error in excluding evidence of such fact is not prejudicial. *Francis v. State*, 188 Ala. 39, 65 So. 969. See also, *McKinney v. Darden*, 192 Ala. 369, 68 So. 269.

Where the facts sought to be established were conceded, the erroneous exclusion of evidence was harmless. *Portsmouth Cotton Oil Refin. Corp. v. Madrid Cotton Oil Co.*, 195 Ala. 256, 71 So. 111.

§ 1058. — Same or Similar Evidence Otherwise Admitted.

§ 1058 (1) In General.

General Rule.—*Morris v. Brown*, 177

Ala. 389, 58 So. 910. See the title APPEAL AND ERROR, § 1058 (1), vol. 1, p. 615.

Where Evidence Already Received. —

The exclusion of testimony is not prejudicial where the substance of evidence sought had already been received. *Boshell v. Cunningham* (Ala.), 76 So. 937; *Hamilton v. Cranford Mercantile Co.* (Ala.), 78 So. 401; *Saxon v. Davie*, 192 Ala. 10, 68 So. 253.

Where Evidence Subsequently Admitted.—Error in excluding evidence is harmless, where it is subsequently admitted. *Streit v. Wilkerson*, 186 Ala. 88, 65 So. 164; *Birmingham Bottling Co. v. Morris*, 193 Ala. 627, 69 So. 85; *Saxon v. Davie*, 192 Ala. 10, 68 So. 253; *Portsmouth Cotton Oil Refin. Corp. v. Madrid Cotton Oil Co.*, 195 Ala. 236, 71 So. 111; *Alexander v. Smith*, 180 Ala. '541, 61 So. 68.

Testimony by Defendant—Refusal to Permit Proof by Others.—Where a defendant testified to a statement made by himself, and the evidence was undisputed, it was not prejudicial error to decline to permit defendant to make such proof by other witnesses. *Hickman v. State*, 12 Ala. App. 22, 67 So. 775.

Particular Instances of Harmless Error.—In an action of assumpsit, there could be no reversal for the erroneous exclusion of a judgment entry, where the identical entry was subsequently placed in evidence. *Williams v. Shows*, 197 Ala. 596, 73 So. 99.

Defendant can not complain of exclusion of contract; he being allowed to fully describe it. *Bass v. Green* (Ala.), 78 So. 869.

Error, if any, in excluding book entries showing purchases and prices of seed, in action for breach of contract to sell seed, was not reversible, where the witnesses fully testified as to such purchases and prices. *Whitehead v. Jasper Oil, etc., Co.* (Ala.), 77 So. 42.

Excluding evidence in damage homicide case is not prejudicial error, where court later changed its ruling, and fact involved was shown without dispute. *Kuykendall v. Edmondson* (Ala.), 77 So. 24.

Although on plaintiff's motion testimony of engineer as to whether he

handled engine carefully and prudently, being expression of opinion, were excluded, where others of similar legal effect were not objected to plaintiff lost his right to insist their admission was error. *Douglass v. Central, etc., R. Co.* (Ala.), 78 So. 457.

Error in excluding a question whether a certain person was in control of land in controversy held cured by the subsequent admission of evidence relating to such person's possession and control of the land. *Ashford v. McKee*, 183 Ala. 620, 62 So. 879.

Under Code 1907, § 4052, it was harmless error to refuse to require witness to answer interrogatories, where the substance of the evidence was otherwise introduced. *Hoffman v. Birmingham R., etc., Co.*, 194 Ala. 30, 69 So. 551.

§ 1058 (2) Other Testimony of Same Witness.

In General.—*Birmingham R., etc., Co. v. Simpson*, 177 Ala. 475, 59 So. 213; *Porter v. Tennessee Coal, etc., R. Co.*, 177 Ala. 406, 59 So. 255; *Bachelder v. Morgan*, 179 Ala. 339, 60 So. 815; *Louisville, etc., R. Co. v. Dilburn*, 178 Ala. 600, 59 So. 438. See the title APPEAL AND ERROR, § 1058 (2), vol. 1, pp. 615, 616.

Testimony Already Given by Witness.

—Where the witness had been allowed to answer a similar question without objection, the exclusion of such questions later was harmless. *Sexton v. State*, 13 Ala. App. 84, 69 So. 341.

Any error in ruling on the admissibility of evidence was harmless, where the witness had previously testified to the same facts or had failed to answer the question. *Blalack v. Blacksher*, 11 Ala. App. 545, 66 So. 863.

In detinue, involving the ownership of a cow, where a witness testified that his wife bought the first cow from J. B., it was not prejudicial error for the court to exclude a question, propounded on cross-examination, asking if the first cow was not bought from S. B., since such question would only have served to require the witness to reiterate what he had already stated. *Dickey v. Vaughn* (Ala.), 73 So. 507.

Testimony Subsequently Given by Witness. — *Bachelder v. Morgan*, 179

Ala. 339, 60 So. 615. See the title APPEAL AND ERROR, § 1058 (2), vol. 1, p. 615. *Sloss-Sheffield Steel, etc., Co. v. Devaney*, 7 Ala. App. 457, 60 So. 990. See the title APPEAL AND ERROR, § 1058 (2), vol. 1, p. 615.

The error, if any, in excluding testimony, is harmless, where the witness is subsequently permitted to testify fully without objection to the facts. *Brooks v. State*, 8 Ala. App. 277, 62 So. 569; *Kendrick v. Cunningham*, 9 Ala. App. 398, 63 So. 797; *Carmichael v. State*, 197 Ala. 185, 72 So. 405; *Hamilton v. Cranford Mercantile Co. (Ala.)*, 78 So. 401; *Haley v. Miller*, 193 Ala. 482, 69 So. 564; *Borden & Co. v. Vinegar Bend Lumber Co.*, 7 Ala. App. 335, 62 So. 245; *Louisville, etc., R. Co. v. Mooror*, 195 Ala. 344, 70 So. 277; *Jefferson Fertilizer Co. v. Burns*, 10 Ala. App. 301, 64 So. 667; *Ward v. Lane*, 189 Ala. 340, 66 So. 499; *Baskett Lumber, etc., Co. v. Gravlee (Ala. App.)*, 73 So. 291.

Error in sustaining an objection to the question is harmless, where the witness thereafter testified to the full extent of his knowledge on the subject. *Pratt Consol. Coal Co. v. Morton*, 14 Ala. App. 194, 68 So. 1015; *Knowlton v. Central, etc., R. Co.*, 192 Ala. 456, 68 So. 281.

Excluded Question Subsequently Answered.—Error can not be predicated on the court's refusal to allow a question to a witness where it appeared that the witness subsequently answered the question and the answer was received without objection. *Central, etc., R. Co. v. Mathis*, 196 Ala. 32, 71 So. 674; *Crews v. Parker*, 192 Ala. 383, 68 So. 287; *Bricken v. Sikes*, 14 Ala. App. 187, 68 So. 801, certiorari denied in *Ex parte Bricken*, 194 Ala. 148, 69 So. 425; *McConnell v. State*, 13 Ala. App. 79, 69 So. 333; *Ashford v. McKee*, 183 Ala. 620, 62 So. 879; *Terry v. State*, 13 Ala. App. 115, 69 So. 370.

Where defendant in the examination of a witness brought out all the facts which were admissible, even if questions to that witness as to which objections were sustained had been answered, error, if any, in sustaining such objections was harmless. *Vinegar Bend Lumber Co. v. Soule Steam Feed Works*, 182 Ala. 146, 62 So. 279.

Error in excluding evidence offered for a particular purpose, which was admissible for other purposes, is harmless, where the witness was thereafter fully examined in regard thereto, and no injury was shown. *Pratt Consol. Coal Co. v. Morton*, 14 Ala. App. 194, 68 So. 1015.

Same—On Cross-Examination.—Error in the exclusion of testimony upon a witness' direct examination may be cured by his answers to the same effect upon cross-examination. *Phillips v. Shotts*, 195 Ala. 20, 71 So. 94.

Subsequent Admission by Defendant Witness.—The error in refusing to allow defendant to testify as to whether he signed the paper in suit held cured by the subsequent admission of defendant that he signed said paper. *Mizzell v. Farmers' Bank*, 180 Ala. 568, 61 So. 272.

Objection Sustained to Question—Answer Not Excluded.—Where the questions were answered fully and the answers not excluded, it was harmless error to sustain objections to the questions. *Storey v. State*, 14 Ala. App. 127, 72 So. 267.

Particular Instance of Harmless Error.—*Napier v. Elliott*, 177 Ala. 113, 58 So. 435. See the title APPEAL AND ERROR, § 1058 (2), vol. 1, p. 616.

Where, after sustaining objection to a question as to how far a wall was leaning over, the court said to let the witness state the condition of the wall, and the witness then proceeded without further objection to testify as to its condition, and that it was leaning over 4 or 5 inches, and that it fell for a distance of about 60 to 80 feet, any error in the ruling on objection was cured. *Barker v. Tennessee Coal, etc., R. Co.*, 189 Ala. 579, 66 So. 600.

Error, if any, in sustaining an objection to a question whether a witness, who was plaintiff's grantor, put him in possession of the land to a specified line in controversy held cured by subsequent testimony that the only possession he delivered was in delivering a deed. *Ashford v. McKee*, 183 Ala. 620, 62 So. 879.

Any error in excluding a question to a witness as to whether or not he rented the land from H. as agent or just rented it from him straight is cured, where the

witness afterwards testified that the rent note was made directly to H. Lefkowitz *v. Lester*, 11 Ala. App. 504, 66 So. 894.

Exclusion of a question as to the horse power of an automobile held harmless, where defendant was subsequently permitted to state that it would develop only 20 horse power. *Stewart v. Riley*, 189 Ala. 519, 66 So. 488.

In an action against a carrier for personal injuries, the exclusion of plaintiff's question to the motorman held not prejudicial, where its purpose was fully met in other parts of the examination. *Birmingham R., etc., Co. v. O'Brien*, 185 Ala. 617, 64 So. 343.

Exclusion of evidence as to who laid out a town site in controversy was harmless error, where a witness subsequently testified as to who had done so. *Haley v. Miller*, 193 Ala. 482, 69 So. 564.

In an action for death by being struck by a street car, the sustaining of objections to evidence by the motorman as to keeping a lookout was harmless error, where he has testified that he was keeping such lookout. *Hoffman v. Birmingham R., etc., Co.*, 194 Ala. 30, 69 So. 551.

Exclusion of secondary evidence of contents of receipt held harmless if erroneous, where defendant was allowed to testify concerning the payment; his testimony showing all of the essentials of the receipt. *Porter v. Watkins*, 196 Ala. 333, 71 So. 687.

§ 1058 (3) Similar Testimony of Other Witnesses.

The exclusion of testimony is harmless where similar testimony has been received without objection. *Campbell v. State*, 13 Ala. App. 70, 69 So. 322.

Where the evidence was not excluded, and defendant received the full benefit at a subsequent time of that or similar testimony, the sustaining of an objection to the evidence as originally offered was harmless, if error. *Ingram v. State*, 13 Ala. App. 147, 69 So. 976.

Where several witnesses for a defendant were allowed to state the facts without objection, any error in refusing to permit another witness to testify to the same fact was harmless. *Phillips v. State*, 11 Ala. App. 15, 65 So. 444.

§ 1059. — Error Cured by Instructions to Jury.

Where General Charge Properly Given.—Where, in an action for the wrongful shooting and killing of the plaintiff's intestate, the evidence was insufficient to take the case to the jury as to certain defendants, in that it failed to show that either of such defendants was present at the difficulty, plaintiff's evidence being neither illegal, irrelevant, nor immaterial, it was not proper practice to exclude it after plaintiff rested, but such exclusion could not injure, and was harmless error, where the court later properly gave the general charge for such defendants. *Wise v. Curl*, 177 Ala. 324, 58 So. 286.

§ 1060. Arguments and Conduct of Counsel.

Argument Merely Amounting to Illustration.—Reversal will not be ordered on account of counsel's argument which, although it might well have been excluded, was no more than an illustration. *Clinton Min. Co. v. Bradford (Ala.)*, 76 So. 74.

Instruction to Disregard Statement.—Where the court charged the jury that there was no evidence of a certain thing stated by counsel, and directed them not to consider such statement, any error in declining to exclude such remarks when made, was rendered harmless. *Brantley v. State*, 11 Ala. App. 144, 65 So. 678.

Instances of Prejudicial Error. — *Dupuy v. Wright*, 7 Ala. App. 238, 60 So. 997. See the title APPEAL AND ERROR, § 1060, vol. 1, p. 618.

In an action of conversion by landlord against tenant, remarks of counsel for plaintiff in argument as to generosity of government to tenant, as well as remarks of court in approbation, held reversible error. *McArthur Bros. Co. v. Middleton (Ala.)*, 75 So. 895.

Instances of Harmless Error.—Improper exclamation of plaintiff's counsel while witness for defendant was testifying to the effect that some one might be indicted for perjury, held not prejudicial, where such exclamation in no wise affected the witness' testimony. *Headley v. Harris*, 196 Ala. 520, 71 So. 695.

In an action for homicide, where de-

fendant pleaded self-defense, the argument of plaintiff's counsel that, if defendant had gone into his house and put up his gun, no one would have been hurt, does not constitute reversible error. *Kuykendall v. Edmondson* (Ala.), 77 So. 24.

In an action against a tenant holding over, in which he claimed a recoupment for improvements, counsel's insinuation in a question that defendant's excuse for a repeated failure to go with plaintiff's agent to estimate the value of the improvements was a mere pretense was harmless, where the answer elicited nothing capable of exerting a prejudicial influence upon the jury. *Walker v. Gunnels*, 188 Ala. 206, 66 So. 45.

In an action for death by electric shock, there being no material conflict in the testimony, all of which came from plaintiff's own witnesses, for whose credibility he vouched, there was no prejudicial error in the refusal of the trial judge to allow plaintiff's counsel to argue to the jury that they could not or ought not to believe the testimony of a witness with respect to warning of danger given deceased, though where a party is not bound by his own witnesses, and the issue of the credibility of the evidence is submitted to the jury, doubtless counsel would be entitled to argue the issue. *Dorough v. Alabama Power Co.* (Ala.), 76 So. 963.

§ 1061. Demurrer to Evidence, Dismissal, Nonsuit or Direction of Verdict.

Direction of Verdict.—Where the evidence clearly showed contributory negligence, the giving of charges which erroneously directed verdict for defendant is harmless. *Kiker v. Hitt*, 189 Ala. 652, 66 So. 632.

Any error in giving affirmative instruction for defendant as to one count is harmless where plaintiff could have proved same facts under other counts. *Burns v. Cline* (Ala. App.), 77 So. 429.

Where plaintiff's whole evidence is insufficient to take the case to the jury, and the ruling on defendants' motion to exclude such evidence is followed by the general charge given on defendants' request in writing, there is no reversible error. *Athey v. Tennessee Coal, etc.*, R. Co., 191 Ala. 646, 68 So. 154.

Plaintiff in detinue, who has never had actual possession of the property, and who does not show legal title and right to immediate possession, not being entitled to recover against defendant in possession, acquired in a legal manner, though he has no title, giving the affirmative charge for plaintiff, under such circumstances, is not harmless error. *Sanders v. Rogers* (Ala. App.), 77 So. 69.

Refusal to Direct Verdict.—In action against street railway, where verdict did not embrace punitive damages, refusal of general affirmative charge for railway on wanton injury count was harmless to it. *Alabama City, etc., R. Co. v. Lee* (Ala.), 76 So. 908.

In action for marble sold and delivered, the refusal of a general charge for defendant was harmless, where the verdict for plaintiff was not based on that count. *Puffer Mfg. Co. v. Alabama Marble Quarries* (Ala.), 73 So. 415.

It was not reversible error to refuse an affirmative charge as to a certain count, where the court charged that the count was immaterial, and that recovery could not be had thereon. *Western Assur. Co. v. Hann* (Ala.), 78 So. 232.

Where motions for judgment by both parties having been denied, plaintiff and the substituted defendant introduced evidence, and plaintiff's evidence entitled him to recover, error, if any, in overruling the motions for judgment was cured or resulted in no injury to such defendant. *Stewart v. Sample*, 8 Ala. App. 663, 62 So. 338, judgment modified for error as to costs in *Ex parte Stewart*, 185 Ala. 216, 64 So. 36.

§ 1062. Submission of Issues or Questions to Jury.

§ 1062 (1) In General.

Submission of Counts Unsupported by Evidence.—Where a complaint in an action for injuries to an employee contained statutory counts and a common-law count, and the court submitted to the jury all the counts, error in submitting the case on the common-law count for want of evidence to support it requires reversal of a judgment for plaintiff. *Langhorne v. Simington*, 188 Ala. 337, 66 So. 85.

In an action for injuries to a minor

employee, where the court erroneously submitted two counts, alleging negligence which the evidence showed was not the proximate cause of the injury, evidence as to the negligence charged in another count, which was properly submitted, held to raise a question for the jury so as to require the reversal of a judgment for plaintiff, though there was sufficient evidence to support a verdict on that count. *Huntsville Knitting Co. v. Butner* (Ala.), 73 So. 907.

Effect of Determination. — *Watters v. Brown*, 177 Ala. 78, 58 So. 291. See the title APPEAL AND ERROR, § 1062 (1), vol. 1, p. 619.

Error in refusing to plaintiff an affirmative charge is cured by a verdict for him. *Hilley v. Central, etc., R. Co.*, 11 Ala. App. 605, 66 So. 883.

§ 1063 (3) Withdrawal of Questions from Jury.

Giving Affirmative Charge on One Count—Benefit of Matters under Other Counts.—The erroneous giving of an affirmative charge in favor of defendant as to one count of the complaint was harmless, where plaintiff had benefit of the same matters under a count submitted. *Walker v. Alabama, etc., Railway*, 194 Ala. 360, 70 So. 125.

Withdrawal of Issue Prejudicial.—Where there was evidence rendering it error to give the affirmative charge against the plaintiff on counts charging willful or wanton misconduct, such error could not be cured by the submission to the jury of the issues raised by the counts declaring on simple negligence. *McNeil v. Munson S. S. Lines*, 184 Ala. 420, 63 So. 992, reversing on this point 8 Ala. App. 610, 62 So. 459.

In a personal injury action by a passenger who fell down the unlighted steps leading to the carrier's station, the fact that the steps were not lighted at all that night held not to render harmless the refusal of the court to submit to the jury the question whether the passenger came to the station at an unreasonable time. *Central, etc., R. Co. v. Campbell*, 10 Ala. App. 288, 64 So. 540.

Withdrawal of Issue Harmless.—In passenger's action for injuries, under allegations that while she was alighting the street car moved suddenly, where the

jury found that the car did not move while plaintiff was alighting, withdrawal of the question of wanton injury, if error, was harmless. *Erwin v. Birmingham R., etc., Co.* (Ala.), 76 So. 915.

In a suit by a boy for injury at a crossing, defended on the ground that he was hurt in attempting to "ride the train" after he crossed the tracks, he was not harmed by a general charge for defendant as to a count for wanton injury. *Cardwell v. Louisville, etc., R. Co.*, 185 Ala. 628, 64 So. 564.

§ 1063. Instructions to Jury.

§ 1064. — Prejudicial Effect in General.

As to cure of error by other instructions, see post, TRIAL.

Abstract Instructions. — See post, "Applicability to Issues and Evidence," § 1066.

Argumentative Instructions.—The giving of argumentative charges will not be reversible error unless the appellate court is satisfied that the jury were misled thereby. *McCary v. Alabama, etc., R. Co.*, 182 Ala. 597, 62 So. 18.

The giving of an instruction which was argumentative and singled out certain parts of the evidence was not reversible error where the proposition asserted was undeniable. *Cummings v. McDonnell*, 189 Ala. 96, 66 So. 717.

The giving of a charge that, even if defendant purchased notes given by plaintiff to a third party in payment for cattle, that fact would not give defendant any lien on the cattle, though it might have been refused as argumentative and misleading, does not require a reversal of the judgment. *Howton v. Mathias*, 197 Ala. 457, 73 So. 92.

Where the evidence as to the cause of the fire and as to the railroad's negligence was conflicting, a charge that the presumption of negligence arising from the starting of a fire by a passing engine only requires the railroad to show that defendant's engine was properly equipped and handled, and that after such showing plaintiff could not recover without other evidence of negligence, while argumentative, was not reversible error. *McCary v. Alabama, etc., R. Co.*, 182 Ala. 597, 62 So. 18.

In an action for death on railroad

track, upon evidence that deceased was walking down a path near the approaching engine, an instruction that the exercise on the part of the engineer of the presumption that a human being will avoid any injury is not the taking of the chance in such a sense as to render the defendant liable until the engineer discovers something in the conduct of plaintiff's intestate which would indicate to reasonable man, situated as the engineer was, that said intestate would not of himself avoid the injury, is not reversible error, as being argumentative or misleading. *Sims v. Alabama, etc., R. Co.*, 197 Ala. 151, 72 So. 328.

Misleading Instructions.—That an instruction is misleading does not constitute reversible error, since plaintiff should ask for an explanatory charge. *Ogburn-Griffin Grocery Co. v. Orient Ins. Co.*, 188 Ala. 218, 66 So. 434.

The court can not be put in error for giving a misleading charge, unless it clearly appears that the jury were thereby misled to appellant's prejudice. *Plott v. Foster*, 7 Ala. App. 402, 62 So. 299; *McCary v. Alabama, etc., R. Co.*, 182 Ala. 597, 62 So. 18; *Karpeles v. City Ice Delivery Co. (Ala.)*, 73 So. 642.

In an action against a railroad for setting fire to plaintiff's property, a misleading instruction as to the presumption of negligence from the happening of the fire held not reversible error. *McCary v. Alabama, etc., R. Co.*, 182 Ala. 597, 62 So. 18.

In an action for conversion of mortgaged crops, a charge that the evidence must reasonably satisfy the jury what property and how much defendant converted before they could find verdict for plaintiffs, and that the jury could not guess or speculate as to how much property or its value to find against defendant, though possibly misleading, was not reversible error. *Hamner & Son v. Johnson (Ala. App.)*, 77 So. 446.

Judgment will not be reversed because charge given for appellee on degree of proof was not technically correct, where it was, at most, calculated to mislead. *Rogers v. Whittle (Ala. App.)*, 74 So. 96.

Same—Correctable by Explanatory Instructions. — *Sloss-Sheffield Steel, etc., Co. v. McCullough*, 177 Ala. 448, 59 So.

210; *Alabama, etc., R. Co. v. Smith*, 178 Ala. 613, 59 So. 464. See the title APPEAL AND ERROR, § 1064, vol. 1, p. 621.

An omission in an instruction that if the testimony of any witness is in conflict with physical facts the jury may consider such conflict in determining the weight they will give to the testimony of such witness, in that it did not say that the conflict hypothesized should be considered in connection with all the other testimony in the cause, merely rendered the instruction misleading or argumentative, and called for correction by an explanatory charge rather than by reversal on appeal. *Karpeles v. City Ice Delivery Co. (Ala.)*, 73 So. 642.

An instruction that where one walks on the tracks or right of way of a railroad, without invitation or license, he is a trespasser and assumes the peril of the position in which he has voluntarily placed himself, and the railroad owes him no duty except the exercise "of reasonable care and diligence" to avoid injuring him as soon as his peril becomes apparent, though misleading in not requiring engineer to do "all in his power" to avoid injury, is not reversible error, where no explanatory instruction was asked. *Sims v. Alabama, etc., R. Co.*, 197 Ala. 151, 92 So. 328.

Invading Province of Jury.—The giving of a requested charge that, "even though" defendant had a lien on the property converted, he could not seize and sell it without due process of law, does not require the reversal of a judgment for plaintiff, though the charge might have been refused for the reason that the use of the expression "even though" carried an intimation as to the court's opinion on the facts. *Howton v. Mathias*, 197 Ala. 457, 73 So. 92.

In an action for death by electric shock, where plaintiff's own witnesses, defendant introducing no testimony, established the defense of contributory negligence, the statement of the trial judge, in instructing the jury to find for defendant, that he did not think plaintiff was entitled to recover, though technically erroneous, was harmless to plaintiff. *Dorough v. Alabama Power Co. (Ala.)*, 76 So. 963.

Giving Unrequested Charges on Effect of Evidence—Statutes.—The giving of an instruction on the effect of evidence is reversible under Code 1907, § 5362, where no charge on that point was requested by either of the parties. *Louisville, etc., R. Co. v. Godwin*, 191 Ala. 498, 67 So. 675.

Same—Burden of Proof.—Under Code 1907, §§ 5362-5364, prohibiting charges on the effect of the evidence, unless requested, an oral charge erroneously placing the burden of proof upon defendant, who had introduced no evidence, and having the same necessary effect as an affirmative charge for plaintiff, who had not requested it, held prejudicial error. *Birmingham Southern R. Co. v. Morris*, 9 Ala. App. 530, 63 So. 768.

Error, in an instruction in an action against a railroad company for damages from fire, in placing the burden on plaintiff of showing that the locomotive was improperly handled or constructed when the property was fired by sparks from it was reversible. *Coffman v. Louisville, etc., R. Co.*, 184 Ala. 474, 63 So. 527.

In suit for conversion of sawmill, error in charging that defendant had the burden of proving its plea of the six-year statute of limitations was harmless, where the undisputed evidence conclusively showed that action was brought within six years after conversion. *Forbes v. Plummer (Ala.)*, 73 So. 451.

Where plaintiff made out prima facie case, a charge that the burden rested on defendant to prove contributory negligence was not reversible error. *Birmingham v. Muller*, 197 Ala. 554, 73 So. 30.

Misleading Instruction on Burden of Proof Asserting No Legal Proposition.—An instruction that the burden of proof meant only that the jury must be reasonably satisfied from the evidence should not have been given, as it asserted no legal proposition and was misleading and prejudicial, since it was bad because of the use of the word "only," and was also calculated to lead the jury to believe that the contestant would meet the burden of proof by satisfying the jury as to any fact, and pretermitted

the fact that he must reasonably satisfy the jury as to the truth of the material issues. *Gaither v. Phillips (Ala.)*, 75 So. 295.

Instructions Not Prejudicial as a Whole.—If when viewed as a whole, instructions are not prejudicial, a reversal will not follow, although when taken from the context and viewed independently they may be prejudicial. *Barber v. State*, 11 Ala. App. 118, 65 So. 842.

Charge that Counsel Had Correctly Stated Law.—An impropriety in charging the jury that plaintiff's counsel correctly stated the law on a certain proposition, and that it was unnecessary to rehearse it, did not present error, where it clearly appeared from the bill of exceptions that counsel's statement of the law was correct. *Republic Iron, etc., Co. v. Passafume*, 181 Ala. 463, 61 So. 327.

Charge to Find for Defendant if Doubtful and Uncertain.—It is harmless error to refuse instructions that if the minds of the jury are in a state of confusion or uncertainty, they should find for the defendant. *Louisville, etc., R. Co. v. Penick*, 8 Ala. App. 558, 62 So. 965; *Hoffman v. Birmingham R., etc., Co.*, 194 Ala. 30, 69 So. 551.

It is not error to refuse an instruction that if after a fair and full consideration of all the evidence in the case, the minds of the jury are in a state of confusion as to whether plaintiff ought to recover or not, then you can not return a verdict for plaintiff. *Birmingham R., etc., Co. v. Adkins*, 8 Ala. App. 555, 62 So. 367.

In negligence case it was improper, but not reversible error, to instruct that if the jury was not reasonably satisfied as to the cause of the damage to return a verdict "in favor of the defendant." *Hamilton v. Cranford Mercantile Co. (Ala.)*, 78 So. 401.

Measure of Damages—Adding Incorrect Reason for Rule.—In an action by a city, based on breach of warranty as to the quality of fire hose purchased, it was not reversible error, after correctly stating that the measure of damages was the amount of the price, to add that the reason for the rule was that a defect in the hose might result in the burning of the whole town, especially in the absence of

a request for a countercharge. *Loeb v. Montgomery*, 7 Ala. App. 325, 61 So. 642.

Request for Instruction Contradicting Oral Charge—Bound by Error.—Plaintiff is bound by error against defendant, in instruction, given on his written request, contradictory of the correct oral charge. *Birmingham R., etc., Co. v. Hunt* (Ala.), 76 So. 918.

Error Cured by Remittitur on Appeal.—Reversible error can not be predicated upon erroneous instructions as to certain items of plaintiff's claim, where on appeal those items are eliminated by remittitur. *Cassels v. Alabama City, etc., R. Co.* (Ala.), 73 So. 494.

Particular Instances of Prejudicial Error.—A charge affirmatively misstating the measure of duty imposed on defendant, as a predicate for a declaration for or against negligence, held prejudicial, notwithstanding supreme court rule 45 (61 South. ix). *Reaves v. Maybank*, 193 Ala. 614, 69 So. 137.

Instruction placing absolute duty on plaintiff's servant to drive cattle off of railroad track if he saw them thereon held necessarily highly prejudicial to plaintiff, the law requiring only ordinary care or prudence to drive the cattle off the tracks in such case. *Fuqua v. Southern R. Co.* (Ala.), 77 So. 690.

Error in instructions, in an action for breach of warranty, that plaintiff could not recover if defendant exhibited to him a sample of the kind of oats plaintiff had agreed to buy, where there was evidence that defendant did not deliver to plaintiff the kind it had agreed to deliver, was prejudicial. *Amzi Godden Seed Co. v. Smith*, 185 Ala. 296, 64 So. 100.

Instruction attempting to apply rule of damages applicable only to cases of death to permanent injury held prejudicial, especially as it implied that mortality tables were conclusive as to life expectancy. *Louisville, etc., R. Co. v. Carter*, 195 Ala. 382, 70 So. 655.

Rule that giving general charge in tort action against one who would be entitled to but nominal damages is error without injury can not be applied in action of trespass, where, although plaintiff proved no actual damage, the jury could have inferred that the trespass was wanton, and afforded a basis for puni-

tive damages. *Climer v. St. Clair County Tel. Co.* (Ala.), 77 So. 30.

Particular Instances of Harmless Error.—*De Soto Coal Min., etc., Co. v. Hill*, 179 Ala. 186, 60 So. 583. See the title APPEAL AND ERROR, § 1064, vol. 1, p. 622.

In an action on benefit certificate, instruction as to payment of dues after forfeiture for nonpayment held not reversible error. *Brotherhood v. Milner*, 193 Ala. 68, 69 So. 10.

In ejectment, where plaintiff was entitled at least to recover an interest in the land, an affirmative charge for plaintiff, asserting such fact, but not stating the extent of the finding of such interest, while erroneous if plaintiff was not entitled to recover all the land or the entire interest therein, was not reversible error. *Bennett v. Albrecht* (Ala.), 78 So. 823.

Where there was evidence that would justify a recovery by the plaintiff for being forcibly ejected from a railroad station, even though he went there an unreasonable length of time before the train was due, an instruction submitting the question whether the time was reasonable, and allowing a recovery only if it was reasonable, was not prejudicial to the defendant. *Louisville, etc., R. Co. v. Kay*, 8 Ala. App. 562, 62 So. 1014.

In an action for death due to a gas explosion in a coal mine, instructions merely instructing a finding for defendant if the jury found the existence of contributory negligence as pleaded and that it was the proximate cause of the injury, "even though" defendant's servants may have been guilty of negligence, if error, was harmless. *Alverson v. Little Cahaba Coal Co.* (Ala.), 77 So. 547.

Same — Instructions on Damages.—Error in an instruction precluding a recovery of only nominal damages was harmless. *Birmingham R., etc., Co. v. Friedman*, 187 Ala. 562, 65 So. 939.

In an action for false imprisonment, defendant held not prejudiced by an instruction that punitive damages could not be awarded unless such imprisonment was willfully and unlawfully done by one of defendant's servants acting within the scope of his employment.

Birmingham Ledger Co. v. Buchanan, 10 Ala. App. 527, 65 So. 667.

§ 1066. — Applicability to Issues and Evidence.

Abstract Instructions.—*L. & N. R. R. Co. v. Glasgow*, 179 Ala. 251, 60 So. 103. See the title APPEAL AND ERROR, § 1066, vol. 1, p. 623.

The giving of abstract charges is not necessarily prejudicial error. *Howton v. Mathias*, 197 Ala. 457, 73 So. 92; *Cummings v. McDonnell*, 189 Ala. 96, 66 So. 717.

That instructions requested and given were abstract, and calculated to mislead, is not bound for reversal, unless the appellate court is satisfied that they operated to appellant's prejudice. *Lockridge v. Brown*, 184 Ala. 106, 63 So. 524; *McCary v. Alabama, etc., R. Co.*, 182 Ala. 597, 62 So. 18; *Western Union Tel. Co. v. Holland*, 11 Ala. App. 510, 66 So. 926.

Same—Instances of Harmless Error.—*Murkerson v. Adler*, 178 Ala. 622, 59 So. 505. See the title APPEAL AND ERROR, § 1066, vol. 1, p. 623.

In an action for damages to growing crops caused by fumes from a fertilizer factory, an instruction as to when the relation of tenants in common of the crop and the relation of laborer and hirer arose between plaintiff and her croppers, even if abstract, held harmless. *International Agr. Corp. v. Burton*, 194 Ala. 108, 69 So. 417.

In detinue for farm stock by a landlord against his tenant, who had given mortgages covering crops, an instruction that plaintiff could apply the proceeds of the mortgaged property only to a debt for supplies for the crop, if abstractly erroneous, held not prejudicial, under evidence that plaintiff had advanced only supplies for the crop. *Reynolds v. Hardee*, 193 Ala. 454, 69 So. 553.

Incorrect Illustration Not Prejudicial.

—Where, upon a review of the whole case, it is reasonably clear that an illustration used by the judge in his instructions, although calculated to prejudice the jury, did not in fact operate against the complaining party, and the court correctly stated the law, there will be no reversal. *Loeb v. Montgomery*, 184 Ala. 217, 63 So. 1023, denying certiorari 7 Ala. App. 325, 61 So. 642.

Instruction on Immaterial Issue Harmless.—*Tannehill v. Birmingham R., etc., Co.*, 177 Ala. 297, 58 So. 198. See the title APPEAL AND ERROR, § 1066, vol. 1, p. 623.

Withdrawing Issue Not Alleged in Declaration Harmless.—There can be no prejudicial error in instructions which take from the jury an issue established by plaintiff's evidence, but not alleged in the declaration. *Park-Robertson Hdw. Co. v. Copeland*, 11 Ala. App. 447, 66 So. 880.

Particular Instances of Prejudicial Error.—In an action by a father for the death of his son killed by an automobile while skating on street, an instruction that all persons are forbidden to use the streets for skating, not being supported by evidence of such ordinance or regulation, was prejudicial error. *Renfroe v. Collins & Co. (Ala.)*, 78 So. 395.

An instruction, in an action on a note purporting to have been signed by a firm, that if the money sued for had been paid to the payee, plaintiff could not recover was prejudicial and erroneous if not supported by the evidence. *Tennessee Valley Bank v. Avery & Sons*, 9 Ala. App. 363, 63 So. 813.

Giving of an instruction stating that plaintiff testified that he derived from the telegram incorrectly transmitted, and delivered by defendant, that his wife had been operated upon, held to require a reversal where it appeared that he did not so testify. *Western Union Tel. Co. v. Favish*, 196 Ala. 4, 71 So. 183.

In an action on a firm note signed "S. M. A. & Sons, by S. M. A.," error in instructing that defendants were not liable if the words "& Sons, by S. M. A.," were written on the note after it was signed by S. M. A. without his knowledge, when the evidence showed that the note was signed by him in the firm name, was prejudicial to plaintiff. *Tennessee Valley Bank v. Avery & Sons*, 9 Ala. App. 363, 63 So. 813.

Where one count of a complaint relied upon a sale of a note and mortgage which was executed except for the payment of the price and another count relied upon an executory agreement for their sale, a charge that the plaintiff was entitled to recover the agreed price,

which was erroneous under the latter count, was prejudicial error. *Norman v. Bullock County Bank*, 187 Ala. 33, 65 So. 371.

Particular Instances of Harmless Error.—Where, from the case against a railroad disclosed by the evidence, no recovery could be had for injury to plaintiff except at a public crossing, it was not reversible error to charge that defendant was under no duty to look out for plaintiff except at the crossing. *Cardwell v. Louisville, etc., R. Co.*, 185 Ala. 628, 64 So. 564.

Where the plea of contributory negligence merely alleged the negligence of the employee in the manner of his use of the machine by which he was injured, any error in a charge that an employee must do that which is dangerous in a negligent manner to constitute contributory negligence was not prejudicial. *Continental Gin Co. v. Milbrat*, 10 Ala. App. 351, 65 So. 424, certiorari denied in *Ex parte Continental Gin Co.*, 191 Ala. 660, 66 So. 1008.

In action under Code 1907, § 3910, subd. 1, for injury from defective machinery, held that on oral charge, merely stating one of plaintiff's contentions and requiring no finding thereon, was not prejudicial to defendant, even if the claim was not supported by the proof. *Caldwell-Watson Foundry, etc., Co. v. Watson*, 183 Ala. 326, 62 So. 859.

In ejectment, where it was claimed that upon the death of plaintiff's father the land vested in his widow, as it was worth less than \$2,000, and did not descend to plaintiff, error in a charge intended to exclude any exemption to the widow if the land was worth over \$2,000, which based the value upon the entire tract, and not upon so much of the land as the father might have owned, was harmless; the proof not showing that whatever land the father got was his exemption at the time of his death, nor that he lived on it or owned less than the exemption, so to vest title in his widow and minor child. *Landers v. Hayes*, 196 Ala. 533, 72 So. 106.

In an action for injury caused by being struck by a street car, where plaintiff was aware of the approach of the car, and issue of willful and wanton mis-

conduct of motorman had been withdrawn, instruction that plaintiff was charged by law with the duty of using ordinary care, and if as a result of his failure so to do, there can be no recovery on any count charging simple negligence, although defendant was guilty of negligence, was not affirmatively faulty, rendering giving thereof reversible error. *Sington v. Birmingham R., etc., Co. (Ala.)*, 76 So. 48.

§ 1067. — Failure or Refusal to Charge.

See post, "Failure or Refusal to Instruct," § 1068 (5).

Requested Charge Covered by Other Charges.—See post, TRIAL.

Where the refused instruction, although stating a correct principle of law, was substantially given in other written instructions, the error, if any, was harmless. *Patterson v. State*, 191 Ala. 16, 67 So. 997.

Same — Particular Instances.—In an action for personal injuries from defendant's alleged willful and wanton act, any error in refusing a charge for defendant held not injurious, where the same charge had been previously given. *Charlie's Transfer Co. v. Leedy & Co.*, 9 Ala. App. 652, 64 So. 205.

Under Code 1907, § 5364, as amended by Acts 1915, p. 815, in action for injuries under federal employers' liability act, refusal of charge on subsequent negligence held not reversible error, where jury was substantially and fairly instructed thereon, and plaintiff was not proceeding on theory of subsequent negligence. *Southern R. Co. v. Fisher (Ala.)*, 74 So. 580.

Oral Charge Embodying Written One Refused.—Where the court's oral charge specifically embodied the substance of a requested written charge, the refusal of the written charge is harmless. *London v. Anderson Brass Works*, 197 Ala. 16, 72 So. 359.

Strict Construction to Avoid Error.—A requested instruction will, to save error in its refusal, be strictly construed. *Jebeles, etc., Confectionery Co. v. Booze*, 181 Ala. 456, 62 So. 12.

Charge against Plaintiff if Jury Confused or Uncertain.—Refusal of an instruction that if, after a full and fair

consideration of all the evidence in the case, your minds are in a state of confusion as to whether the plaintiff ought to recover in this action or not, then you can not return a verdict for plaintiff, was not ground for reversal. *Birmingham R., etc., Co. v. Adkins*, 8 Ala. App. 555, 62 So. 367.

Where a count in a complaint is withdrawn by the plaintiff before the jury retires, any error in refusing to charge the jury that they could not find for plaintiff under that count, is harmless. *Western Union Tel. Co. v. Boteler*, 183 Ala. 457, 62 So. 821.

Where Jury Could Not Have Found Otherwise.—Where the evidence was such that the jury could not have found otherwise than they did, the refusal of special charges requested by appellant was harmless. *Bruce v. Citizens' Nat. Bank*, 185 Ala. 221, 64 So. 82.

Where Plaintiffs Entitled to Affirmative Charge.—If plaintiffs in ejectment are otherwise entitled to general affirmative charge, no reversible error can be predicated on failure to restrict recovery to plaintiffs' proportionate shares, when one claimant entitled to share with plaintiffs was not a party. *Reynolds v. Trawick* (Ala.), 78 So. 827.

Where Plaintiff Not Entitled to Recover.—Where plaintiff in an action of trover, was not entitled to recover as against defendants' plea of general issue, refusing charges, if erroneous, was harmless. *Smith v. Davenport & Co.*, 12 Ala. App. 456, 68 So. 545.

Same—Note and Mortgage in Suit Void.—Where a note and mortgage were void, errors in an action thereon, in rulings upon requested charges, are harmless to plaintiff. *Hartsell v. Roberts*, 185 Ala. 201, 64 So. 90.

Same—Evidence Not Sustaining Verdict on Issue.—Failure to instruct that plaintiff's contributory negligence was not a defense to defendant's wanton negligence is harmless error, where evidence would not sustain verdict for wanton negligence. *Aquilino v. Birmingham R., etc., Co.* (Ala.), 77 So. 328.

Refusal of Charge on Value of Services—No Recovery by Plaintiff.—Refusal of an instruction as to the reasonable value of the services rendered by the plaintiff

attorney, if error, held harmless, where plaintiff recovered nothing. *Tyson v. Thompson*, 195 Ala. 230, 70 So. 649.

Refusal to Charge for Defendant on Counts—Same Damages under Other Counts.—In an action for unlawful arrest and imprisonment, with counts for the same wrong with malice and without probable cause, any error in refusing to charge for defendant on the latter counts was immaterial, where the damages under the other counts might have been exactly the same. *Rhodes v. McWilson*, 192 Ala. 675, 69 So. 69.

Instance of Prejudicial Error.—Refusal to give requested instruction that defendant railroad was guilty of willful or wanton conduct only if it acted with reckless indifference and consciously or intentionally did some wrongful act, etc., is reversible error. *Seaboard, etc., Railway v. Laney* (Ala.), 75 So. 15.

In statutory ejectment the refusal of correct and applicable instructions as to defendant's adverse possession, not substantially covered by any other charge, was prejudicial error. *Veitch v. Hard* (Ala.), 75 So. 405.

Instances of Harmless Error.—In an action for unlawful arrest and false imprisonment on a charge of trespass after warning, where no damage was claimed for defendant's act in throwing out plaintiff's cot and bedding, an instruction that plaintiff could not recover therefor might well have been given as requested by defendant, though its refusal might not be prejudicial error. *Rhodes v. McWilson*, 192 Ala. 675, 69 So. 69.

In an action against a railroad for wrongful death, where plaintiff's intestate was under facts of case a trespasser, refusal to charge that one walking longitudinally along track became trespasser was error without injury. *Louisville, etc., R. Co. v. Ganter* (Ala. App.), 77 So. 917.

§ 1068. — Error Cured by Verdict or Judgment.

§ 1068 (1) In General.

Charge Authorizing Recovery against All or None—Verdict against All.—A verdict against all defendants renders innocuous refusal of a charge that plain-

tiff can not recover against either unless entitled to recover against all. *Brown & Co. v. Matthews*, 14 Ala. App. 428, 70 So. 287.

§ 1068 (2) Finding on One of Several Issues.

Charge Withdrawing Wanton Injury—Verdict Negating Any Negligence.—

Error of the trial court in giving affirmative charge taking from the jury the question of wanton or intentional injury could not be cured by submitting the issues of simple negligence, although the verdict was in favor of defendant on the question of negligence on the whole evidence, including the conduct complained of as wanton negligence. *McNeil v. Munson S. S. Lines*, 184 Ala. 420, 63 So. 992, reversing on this point 8 Ala. App. 610, 62 So. 459.

§ 1068 (3) Appellant Not Entitled to Favorable Determination in Any Event.

See ante, "Failure or Refusal to Charge," § 1067; post, "Amount of Recovery or Damages," § 1068 (4).

In General.—*Key v. Goodall, etc., Co.*, 7 Ala. App. 227, 60 So. 986. See the title APPEAL AND ERROR, § 1068 (3), vol. 1, p. 627.

Appellant Not Showing Prima Facie Right.—Giving of erroneous instructions in an action of trover held harmless to plaintiff, where he failed to show a prima facie right to recover. *Smith v. Davenport & Co.*, 12 Ala. App. 456, 68 So. 545.

Plaintiff Entitled to Affirmative Charge.—Where plaintiff, obtaining a verdict, was entitled to the general charge, errors in instructions given or refused were harmless. *Jeffreys v. Jeffreys*, 183 Ala. 617, 62 So. 797.

Any error in rulings on instructions requested by defendant was harmless, where plaintiff was entitled to the general affirmative charge. *Southern R. Co. v. Hartman*, 12 Ala. App. 483, 68 So. 557.

In an action against a railroad for injury to stock frightened by a train, where plaintiff was entitled to an affirmative charge, an oral charge that the burden of proof was on defendant to acquit itself of negligence would be error without injury. *Birmingham Southern R. Co. v. Morris*, 9 Ala. App. 530, 63 So. 768.

Any error in refusing an instruction that a certain witness, though defendant's employee, was plaintiff's witness, and plaintiff vouched for his giving a true account of the accident, and was bound by his testimony, was harmless to defendant, where plaintiff was entitled to the affirmative charge, even if such witness' testimony was true. *Southern R. Co. v. Parkes*, 10 Ala. App. 318, 65 So. 202.

Defendant Entitled to Affirmative Charge.—Where the court properly gave a general charge for defendant, errors, if any, in giving or refusing special instructions, were not prejudicial to plaintiff. *Nelson v. Weekley*, 195 Ala. 1, 70 So. 661.

Where, in negligence action, defendant was entitled to the general charge on all the counts, any error in giving or refusing special charges for plaintiff appellant was without injury. *Hambricht v. Birmingham R., etc., Co. (Ala.)*, 77 So. 702.

Same — Count to Which Instruction Applicable.—The refusal of a charge requested by plaintiff which was applicable only to one of the counts, as to which the affirmative charge was properly given for defendant, if error, was harmless. *Jones v. Adler*, 183 Ala. 435, 62 So. 777.

§ 1068 (4) Amount of Recovery or Damages.

See post, "Failure or Refusal to Instruct," § 1068 (5).

Amount or Measure of Damages—Verdict for Defendant.—Where a verdict is for defendant, any error in instructions as to the amount of damages is harmless. *Kimbrell v. Louisville, etc., R. Co.*, 191 Ala. 392, 67 So. 586.

In detinue for chattels, brought by virtue of a mortgage given by defendant's husband, refusal of instructions as to the amount of recovery for detention was harmless, where the jury found for defendant. *King Mercantile Co. v. Adams*, 193 Ala. 466, 69 So. 524.

Error in a charge as to the measure of damages is not prejudicial to plaintiff, where the jury returned a verdict for the defendant. *Ogburn-Griffin Grocery Co. v. Orient Ins. Co.*, 188 Ala. 218, 66 So. 434.

Same—Verdict Not in Excess of Proper Standard.—In an action for damages for failure to deliver cotton seed, sold to plaintiff to be delivered at defendant's station, any error in an instruction that a difference in price of other seed bought might be estimated as at the point of destination held harmless, where plaintiff's purchase of seed to replace that not delivered was shown to have been made at the lowest market price and the verdict was not in excess thereof. *Ward v. Cotton Seed Products Co.*, 193 Ala. 101, 69 So. 514.

Same—Statutory Insurance Penalty Not Assessed.—Where the 20 per cent. penalty imposed by Code 1907, § 4595, as amended by Act 1911, p. 316, on insurance companies belonging to tariff associations, is not assessed, there can be no reversible error in the court's charges as to the penalty. *Exchange Underwriters' Agency v. Bates*, 195 Ala. 161, 69 So. 956.

Civil Libel—Charging Jury to Decide Law and Facts—Constitutional Provision—Insufficient Verdict for Plaintiff.—In a civil action for libel actionable per se appealed from by plaintiff for insufficient damages in which plaintiff did not undertake to prove damages, it was reversible error, though verdict was for plaintiff, to instruct the jury that they were the judges of both the law and the facts, and that the amount of damages was subject to their discretion, without telling them that they should be guided by the circumstances and justice of the case, as this amounted to a license to disregard all instructions and the provision of Const. 1901, § 12 (Const. 1875, art. 1, § 13), giving a jury the right to determine the law in indictments for libel, does not include civil actions for libel. *Comer v. Advertiser Co.* (Ala.), 77 So. 685.

Charge on Punitive Damages—Verdict for Actual Damages.—The giving of instructions authorizing the allowance of punitive damages is not prejudicial where the verdict shows that only actual damages were awarded. *Corry v. Sylvia Y Cia*, 192 Ala. 550, 66 So. 891.

Rulings as to Wanton Injury—Verdict Less than Value of Cow.—In action for value of cow struck by street car, rulings on counts alleging wantonness held not prejudicial, where verdict was for less

than the value of the cow. *Mobile, etc., R. Co. v. Portiss*, 195 Ala. 320, 70 So. 136.

§ 1068 (5) Failure or Refusal to Instruct.

See ante, "Failure or Refusal to Charge," § 1067.

In General.—*Key v. Goodall, etc., Co.*, 7 Ala. App. 227, 60 So. 986. See the title APPEAL AND ERROR, § 1068 (5). vol. 1, p. 629.

Plaintiff Entitled to Affirmative Charge.

—Where the plaintiff was entitled to an affirmative charge, it was unnecessary on appeal to consider refused special charges requested by defendant. *Knights v. Gillespie*, 14 Ala. App. 493, 71 So. 67.

Plaintiff Not Entitled to Recover on Penalty Count.—Where, in trespass and trover for cutting and removing trees and for the statutory penalty for cutting trees, plaintiff was entitled to the general charge, except as to the count for the statutory penalty of \$10 a tree, and the verdict was for only \$122.54 and the uncontroverted evidence showed that there were not less than 80 trees cut, the jury could not have found for plaintiff on the penalty count, so that the giving of plaintiff's, or the refusal of defendant's, special charges, was harmless. *Turner v. Davis*, 186 Ala. 77, 64 So. 958.

Verdict Denying Recovery on Count to Which Charges Applicable.—In an action against a railroad for personal injuries, where the verdict clearly discloses that recovery on a count was denied, error in refusal of requested charges referring to that count was harmless as to defendant. *Central, etc., R. Co. v. Chambers*, 197 Ala. 93, 72 So. 351.

§ 1070. Verdict.

Verdict Not in Proper Form—Correction by Jury.—Trial court's refusal to grant new trial on ground that after adjournment jury brought in verdict for plaintiff, in absence of counsel for defendant, which was not in proper form, and that jury retired and brought in corrected verdict, was not reversible error. *Hatfield v. Riley* (Ala.), 74 So. 380.

Cure of Error by Reduction of Judgment.—A charge in an action on a life policy not taking into account the amount of the premium deposited in court for plaintiff is erroneous, but where the

judgment was reduced by the amount of such premium, the error was cured. *Massachusetts Mut. Life Ins. Co. v. Crenshaw*, 195 Ala. 263, 70 So. 768.

Erroneous Finding Harmless Where Plaintiff Otherwise Entitled to Recover.—In ejectment, any error in finding that a deed to the property involved was delivered to plaintiff is harmless, where he was entitled to recover in any event as the assignee of mortgages on such property. *Love v. Lee* (Ala.), 75 So. 24.

§ 1072. Decisions on Motion for New Trial or Rehearing.

Granting Rehearing Not Prejudicial.—Since Chancery Practice Rule 81 (Code 1907, p. 1553) does not provide for notice of petition for rehearing to opposite party and requires determination without argument, it was not prejudicial to grant rehearing without notice and render final decree at the same time foreclosing a mortgage, where the complainant was entitled to foreclose but the original judgment erroneously denied it. *Cox v. Brown* (Ala.), 73 So. 964.

§ 1073. Judgment or Order.

§ 1073 (1) In General.

Particular Instances of Harmless Error.—*Albritton v. Lott-Blackshear Com. Co.*, 180 Ala. 33, 60 So. 148. See the title APPEAL AND ERROR, § 1073 (1), vol. 1, p. 630.

Where defendant pleaded the general issue and claimed that he was entitled to a general verdict, the rendition of a judgment in his favor which denied the plaintiff relief and awarded him a money judgment against plaintiff is not prejudicial. *Bynum v. Stroup*, 10 Ala. App. 637, 65 So. 704.

§ 1073 (2) By Default.

Judgment of Default Instead of Nil Dicit Harmless.—Where an appeal is taken from a judgment in a justice court, and defendant fails to appear in the circuit court, any error in rendering a judgment by default instead of nil dicit is not prejudicial to defendant. *Potter v. Tucker*, 11 Ala. App. 466, 66 So. 922.

§ 1073 (7) Amount.

Correction by Reduction.—See ante, "Verdict," § 1070.

§ 1074. Proceedings after Judgment.

Setting Aside Judgment—Hearing Evidence of Jury Findings.—On hearing of a motion to set aside a judgment entered more than three months after verdict, the admission in evidence of a paper purporting to be jury findings held harmless. *McEntire v. Paffe*, 12 Ala. App. 507, 67 So. 713.

Ruling Requiring Security for Costs from Married Woman Appealing—Mandamus.—A ruling that appellant was not a "married woman" within the purview of Code 1907, § 2879, as amended by Gen. Acts 1915, p. 715, and hence that she was not entitled to effect her appeal without giving security for costs, can not be assigned as error; mandamus being the proper remedy to review such action. *Kimball v. Cunningham Hdw. Co.* (Ala.), 78 So. 787.

(I) ERROR WAIVED IN APPELLATE COURT.

§ 1076. Proceedings Inconsistent with Objection.

Affirmative Charge — Assignments Stricken from Record—No Motion for New Trial.—Where there was no motion for a new trial, and appellant struck from the record assignments of error presenting error in refusing him the affirmative charge, and in giving the affirmative charge for appellee, appellant waived his right to complain that the verdict was not supported by the evidence. *Cochran v. Burdick Bros.*, 7 Ala. App. 274, 61 So. 29.

§ 1077. Failure to Move for Dismissal.

Submission on Merits.—Irregularities arising from a failure to comply with a rule of practice, not affecting the jurisdiction of the appellate court, are waived by the submission of the case on the merits. *Chandler v. State*, 12 Ala. App. 287, 68 So. 536.

§ 1078. Failure to Urge Objections.

§ 1078 (1) In General.

Necessity for Insistence on Errors Assigned.—*Morris & Co. v. Barton*, 180 Ala. 98, 60 So. 172; *Key v. Goodall, etc., Co.*, 7 Ala. App. 227, 60 So. 986. See the title APPEAL AND ERROR, § 1078 (1), vol. 1, pp. 633, 634.

Assignments of error not insisted on and argued in appellant's brief are waived and will not be considered. *Kinnon v. Louisville, etc., R. Co.*, 187 Ala. 480, 65 So. 397; *Pennsylvania Fire Ins. Co. v. Draper*, 187 Ala. 103, 65 So. 923; *Clinton Min. Co. v. Bradford*, 192 Ala. 576, 69 So. 4; *Huntsville v. Goodenrath*, 13 Ala. App. 579, 68 So. 676; *Central, etc., R. Co. v. Stephenson*, 189 Ala. 553, 66 So. 495; *Barney Coal Co. v. Davis*, 9 Ala. App. 235, 62 So. 985; *Atkinson v. Kelley*, 8 Ala. App. 571, 62 So. 441; *Scarborough v. Scarborough*, 185 Ala. 468, 64 So. 105; *Georgia Cotton Co. v. Lee*, 196 Ala. 599, 72 So. 158; *Gilley v. Denman*, 185 Ala. 561, 64 So. 97; *Brantley v. State*, 11 Ala. App. 144, 152, 65 So. 678; *Commercial Finance Co. v. Dyer (Ala. App.)*, 75 So. 706; *Alabama Power Co. v. Hamilton (Ala.)*, 77 So. 356; *Ward v. Watley (Ala. App.)*, 77 So. 451; *Mobile Light, etc., Co. v. Thomas (Ala. App.)*, 77 So. 463; *Howze v. Powers (Ala. App.)*, 77 So. 985; *Hess v. Hodges (Ala.)*, 78 So. 85; *Henderson Land, etc., Co. v. Brown (Ala. App.)*, 78 So. 716; *Adams Hdw. Co. v. Wimbish (Ala.)*, 78 So. 901; *Western Union Tel. Co. v. Morrison (Ala. App.)*, 74 So. 88; *Southern States Fire Ins. Co. v. Kronenberg (Ala.)*, 74 So. 63; *Baumhauer v. McGill (Ala. App.)*, 73 So. 753; *Louisville, etc., R. Co. v. Blankenship (Ala.)*, 74 So. 960; *Alabama, etc., R. Co. v. Taylor*, 7 Ala. App. 583, 61 So. 475; *Brown v. Shorter*, 195 Ala. 692, 71 So. 103.

A brief containing only a restatement of the assignment of error without citation of authority or argument waives the assignment. *Anderson v. Anniston Elect., etc., Co.*, 11 Ala. App. 560, 66 So. 925; *Comstock v. Jahant Heating Co.*, 10 Ala. App. 663, 64 So. 178; *Central, etc., R. Co. v. Barnitz*, 14 Ala. App. 354, 70 So. 945; *Lang v. Leith (Ala. App.)*, 77 So. 445; *Howton v. Mathias*, 197 Ala. 457, 73 So. 92.

An assignment of error not referred to in counsel's brief, either by name or allusion to its subject matter or the questions of law that might be involved, will be treated as abandoned. *Butler-Kyser Mfg. Co. v. Mitchell & Co.*, 195 Ala. 240, 70 So. 665.

Assignments of error, not insisted upon in the brief in conformity to Supreme

Court rules 10, 12 (Code 1907, vol. 2, p. 1058, 61 South. vii) held to be considered as abandoned. *Western Union Tel. Co. v. Emerson*, 14 Ala. App. 247, 69 So. 335.

Where there were 18 assignments of error, all relating to the charges, but the brief discussed 26 assignments, all but 3 of which referred to a charge not referred to in the assignment, all of the assignments, except those 3, will be treated as waived, under Supreme Court rule 10 (Code 1907, p. 1508). *Ogburn-Griffin Grocery Co. v. Orient Ins. Co.*, 188 Ala. 218, 66 So. 434.

Summons Not Issued to Defendant Not Joining in Appeal.—Where summons is not issued to one of two defendants who does not join in an appeal, as required by Code 1907, § 2884, as amended by Acts 1911, p. 589, the irregularity is waived if the cause is submitted without objection. *Norton v. Birmingham Fertilizer Co. (Ala. App.)*, 74 So. 97.

Errors Waived Not Revived by Supplemental Brief.—Where assignments of error were not insisted upon in the original brief, they were waived, and were not revived by being urged in a supplemental brief subsequent to submission of the appeal. *Hamilton v. Cranford Mercantile Co. (Ala.)*, 78 So. 401.

Reversal Necessary—Indicating Other Errors to Be Avoided.—While a judgment will not be reversed solely because of assigned errors not insisted upon in appellant's brief, where a reversal is to be had on one ground, the court may properly point out other errors which should be avoided in the new trial, although not insisted upon. *Warrior-Pratt Coal Co. v. Shereda*, 183 Ala. 118, 62 So. 721.

§ 1078 (3) Rulings on Pleadings.

Rulings on Demurrers in General.—Only those demurrers insisted upon in the brief of appellant's counsel will be considered. *Alabama, etc., R. Co. v. Neal*, 8 Ala. App. 591, 62 So. 554.

Objections raised by demurrer below, but not argued in the brief on appeal, need not be considered. *Beatty v. Palmer*, 196 Ala. 67, 71 So. 422.

Grounds of Demurrer to Complaint.—Grounds of demurrer to the complaint will not be considered on appeal, where

they have not been supported by argument or citation of authority. *Birmingham R., etc., Co. v. Pratt*, 10 Ala. App. 273, 64 So. 510, certiorari denied in 187 Ala. 511, 65 So. 533; *Knights v. Gillespie*, 14 Ala. App. 493, 71 So. 67.

Overruling Demurrer to Bill.—Where the overruling of defendant's demurrer to the bill was not insisted on in the appellate court as error, the error will be considered waived. *Ely v. Brewer*, 182 Ala. 396, 62 So. 742.

Sustaining Demurrer to Plea.—Where an appellant assigned as error, the sustaining of a demurrer to one of his pleas, the error is waived where there is neither argument nor citation of authority in support of the assignment. *Ewart Lumber Co. v. American Cement Plaster Co.*, 9 Ala. App. 152, 62 So. 560.

§ 1078 (4) Errors Occurring at Trial.

Admission of Evidence.—Complaints of the admission of evidence, not insisted upon in the brief, can not be considered. *Central, etc., R. Co. v. Campbell*, 10 Ala. App. 288, 64 So. 540.

In absence of any argument in brief insisting on objection to introduction of writing in evidence, it must be treated as waived. *People's Sav. Bank v. Jordan* (Ala.), 76 So. 442.

Ground of objection to the introduction in evidence of the statute of a foreign state, not insisted on in appellant's brief, is waived. *Pensacola, etc., Co. v. Brooks*, 14 Ala. App. 364, 70 So. 968.

Exclusion of Evidence.—Where action of court in sustaining objection to testimony made basis of assignment of error was not insisted upon in brief, it was waived. *West v. Arrington* (Ala.), 76 So. 352.

Instructions Given.—The point that certain charges were charges on the effect of the evidence was waived, when it was not insisted upon in the brief. *Parnell v. Farmers' Bank, etc., Co.* (Ala. App.), 77 So. 442.

§ 1078 (6) Ruling on Motion for New Trial.

Grounds of Motion.—Grounds of motion for new trial assigned as error not insisted on and supported by argument or citation of authority are waived. *Cobb v. Hand*, 12 Ala. App. 461, 68 So. 541.

§ 1079. Insufficient Discussion of Objections.

Mere Assertion of Error in Ruling.—

An assignment of error will not be considered on appeal where appellant's counsel does not argue it except to assert that it is (well taken. *Hooper v. Herring*, 9 Ala. App. 292, 63 So. 785.

Merely referring to ruling made the basis of assignment of error and stating that such ruling is error is not insistence thereon, and it must be deemed waived. *Barbour Plumbing, etc., Co. v. Ewing* (Ala. App.), 77 So. 430.

Same—Refusal to Grant New Trial.—

A brief, insisting, as to refusal of new trial, merely that "the great weight of testimony was in favor of defendant, and the court below erred in refusing to grant defendant's motion for a new trial," will be treated as a waiver of the assignment of error. *Louisville, etc., R. Co. v. Dickson* (Ala. App.), 73 So. 750.

(J) DECISIONS OF INTERMEDIATE COURTS.

§ 1081. Questions Considered.

§ 1082. — Scope of Inquiry in General.

Dismissal Sole Question on Appeal to Circuit Court.—

The court on appeal can review only those questions passed on below, so that, where the bill of exceptions from the circuit court discloses that the sole question before it was whether the appeal from the probate court should be dismissed, only that question can be reviewed on appeal to the supreme court. *McKenzie v. Jensen*, 195 Ala. 36, 70 So. 678.

Application for Mandamus Not Passed upon by Circuit Court on Appeal.—

In the absence of application for mandamus to the circuit court to compel it to mandamus the probate judge to establish a bill of exceptions, the court can not consider the question whether the bill should be established, where the application was not passed on by the circuit court. *McKenzie v. Jensen*, 195 Ala. 36, 70 So. 678.

Objection Not Made in Circuit Court on Appeal.—

Where no such objection is made in the circuit court on appeal, it can not be urged on further appeal that its judgment in detinue is in excess of the amount with interest of which the lower

court had jurisdiction. *Tidwell v. Robinette*, 12 Ala. App. 655, 68 So. 555.

§ 1083. Review of Questions of Fact.

§ 1084. — In General.

Finding of Fact.—The supreme court will not review the court of appeals as to findings of facts. *Pearson v. Hancock & Son (Ala.)*, 78 So. 806.

Question of Mixed Law and Fact.—Where in a case involving a question of mixed law and fact, the court of appeals correctly applies the law to its conclusion of fact, its judgment will not be disturbed. *Ex parte Shoaf*, 186 Ala. 394, 64 So. 615, denying certiorari *Hagin v. Shoaf*, 9 Ala. App. 300, 63 So. 764.

§ 1085. — Necessity and Effect of Findings by Intermediate Court.

Effect of Fact Findings of Court of Appeals.—The supreme court will not review or revise the findings of fact by the court of appeals, or the application of the law to the facts by such court. *Conford v. State (Ala.)*, 75 So. 335.

Under Const. § 140, supreme court will not review findings or conclusions of court of appeals on matters of fact only, to determine whether legal principles applied by that court should have been applied. *Ex parte Barrett Bros. Shipping Co.*, 196 Ala. 655, 72 So. 259.

The supreme court exercises supervisory powers over the court of appeals only as to questions of law, and will not disturb its findings of fact. *Ex parte Shoaf*, 186 Ala. 394, 64 So. 615, denying certiorari *Hagin v. Shoaf*, 9 Ala. App. 300, 63 So. 764.

Where Reasonable Minds May Differ.—Where two opposite but entirely rational conclusions may be drawn by different minds from the same state of facts, the conclusions drawn therefrom by the court of appeals are conclusive on the supreme court. *Ex parte Shoaf*, 186 Ala. 394, 64 So. 615, denying certiorari *Hagin v. Shoaf*, 9 Ala. App. 300, 63 So. 764.

Particular Findings Not Reviewable.—Finding of court of appeals as a fact that a witness understood place contradictory statements were claimed to have been made and could not be taken by surprise held not reviewable. *Ex parte Phillips*, 188 Ala. 57, 66 So. 3.

Conclusion of court of appeals that de-

posit of money in name of depositor's wife did not vest title in her held conclusive on the supreme court as a finding of fact. *Ex parte Shoaf*, 186 Ala. 394, 64 So. 615, denying certiorari *Hagin v. Shoaf*, 9 Ala. App. 300, 63 So. 764.

(K) SUBSEQUENT APPEALS.

§ 1086. Scope and Extent of Review.

Errors Existing and Not Presented on Former Appeal.—All assignments of error referable only to matters preceding the former appeal and reversal and not shown to have been subsequently passed on will be stricken. *McGeever v. Terre Haute Brewing Co. (Ala.)*, 78 So. 66.

Same—Demurrer Ruling.—A ruling on demurrer, made prior to appeal from a judgment and reviewable on such appeal, is not reviewable on appeal from a subsequent judgment. *Sellers v. Dickert*, 194 Ala. 661, 69 So. 604.

§ 1087. Former Decision as Law of the Case in General.

General Rule.—*Louisville, etc., R. Co. v. Dilburn*, 178 Ala. 600, 59 So. 438. See the title APPEAL AND ERROR, § 1097, vol. 1, p. 638.

Supreme Court of Different Opinion Later — Statute.—Under Code 1907, § 5965, requiring the supreme court, in deciding a case when there is a conflict between its existing opinion and any former ruling in the case, to be governed by its later opinion it is the duty of the court, where its former ruling that petitioner had a right to condemn the property desired is attacked on appeal, after the award of damages, to reconsider the former opinion, and, if convinced that it is erroneous, to disregard and overrule it. *Louisville, etc., R. Co. v. Western Union Tel. Co.*, 195 Ala. 124, 71 So. 118.

§ 1089. Questions Concluded.

Construction of Will.—The construction of an item of a will in the opinion on a former appeal will be adhered to on a subsequent appeal, where the argument is not persuasive of error in the former opinion. *De Yampert v. Duncan*, 190 Ala. 572, 67 So. 287.

Sufficiency of Complaint.—A determination on a former appeal that the bill of complaint contained equity is the law of

the case on a subsequent appeal. *Rittenberry v. Wharton*, 182 Ala. 388, 62 So. 672.

The decision on a former appeal as to the sufficiency of several counts of the complaint, followed by the trial court on the second trial, was the law of the case on a subsequent appeal. *Central, etc., R. Co. v. Chambers*, 194 Ala. 152, 69 So. 518.

The determination upon a former appeal that complaint was sufficient became the law of the case on a subsequent appeal, where complaint and demurrer were the same. *Birmingham v. McKinnon* (Ala.), 75 So. 487.

Questions as to Evidence.—Where upon the second trial the evidence was the same as it was on the first, the determination of the supreme court on appeal from the first trial must be followed, being the law of the case. *Garrow v. Toxey*, 188 Ala. 572, 66 So. 443.

Same — Newly Discovered Evidence Justifying New Trial.—Where, on former appeal, the court held that new trial should have been granted on the ground of newly discovered evidence, it was unnecessary to decide the sufficiency of the evidence to support the judge's finding, and an opinion thereon was dictum. *Bell v. Bell*, 196 Ala. 465, 71 So. 465.

Same—Right to Affirmative Charge.—The holding of the supreme court on a former appeal settled the law on a subsequent appeal, to the effect that defendant was not entitled to the affirmative charge, where the evidence on the subsequent appeal was similar to that on the former appeal. *Forbes v. Plummer* (Ala.), 73 So. 451.

The supreme court's conclusion on former appeal that testimony of claimant excluded was sufficient to create estoppel against plaintiff from setting up in claim suit that two persons were one and the same became law of case, entitling claimant to general affirmative charge on second trial, unless evidence contradicting his testimony creating estoppel was introduced. *Millitello v. Roden Grocery Co.* (Ala.), 78 So. 960.

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

(A) DECISION IN GENERAL.

§ 1100. Necessity of Decision.

Reversal on One Ground—Indicating

Errors Waived but to Be Avoided on New Trial.—Where a reversal is to be had on one ground, the court may properly point out other errors which should be avoided in the new trial, although such errors were not insisted upon and hence were waived on the instant appeal. *Warrior-Pratt Coal Co. v. Shereda*, 183 Ala. 118, 62 So. 721.

§ 1108. Effect of Change in State of Facts.

Matters Subsequent to Trial Judgment.—Matters occurring after judgment in the trial court do not affect the determination of the question on appeal, whether the judgment shall be affirmed or reversed. *Vandiver v. American Can Co.*, 190 Ala. 352, 67 So. 299.

§ 1109. Effect of Death or Change of Parties.

Cause Submitted without Suggestion of Appellee's Death.—Where transcript was filed and the cause submitted without suggestion of death of appellee, judgment of appellate court is not void. *Roll v. Howell* (Ala. App.), 73 So. 218.

§ 1110. Scope of Decision in General.

§ 1111. — On Appeal or Writ of Error.

Affirmance or Reversal of Judgment at Law.—The supreme court on appeal from a judgment at law may only affirm or reverse the judgment. *Vandiver v. American Can Co.*, 190 Ala. 352, 67 So. 299.

(B) AFFIRMANCE.

§ 1124. On Motion.

§ 1133. Insufficient Presentation of Case or Questions.

Bill of Exceptions Not Signed by Judge.—*Drummond v. Lamar*, 177 Ala. 530, 58 So. 194. See the title APPEAL AND ERROR, § 1133, vol. 1, p. 643.

§ 1134. Error Not Shown.

§ 1136. — As to Part of Grounds of Decision.

Demurrer Sufficient on Some of Grounds.—Where there are several grounds of demurrer, some of which are sufficient and others insufficient, and the judgment sustaining the demurrer is general, the ruling will be referred to the grounds that are well taken. *National Park Bank v. Louisville, etc., R. Co.* (Ala.), 74 So. 69.

§ 1140. Remission of Part of Recovery.

Remittitur of Excessive Damages.—*Western Union Tel. Co. v. North*, 177 Ala. 319, 58 So. 299. See the title APPEAL AND ERROR, § 1140, vol. 1, p. 644.

A judgment for sum of money in excess of that warranted by evidence will be upheld on condition that plaintiff remit the excess; otherwise it will be reversed. *Nixon v. Smith*, 193 Ala. 443, 69 So. 117.

Under Acts 1911, p. 587, it is the duty of the court of appeals, when it deems a verdict excessive, to determine the amount of the excess, and to direct a reversal unless the appellee shall remit the excess. *Birmingham R., etc., Co. v. Comer*, 10 Ala. App. 261, 64 So. 533.

(C) MODIFICATION.

§ 1149. Amendment of Defects and Correction of Errors.

Error in Rendering Default Judgment.—Error in rendering a default judgment against defendants, who had not been properly served, may be corrected in the supreme court without remanding the cause, if the judgment can be otherwise affirmed. *Long v. Gwin*, 188 Ala. 196, 66 So. 88.

Striking Unauthorized Portion of Judgment.—In trespass for wrongful attachment, where the judgment improperly allowed plaintiff to recover on the attachment bond, the judgment for plaintiff, being correct, will not be reversed and remanded; but the unauthorized portion of the judgment will be stricken. *Walker & Co. v. Norris*, 10 Ala. App. 515, 63 So. 935.

§ 1151. Modification as to Amount of Recovery.

Reducing Amount of Recovery.—In assumpsit for the rental of a motor, where duty was upon defendant to return the motor in condition as good as when installed, but verdict erroneously included repairs furnished by plaintiff the amounts of which were precisely ascertainable, the appellate court may properly modify judgment where plaintiff consents to remittitur. *Cassels v. Alabama City, etc., R. Co. (Ala.)*, 73 So. 494.

Error in Computation of Interest.—

Southern States, etc., Co. v. Brannon, 178 Ala. 115, 59 So. 60. See the title APPEAL AND ERROR, § 1151, vol. 1, p. 647.

Same — In Verdict.—*Cook, etc., Contracting Co. v. Bell*, 177 Ala. 618, 59 So. 273. See the title APPEAL AND ERROR, § 1151, vol. 1, p. 647.

§ 1152. Modifying Provisions of Judgment or Order.

Eliminating Provision Dismissing the Bill.—*Alston v. Dunn*, 176 Ala. 421, 58 So. 300. See the title APPEAL AND ERROR, § 1152, vol. 1, p. 648.

§ 1153. Rendering Judgment Which Lower Court Should Have Rendered.

Case Tried without Jury.—Where a judgment in a cause tried without a jury was erroneous, supreme court on appeal would render judgment which trial court should have rendered. *Hill v. Rentz (Ala.)*, 78 So. 881.

(D) REVERSAL.

§ 1170. Technical, Formal, or Trivial Defects or Errors.

§ 1170 (1) In General.

Error Not Affecting Substantial Rights of Parties.—Error not injuriously affecting substantial rights of parties is not reversible in view of court rule 45 (175 Ala. 21, 61 South. ix), preventing reversal for harmless error. *Tyson v. Jennings Produce Co. (Ala. App.)*, 77 So. 986; *Sloss-Sheffield Steel, etc., Co. v. Taylor (Ala. App.)*, 77 So. 79.

§ 1170 (3) Pleadings in General.

Rulings Not Prejudicial to Appellant.—Erroneous rulings on pleadings not prejudicial to party complaining held not to justify a reversal under Supreme Court rule 45 (175 Ala. xxi, 61 South. ix). *Crow v. Burtwell*, 13 Ala. App. 468, 69 So. 382.

Instructions Indicating Prejudice.—Where the court erred in rulings on the pleadings, and, though there was no non-suit or bill of exceptions, the instructions were sent up as a part of the record, and indicating prejudice, the judgment will be reversed, notwithstanding Supreme Court rule 45 (175 Ala. xxi, 61 South. ix). *Henderson v. Tennessee Coal, etc., R. Co.*, 190 Ala. 126, 67 So. 414.

Pleading Set-Off and Showing Recoupment.—Under rule 45 of the supreme court (175 Ala. xxi, 61 South. ix), prohibiting reversal for harmless error, where defendants filed pleas of set-off, but the proof sustained pleas of recoupment, the case being presented to the jury upon the single issue, judgment for defendants will not be reversed. *Lehman v. Austin*, 195 Ala. 244, 70 So. 653.

Withdrawal of Issue Raised by Defective Plea.—Error in withdrawing an issue raised by a defective plea can not be disregarded under Supreme Court rule 45 (175 Ala. xxi, 61 South. ix), where the defect was not pointed out as required by Code, § 5340. *Clinton Min. Co. v. Bradford*, 192 Ala. 576, 69 So. 4.

Sustaining Demurrers.—Any error in sustaining demurrer to plea raising general issue is harmless where defendant had benefit of general issue, under Supreme Court rule No. 45, prohibiting reversals for errors not injuriously affecting substantial rights. *Lang v. Leith* (Ala. App.), 77 So. 445.

Overruling Demurrers.—In view of circuit court rule 32, as amended (175 Ala. xxi), in the absence of a statement showing the evidence tending to support the complaint, it can not be said that any substantial rights were affected by overruling demurrers to special pleas. *Walker v. Fletcher* (Ala. App.), 77 So. 56.

Any error in overruling a demurrer to a plea of contributory negligence was not ground for reversal where the jury was correctly instructed on this issue under Supreme Court rule 45, confining reversals to errors probably injuriously affecting substantial rights. *Vance v. Morgan* (Ala.), 73 So. 406.

Where complaint in anticipating defense set up a complete defense, overruling demurrer to a plea setting up the same defense was not ground for reversal under rule 45 (61 So. ix), since in any case judgment for plaintiff could not have been sustained. *Meharg v. Alabama Power Co.* (Ala.), 78 So. 909.

Plaintiffs Failure to Sustain Burden of Issues under Pleadings.—Where, under the pleadings as made, the burden was on plaintiff to establish that he was a bona fide purchaser for value, without notice, of a certain mortgage, which he failed

to do, a judgment in his favor would be reversed, notwithstanding Supreme Court rule 45 (61 South. ix). *Miller v. Johnson*, 189 Ala. 354, 66 So. 486.

Where, in an action on a note which plaintiff alleged had been transferred to him for value, he failed to show the payment of value, the failure to allege the method or mode of transfer could not be cured by the application of rule 45 (61 South. ix), providing that no judgment will be reversed for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it appears that the error complained of has probably injuriously affected substantial rights of parties. *Wilson v. Weaver* (Ala. App.), 77 So. 238.

§ 1170 (5) Variance.

Variance Due to Omission of Averments Reversible.—Although evidence showed that defendant telegraph company had knowledge of circumstances surrounding sending of message, held, it was not in default in failing to produce witnesses to meet plaintiff's testimony, given in absence of appropriate averments, and rule 45 (175 Ala. xxi), as to reversal of judgment only for error affecting special rights of parties, would not be applied. *Western Union Tel. Co. v. Bowen* (Ala. App.), 76 So. 985.

Variance Due to Clerical Error Harmless.—Variance as to date of policy resulting from clerical error held not ground for reversal. *National Life, etc., Ins. Co. v. Singleton*, 193 Ala. 84, 69 So. 80.

§ 1170 (7) Reception of Evidence.

Erroneous Admission of Evidence.—Under court rule 45 (175 Ala. xxi, 61 South. ix), a judgment will not be reversed on account of the erroneous admission of evidence, where no prejudice appeared. *Farmers' Mut. Ins. Ass'n v. Tankersley*, 13 Ala. App. 524, 69 So. 410.

Under Supreme Court rule 45 (175 Ala. xxi, 61 South. ix), inhibiting reversal for erroneous admission of evidence unless probably injurious, a party, to have relief on account of error in admitting evidence, must show an objection to the question or that the statement was gra-

tuitous. *Orr v. Stewart*, 13 Ala. App. 542, 69 So. 649.

Testimony that defendant said he "would not guarantee her," but would do all he could for plaintiff, held of two little significance to require a reversal. *Barfield v. South Highland Infirmary*, 191 Ala. 553, 68 So. 30.

§ 1170 (8) Taking Case or Question from Jury.

Refusal of Affirmative Charge Prejudicial.—Where court erroneously failed to give affirmative charge for defendant upon one count, and verdict was general, so that it could not be known upon which count it was rendered, error was prejudicial. *Woodward Iron Co. v. Maxey* (Ala.), 76 So. 913.

Refusal of Affirmative Charge Harmless.—Under Supreme Court rule 45 (175 Ala. xxi, 61 South. ix), refusal of general affirmative charge as to counts of the complaint describing a collision between defendant's street car and plaintiff's truck as occurring at Fifty-Fourth street, when it occurred near Fiftieth street, held not reversible error. *Birmingham R., etc., Co. v. Broyles*, 194 Ala. 64, 69 So. 562.

§ 1170 (9) Instructions.

Requested Charges Erroneously Given—Application of Statute.—Acts 1915, p. 815, denying reversal for refusal of correct charges substantially covered, relates to refused charges, though correct, covered either by general charge or special given charges, and has no application to charges erroneously given on request. *Monte v. Narramore* (Ala.), 77 So. 726.

Same — Court Rule.—Supreme Court rule 45 (61 South. ix), limiting reversals to cases where substantial injury has been done, does not prevent reversal where a count charging defendant mine owner with failing to furnish a safe place to work, was improperly submitted to the jury. *Wadsworth Red Ash Coal Co. v. Scott*, 197 Ala. 361, 72 So. 542.

Failure to Submit Issue of Contributory Negligence.—In an action for injuries to a passenger in alighting from a street car, errors in instructions held probably injurious within court rule 45 (175 Ala. xxi, 61 South. ix) for failing to

submit the issue of contributory negligence. *Birmingham, etc., R. Co. v. Hoskins*, 14 Ala. App. 254, 69 So. 339.

§ 1171. Amount or Extent of Recovery.

Amount Not Palpably Excessive or Opposed to Evidence.—Where the appellate court can not say that the award of damages was excessive, or that the verdict was so palpably opposed to the weight of the evidence as to warrant a reversal of the trial court's conclusion thereon, it will not reverse. *Louisville, etc., R. Co. v. Laney*, 14 Ala. App. 287, 69 So. 993.

An error in a 20-cent item is not ground for disturbing a judgment. *Ligon v. Roberts*, 192 Ala. 31, 68 So. 319.

§ 1172. Reversal in Part.

Cross-Appeal—Reversal of Whole Decree Necessary.—Where complainant assigned cross-error on his cross-appeal from a decree granting relief to him, and complained of the action of the court in denying to him the right to compel defendant to be examined orally, the decree must be reversed as a whole. *West v. Cowan*, 189 Ala. 138, 66 So. 816.

§ 1173. Reversal as to One or More Co-parties.

Where Case Becomes Moot as to Part of Appellants.—Fact that a case has become moot as to some of appellants would not exclude consideration of the appeal as to others, there being a severance in the assignments of error, or prevent a reversal, and appellants who are no longer necessary parties can be discharged by trial court. *Ferrell v. Leonard* (Ala.), 76 So. 51.

Joint Defendants — Reversal as to Party Not Connected with Injury.—In an abutting owners' action against city and street railroad company for injuries caused by change of grade, reversal of judgment against company, whose act had no proximate connection with the injury, held not to require a reversal of the judgment against the city, whose exceptions had no merit. *North Alabama Tract. Co. v. Hays*, 184 Ala. 592, 64 So. 39.

§ 1175. Rendering Final Judgment.

§ 1175 (1) In General.

Special Statute Creating Mobile Court.—Under Acts 1907, p. 570, § 17, the court,

on appeal from the Law and Equity Court of Mobile of a case tried by the court, if it finds error, must render such judgment as should have been rendered below, or may reverse and remand for further proceedings if in its judgment it seems right. *Mobile West Short Tract. Co. v. Austill*, 197 Ala. 432, 73 So. 4.

Chancellor's Refusal of Relief through Mistake as to Jurisdiction.—Where the chancellor refused to order a sale of the homestead at the suit of the widow and minor children because of the uncertainty as to his power and not because the facts justifying a sale had not been proved, the supreme court would render a decree ordering a sale. *Clements v. Faulk & Co.*, 181 Ala. 219, 61 So. 264.

§ 1175 (5) Evidence Insufficient to Establish Cause of Action or Defense.

Under Code 1907, § 2890, where the judgment was not justified by the evidence, the supreme court will render a final judgment in accordance with the law and evidence. *Montgomery, etc., Tract. Co. v. Woods*, 194 Ala. 329, 70 So. 119.

§ 1175 (6) Facts Found or Admitted.

Agreed Case.—*Bassett v. Powell*, 178 Ala. 340, 60 So. 88. See the title APPEAL AND ERROR, § 1175 (6), vol. 1, p. 654.

§ 1178. Ordering New Trial, and Director Referee.

See ante, "In General." § 1175 (1).

If error is discovered in judgment of court on the evidence in cause tried without a jury, the supreme court may render such judgment as the trial court should have rendered. *Wallace v. Crosthwait*, 196 Ala. 356, 71 So. 666.

§ 1176. Directing Judgment in Lower Court.

Remand with Directions to Reform.—*Davison v. Dennis*, 176 Ala. 435, 58 So. 401. See the title APPEAL AND ERROR, § 1176, vol. 1, p. 654.

§ 1177. Necessity of New Trial.

Evidence Admitted without Allegations in Pleading.—Where it is apparent that judgment in action for personal injuries was excessive, and that evidence as to miscarriage was admitted without pleading to support it judgment will be

reversed for a new trial. *Louisville, etc., R. Co. v. King (Ala.)*, 73 So. 456.

Reversal for Introduction of New Evidence.—An application for reversal, merely claiming that applicant should have opportunity to offer new evidence, is not sufficient, especially when applicant prevented identical evidence from being offered on first trial. *Hill v. Rentz (Ala.)*, 78 So. 881.

Supreme court will never remand case for new trial because there might possibly be new evidence offered at next trial, but must be satisfied that additional or different evidence will be offered at next trial, and that it would probably result in different verdict. *Hill v. Rentz (Ala.)*, 78 So. 881.

Where, on appeal in a suit to partition land of deceased tenants in common, the widow of one does not by cross-bill seek the relief to which the evidence shows her entitled, but her answer supported by evidence shows complainant not entitled to the decree procured below, the case will be remanded to permit the pleadings to be amended according to the evidence and to permit the introduction of new evidence. *Hollis v. Watkins (Ala.)*, 66 So. 29.

Newly Discovered Evidence Entitling to New Trial.—Where the probate court, on an issue of marriage between a freedman and a freedwoman, correctly found on the evidence before it that such marriage had taken place, but should have granted a new trial on affidavits as to newly discovered evidence submitted, it was error for the circuit court, on appeal from the judgment and order denying a new trial, to reverse and render judgment in favor of the opposite parties. *Bell v. Bell*, 183 Ala. 645, 62 So. 833.

§ 1175 (7) In Equity or on Trial by Court ing Further Proceedings in Lower Court.

Reversal of Decree Overruling Demurrer.—On reversal of a decree overruling a demurrer to a bill for want of equity, judgment will be rendered sustaining the demurrer, and the case will be remanded. *Farrow v. Sturdivant Bank*, 181 Ala. 283, 61 So. 286.

Undisputed Evidence Showing Damage Many Times Amount of Verdict.—On ap-

peal in an action for damage to an automobile, where the undisputed evidence showed that the damage was at least \$600, the jury found for plaintiff in the sum of \$20, and plaintiff moved to set aside the verdict and judgment, on the ground that if entitled to recover at all, it was entitled to recover more than \$20, which motion was overruled, it is the duty of the supreme court to render the judgment, which should have been rendered below, granting a new trial. *Aetna Acci., etc., Co. v. Birmingham R., etc., Co. (Ala.)*, 73 So. 383.

§ 1180. Effect of Reversal.

Reversal as to Costs.—Reversal of the main judgment also annuls the judgment for costs, rendering moot the question whether they were properly taxed. *Tuscaloosa v. Hill*, 14 Ala. App. 541, 69 So. 486, certiorari denied in *Ex parte Hill*, 194 Ala. 559, 69 So. 598.

(E) RENDITION, FORM, AND ENTRY OF JUDGMENT.

§ 1184. Entry Nunc Pro Tunc.

Change in Situation of Parties—Judgment as of Date of Submission.—Where the supreme court renders a judgment on appeal regularly and appropriately submitted, but the situation of the parties have materially changed subsequent to the submission, the judgment will be as of the date of submission. *Vandiver v. American Can Co.*, 190 Ala. 352, 67 So. 299.

§ 1185. Amendment, Modification, or Setting Aside.

Record Imports Verity as to Jurisdiction of Parties.—Where on the face of the record jurisdiction is affirmatively shown and the proceedings appear in all things regular, on a motion to vacate the judgment because the court did not have jurisdiction of the parties, the record imports absolute verity. *Roll v. Howell (Ala. App.)*, 73 So. 218.

Setting Aside Irregular Judgment after Term Adjourned.—Where a judgment of the appellate court was not void, but at most irregular, the court had no authority after the adjournment of the term to set it aside. *Roll v. Howell (Ala. App.)*, 73 So. 218.

(F) MANDATE AND PROCEEDINGS IN LOWER COURT.

§ 1198. Powers and Duties of Lower Court.

§ 1199. — Opening, Vacating, Modification, or Amendment of Judgment or Order.

Merger in Judgment on Appeal—No Correction Nunc pro Tunc.—A judgment of the circuit court which has been affirmed and corrected on appeal is merged in the judgment on appeal, and the circuit court has no jurisdiction to amend it nunc pro tunc. *Peters v. Nolen*, 10 Ala. App. 599, 65 So. 699, certiorari denied in *Ex parte Peters*, 187 Ala. 672, 65 So. 1034.

§ 1201. — Amendments as to Pleadings and Parties.

Under Code 1907, § 3126, providing that amendments to bills must be allowed at any time before final decree, by striking out or adding new parties, and to meet any state of evidence which will authorize relief, the time limit to the right of amendment is the rendition of the final decree, and amendment to a bill, proper in itself, within the *lis pendens*, may be allowed even after reversal and remand on appeal. *Kirby v. Puckett (Ala.)*, 75 So. 6.

Filing Additional Counts—Discretion of Court.—*Craig & Co. v. Pierson Lumber Co.*, 179 Ala. 535, 60 So. 838. See the title APPEAL AND ERROR, § 1201, vol. 1, p. 660.

Amended Pleas Presenting Same Defenses.—While defendant on second trial after remand should be allowed to place on file amended pleas which are in substance amendatory statements of the defense upon which the case was first tried, filing may be denied where defendant would have the benefit of such pleas under other pleas. *Massachusetts Mut. Life Ins. Co. v. Crenshaw*, 195 Ala. 263, 70 So. 768.

Amended Pleas Presenting New Defenses.—After there has been one trial, it is discretionary on re-trial for the court to receive amended pleas presenting an entirely new ground of defense. *Massachusetts Mut. Life Ins. Co. v. Crenshaw*, 195 Ala. 263, 70 So. 768.

Amendment as to Parties.—Where the case was reversed and remanded because

proof showed a contract by one of joint defendants only, the plaintiffs were entitled to amend their complaint by dropping one of the defendants, and the court erred in dismissing plaintiffs' action on the ground of discontinuance. *Sanders v. Harris* (Ala.), 75 So. 283.

§ 1209. New Trial.

§ 1212. — Scope of Issues.

Plea Bad on Demurrer Not Refiled after Ruling Sustained on Appeal.—*Bohanan v. Dodd*, 7 Ala. App. 220, 60 So. 955. See the title APPEAL AND ERROR, § 1212, vol. 1, p. 663.

§ 1214. — Evidence.

Opinion of Supreme Court.—In an action on the common counts for money due plaintiff under an agreement with defendant that if plaintiff would pay the debt of a third person, he should, if defendant succeeded, have cotton raised by the debtor and in defendant's possession, but claimed by another, the opinion of the supreme court, reversing the first judgment for defendant, not tending to clear up any disputed fact, was properly excluded. *Williams v. Shows*, 197 Ala. 596, 73 So. 99.

§ 1215. — Instructions to Jury.

See post, "Failure to Obey Mandate or Follow Decision of Appellate Court," § 1216.

Instructions Not in Accord with Previous Rulings.—Instructions not in accord with rulings in the same case, on previous appeals are properly refused. *Bixby-Theisen, Co. v. Evans*, 186 Ala. 507, 65 So. 81.

§ 1216. Failure to Obey Mandate or Follow Decision of Appellate Court.

Duty to Give Instructions—Reversal of Judgment.—Where ruling of trial court in refusing to give certain requested instructions upon trial after remand was not in accord with opinion on former appeal, the judgment will be reversed. *McCoy v. Prince*, 197 Ala. 665, 73 So. 386.

(G) JURISDICTION AND PROCEEDINGS OF APPELLATE COURT AFTER REMAND.

§ 1221. Amendment or Modification of Judgment.

After Judgment Affirmed.—After court

of appeals has affirmed judgment upon case being again submitted on briefs, it can not disturb such judgment. *Conner v. State* (Ala. App.), 74 So. 754.

XVIII. LIABILITIES ON BONDS AND UNDERTAKINGS.

§ 1225. Insufficient, Informal, or Defective Bond or Undertaking.

Defective Bond Valid as Common-Law Obligation.—An appeal bond executed to the appellee, and conditioned to satisfy the judgment of the appellate court, is valid as a common-law obligation, though under Code 1907, § 2875, a statutory supersedeas bond must be executed to the register, and he conditioned to pay the judgment of the appellate court and all costs and damages occasioned by the appeal. *Decker v. Decker*, 9 Ala. App. 241, 63 So. 24.

§ 1228. Accrual or Release of Liability by Breach or Fulfillment of Conditions.

Affirmance of Judgment.—The affirmance of a judgment for the custody of a child has the effect of making the judgment of the lower court the judgment of the appellate court, and the sureties on an appeal bond, conditioned to satisfy the judgment of the appellate court, are liable for damages for failure of the appellant to deliver the child. *Decker v. Decker*, 9 Ala. App. 241, 63 So. 24.

Where the mother was awarded the custody of a child, and the father executed an appeal bond to satisfy the judgment of the appellate court, the judgment being affirmed, the condition of the bond was broken, where the father fled with the child to parts unknown, and failed and refused to deliver it to the mother. *Decker v. Decker*, 9 Ala. App. 241, 63 So. 24.

Same—"Wrongful Appeal."—Under supersedeas bond conditioned to pay judgment supreme court might render, and costs and damages party aggrieved might sustain by wrongful appeal, an appeal which did not reverse judgment or discover and correct some error of judgment materially prejudicial would be a "wrongful appeal;" but an appeal which did discover and correct such an error was not a "wrongful appeal." *Cobb v. Morrison*, 197 Ala. 550, 73 So. 42.

Reversal of Judgment—Correction as

to Interest.—Where a bill in chancery was filed to redeem land sold under a deed of trust, and the decree allowed a redemption and fixed the amount to be paid by the complainants at \$633.18 with the statutory 10 per cent. on a mortgage indebtedness only to the date of the filing of the bill, and where respondent therein appealed and gave a supersedeas bond conditioned that, if the bondsmen should "fail in said appeal," and should pay any judgment rendered by the supreme court, the obligation was to be void, and where the supreme court adjudged the decree erroneous in part, and corrected it by allowing interest to respondent to the date of the final decree, amounting to over \$150, and as corrected affirmed, the respondent successfully impeached the correctness of the decree in a substantial particular, and hence did not "fail in said appeal," so that there was no breach of the bond. *Cobb v. Morrison*, 197 Ala. 550, 73 So. 42.

§ 1234. Extent of Liability.

Bond Conditioned to Satisfy Judgment and Not to Pay Costs and Damages. — The fact that an appeal bond is merely conditioned to satisfy the judgment of the appellate court, without also providing, as authorized by Code 1907, § 2875, for the costs and damages resulting from the appeal, does not prevent recovery on the bond for failure to comply with judgment of the appellate court. *Decker v. Decker*, 9 Ala. App. 241, 63 So. 24.

Same—Failure to Deliver Custody of Child as Ordered.—In an action on an appeal bond, conditioned only to "satisfy" the judgment of the appellate court, which affirmed a judgment awarding the mother the custody of a child, the appellant, the father, having fled with the child to parts unknown, the mother is entitled to judgment for the loss of the services and companionship of the child after the affirmance, but not pending the appeal. *Decker v. Decker*, 9 Ala. App. 241, 63 So. 24.

§ 1235. Actions.

Right of Action of Equitable Assignee.—Complainant's assignor recovered judg-

ment against defendant company, which appealed and gave supersedeas bond. The transcript of the appeal erroneously named the sureties. The judgment was affirmed as against the company and its sureties. The company became insolvent. Held, that complainant had a right of action on the supersedeas; complainant being an equitable assignee. *Hanby v. Cahaba Coal Co.* (Ala.), 75 So. 964.

Same—Recovery Not Prevented by Merger.—Doctrine of merger held not to prevent recovery by equitable assignee of judgment on supersedeas bond after affirmance. *Hanby v. Cahaba Coal Co.* (Ala.), 75 So. 964.

Statutory Remedy Not Exclusive—Independent Action against Sureties.—The remedy provided by Code 1907, § 4725, for obtaining judgments against sureties on appeal bonds at the time judgment is obtained against the principal not being exclusive, an independent action against the sureties on the bond will lie. *James v. Kitzinger & Co.*, 13 Ala. App. 448, 68 So. 582.

Demand for Payment as Condition Precedent.—To maintain an action against the sureties on an appeal bond, demand for payment is not a condition precedent. *James v. Kitzinger & Co.*, 13 Ala. App. 448, 68 So. 582.

Sufficiency of Consideration for Bond—Retention of Child's Custody.—Where the mother was awarded the custody of a child, an appeal bond conditioned to satisfy the judgment of the appellate court, executed to permit the father to retain the custody of the child pending the appeal, was based on a sufficient consideration. *Decker v. Decker*, 9 Ala. App. 241, 63 So. 24.

Sureties Erroneously Named in Bond as Defense.—Where transcript on appeal erroneously named sureties on supersedeas bond, although complainant waived defects in transcript and although she might have had it correctly, duty was equally upon defendants to correct it, and therefore error was no bar to action on supersedeas. *Hanby v. Cahaba Coal Co.* (Ala.), 75 So. 964.

APPEARANCE.

- § 7. Proceedings Constituting Appearance.
- § 8. — In General.
- § 9. — General or Special Appearance.
- § 11. Operation and Effect in General.
- § 12. — Relation of Party to Cause in General.
- § 13. — Rights Acquired by Defendant.
- § 16. Jurisdiction Acquired.
- § 19. — Of the Person.

Cross References.

See the title APPEARANCE, vol. 1, p. 670, and references there given.

§ 7. Proceedings Constituting Appearance.

§ 8. — In General.

By Attorney.—A general appearance cures defects in service of process and obviates the necessity of service, which appearance may be made by an attorney by the entry of his name on the margin of the docket opposite name of defendant. *McAdams v. Windham*, 191 Ala. 287, 68 So. 51.

§ 9. — General or Special Appearance.

Appearance in Attachment.—Where a suit was instituted against a foreign corporation by attachment, defendant executing a bond conditioned on returning the property within 30 days after it failed in the attachment suit, and its appearance in court, and that to answer the process served on its property, was each limited and special, and the attachment was dissolved on the ground that the property was in custodia legis at the time of the levy, but defendant, prior to the dissolution of the attachment, had replevied the property, so that when, after dissolution, defendant filed a plea to the jurisdiction, the plea was stricken on plaintiff's motion, on the ground that replevying the property was such an appearance as conferred jurisdiction and authorized personal judgment, such ruling was erroneous; both the attachment and bond having been functus officio when the attachment was dissolved,

there never having been any attempt to acquire jurisdiction by process other than to subject the property, and there having been no personal appearance. *Terminal Oil Mill Co. v. Planters' Warehouse, etc., Co.*, 197 Ala. 429, 73 So. 18.

§ 11. Operation and Effect in General.

§ 12. — Relation of Party to Cause in General.

Defects in Service.—A general appearance cures defects in service of process and obviates the necessity of service. *McAdams v. Windham*, 191 Ala. 287, 68 So. 51.

§ 13. — Rights Acquired by Defendant.

A general appearance by the defendant without any plea entitles him to offer a plea of the general issue, and precludes judgment by default or judgment nil dicit. *Craig & Co. v. Pierson Lumber Co.*, 179 Ala. 535, 60 So. 838.

§ 16. Jurisdiction Acquired.

§ 19. — Of the Person.

Appearance by Nonresident.—Where the resident plaintiff could not maintain in this state an action against a nonresident defendant, with a writ of attachment therein, by reason of its breach of good faith in inducing defendant to ship goods to it in the state, an appearance to dispute the jurisdiction did not waive the rights set up in the plea. *Sessoms Grocery Co. v. International Sugar Feed Co.*, 188 Ala. 232, 66 So. 479.

Appellate Courts.

See post, COURTS.

Appellate Jurisdiction.

See ante, APPEAL AND ERROR; COURTS; CRIMINAL LAW; JUSTICES OF THE PEACE.

Appliances.

See post, CARRIERS; MASTER AND SERVANT; and the particular appropriate titles.

Appointment.

See the particular appropriate titles.

Apportionment.

See post, COSTS; DAMAGES; DESCENT AND DISTRIBUTION; TAXATION; and other appropriate titles.

Appraisal.

See post, EXECUTORS AND ADMINISTRATORS; INSURANCE; TAXATION; and other appropriate titles.

Apprehension.

See post, HOMICIDE.

Apprentices.

See the title APPRENTICES, vol. 1, p. 681, and references there given.

Approaches.

See post, CARRIERS; EMINENT DOMAIN.

Appropriation.

See the particular appropriate titles.

Approval.

See the particular appropriate titles.

Appurtenances.

See post, EASEMENTS; VENDOR AND PURCHASER.

ARBITRATION AND AWARD.

I. Submission.

- § 3. Matters Subject to Arbitration.
- § 5. Agreements to Arbitrate.
- § 10. — Effect on Pending or Subsequent Action.
- § 16. Revocation or Setting Aside.
- § 22. Performance or Breach.

III. Award.

- § 48. Nature and Essentials in General.
- § 56. Sufficiency.
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- § 68. Objections and Exceptions.
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- § 73. Appeal or Other Proceedings for Review.
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- § 85. Actions on Awards.
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- § 86. Pleading and Evidence of Award as Estoppel or Defense.

Cross References.

See the title ARBITRATION AND AWARD, vol. 1, p. 684, and references there given.

I. SUBMISSION.

§ 3. Matters Subject to Arbitration.

Parties can not make disputes of a criminal nature or criminal prosecutions the subject of arbitration, since they are matters of public concern, and awards including criminal prosecutions, where not divisible, are void in toto. *Wise v. Johnson*, 14 Ala. App. 396, 69 So. 986.

§ 5. Agreements to Arbitrate.

See post, "Nature and Essentials in General," § 48.

§ 10. — Effect on Pending or Subsequent Action.

An agreement to submit a controversy to arbitration, not consummated, does not oust the jurisdiction of the courts at the instance of either party, and therefore a clause in the contract agreeing to submit matters of difference that might arise in the future to a certain umpire for its final determination, which was not acted upon, would not preclude the

plaintiff from recovering. *Imperial Motorcar Co. v. Skinner* (Ala.), 78 So. 641.

§ 16. Revocation or Setting Aside.

Institution of suit by one of the parties to a submission to an oral arbitration before award operates as a revocation, provided such suit is begun before an award is made. *Bullock v. Mason*, 194 Ala. 663, 69 So. 882.

§ 22. Performance or Breach.

Damages.—Where a party breaches his agreement to submit to arbitration and institutes suit, damages for loss of time in attending the arbitration can not be recovered by defendant; for if there was any damage of that kind, it would be for attendance at trial of the suit. *Bullock v. Mason*, 194 Ala. 663, 69 So. 882.

Costs.—Where an agreement to submit to arbitration is breached and plaintiff wrongfully instituted suit, costs of the arbitration assessed against the defendant by the award can not be recovered by defendant as caused by the

breach of the agreement although costs of suit might be recovered. *Bullock v. Mason*, 194 Ala. 663, 69 So. 882.

Counsel Fees. — Where defendant claimed damages for plaintiff's breach of agreement to submit controversy, to arbitration, counsel fees expended by defendant in the suit can not be recovered without a showing that they were reasonable. *Bullock v. Mason*, 194 Ala. 663, 69 So. 882.

III. AWARD.

§ 48. Nature and Essentials in General.

There can be no recovery on an alleged arbitration award, where there has been no agreement on arbitrators and the persons assuming to act as such have made only a partial statement of the account between the parties, though there has been an attempted mutual waiver of technicalities. *Reid v. McElderry*, 188 Ala. 150, 66 So. 7.

§ 56. Sufficiency.

§ 57. — Conformity to Submission and Completeness.

Under an agreement for an arbitration and award, the arbitrators derive their powers entirely from the submission, and can not legally include anything in the award not within the terms and scope of the submission. *Wise v. Johnson*, 14 Ala. App. 396, 69 So. 986.

Where a complaint both denied defendant's right to rescind a contract and alleged his subsequent waiver of any such right, an arbitrator's award that defendant had a right to rescind did not support a final judgment for defendant. *Bell v. McKay & Co.*, 196 Ala. 408, 72 So. 83.

§ 68. Objections and Exceptions.

A party to an award of arbitrators need not be present when the award is made, and his absence does not estop him from attacking the correctness thereof. *Black v. Woodruff*, 193 Ala. 327, 69 So. 97.

§ 69. Amended and Supplemental Awards.

Where arbitrators have returned an award in a pending suit, they are powerless to subsequently modify it, since their authority ceases upon the return

of the award to the court. *Black v. Woodruff*, 193 Ala. 327, 69 So. 97.

§ 73. Appeal or Other Proceedings for Review.

Under Code 1907, § 2922, a judgment entered on award of arbitrators is reviewable to the same extent as a judgment of the trial court itself. *Bell v. McKay & Co.*, 196 Ala. 408, 72 So. 83.

Although the question submitted for arbitration may be limited to whether defendant had a right to rescind the contract and not include whether he subsequently waived such right, yet the waiver question will be decided where it has been contested throughout. *Bell v. McKay & Co.*, 196 Ala. 408, 72 So. 83.

§ 80. Construction and Operation in General.

Where it is obvious on the face of an award that it was drawn by one not skilled in legal phraseology, it must be broadly interpreted to give effect to the intent of the parties, since the law favors arbitrations, avoiding the formalities, delay, and expense of ordinary litigation. *Wise v. Johnson*, 14 Ala. App. 396, 69 So. 986.

Novation.—Where the award was that defendants keep and work the negro Ed. Mosely, and * * * pay the plaintiffs \$150.00, same being the indebtedness of the negro to plaintiff and the damages, it is clear that it means only that defendants should assume the debt of the negro to plaintiff, and that plaintiff should not interfere with the contract of hire between the negro and defendants, and does not fix the status of the negro so as to be void as against public policy. *Wise v. Johnson*, 14 Ala. App. 396, 69 So. 986.

§ 81. Merger and Bar of Causes of Action and Defenses.

Where a complaint both denied defendant's right to rescind a contract and alleged a subsequent waiver of any such right, submitting the first question to arbitration does not preclude the later assertion of the second proposition. *Bell v. McKay & Co.*, 196 Ala. 408, 72 So. 83.

§ 82. Conclusiveness.

Mistake.—An award of arbitrators may

be impeached for their mistake in setting down their conclusion, although such mistake appears dehors the award only. *Black v. Woodruff*, 193 Ala. 327, 69 So. 97.

§ 85. Actions on Awards.

§ 85 (1) Right of Action and Form of Remedy.

Where an award on arbitration does not state when the amount awarded shall be paid, the money is payable instant, and, if not paid on delivery of a copy of the award, action may be brought to enforce the payment. *Wise v. Johnson*, 14 Ala. App. 396, 69 So. 986.

§ 85 (3) Evidence.

Evidence held to show such conflict as to carry the case to the jury on the question whether criminal prosecutions were included in an arbitration and award. *Wise v. Johnson*, 14 Ala. App. 396, 69 So. 986.

§ 86. Pleading and Evidence of Award as Estoppel or Defense.

A plea setting up an award by arbitrators as a defense was not demurrable be-

cause the award named the parties as defendant and M., who was the president of plaintiff corporation, where it was averred that the subject matter of the suit was submitted to arbitration by plaintiff and defendant, and the arbitrators rendered the award set out, as plaintiff's participation in the arbitration could not have been more pointedly averred, and the fact that the award named the parties as defendant and M. did not make the plea contradictory; there being nothing in the terms of the award inconsistent with the averment as to the submission. *Florence, etc., Supply Co. v. International Agri. Corp.*, 10 Ala. App. 463, 65 So. 413.

Under the general issue and the pleas of awards upon submission to arbitration by the parties, the defendant could introduce evidence that plaintiff corporation furnished the items under a contract entered into by its president, which it undertook to perform, that the last submission to arbitration was participated in by plaintiff, and the award released defendant, though it named the parties as plaintiff's president and defendant. *Florence, etc., Supply Co. v. International Agri. Corp.*, 10 Ala. App. 463, 65 So. 413.

Arbitrators.

See ante, ARBITRATION AND AWARD.

Argument.

See post, CONTRACTS.

Argumentativeness.

See post, CRIMINAL LAW; INDICTMENT AND INFORMATION; PLEADING; TRIAL.

Argument and Conduct of Counsel.

See ante, APPEAL AND ERROR; post, CRIMINAL LAW; NEW TRIAL; TRIAL.

Army and Navy.

See the title ARMY AND NAVY, vol. 1, p. 713, and references there given.

Arraignment.

See post, CRIMINAL LAW.

Array.

See post, GRAND JURY; JURY.

Arrears.

See post, MORTGAGES; and other appropriate titles.

ARREST.

II. On Criminal Charge.

§ 61. Authority to Arrest without Warrant.

§ 62. — In General.

§ 63. — Officers and Persons Assisting Them.

§ 63 (1) In General.

§ 63 (4) Suspicion or Reasonable Grounds for Belief That Offense Has Been Committed.

§ 64. — Private Persons.

§ 68. Mode of Making Arrest.

Cross References.

See the title ARREST, vol. 1, p. 715, and references there given.

In addition, see post, CARRIERS; CRIMINAL LAW; FALSE IMPRISONMENT; SEARCHES AND SEIZURES; SHERIFFS AND CONSTABLES.

II. ON CRIMINAL CHARGE.

§ 61. Authority to Arrest without Warrant.

§ 62. — In General.

Under Charter of Bessemer. — The charter provision of the city of Bessemer does not authorize arrest without warrant, but merely authorizes passage of an ordinance granting such authority. *Sherrod v. State*, 14 Ala. App. 57, 71 So. 76.

§ 63. — Officers and Persons Assisting Them.

§ 63 (1) In General.

Misdemeanor Not Committed in Officers' Presence.—Under Code 1907, § 6269, a sheriff can not arrest one on a charge of misdemeanor not committed in his presence without a warrant. *Deason v. Gray*, 192 Ala. 611, 69 So. 15.

Under Code 1907, §§ 6267, 6269, providing that any sheriff or other officer may arrest within the limits of the county, and that an officer may arrest any person without warrant for any public offense or breach of the peace threatened in his

presence, or when a felony has been committed though not in his presence, by the person arrested, or when a felony has been committed and he has reasonable cause to believe that the person arrested committed it, or when he has reasonable cause to believe that the person arrested has committed a felony, although it may afterwards appear that a felony in fact was not committed, or on a charge made upon reasonable cause that the person arrested has committed a felony, an officer has no authority, without a warrant, to arrest for a misdemeanor or for a violation of a town ordinance not committed in his presence, and he is guilty of an assault if he attempts to do so. *Ezzell v. State*, 13 Ala. App. 156, 68 So. 578.

Acts Not Giving Right to Arrest.—The presence of the owner on his own premises on which defendant by mistake had built a house was not an offense in the presence of an officer, where plaintiff had not been warned to keep off the premises. *Rhodes v. McWilson*, 192 Ala. 675, 69 So. 69.

A statement by owner of land on which

defendant, by mistake, had built house, of his general intention to continue his entries, held not a threat to commit a breach of the peace, nor an act in the officer's presence threatening violation of general law, so as to authorize arrest without warrant. *Rhodes v. McWilson*, 192 Ala. 675, 69 So. 69, cited in note in Ann. Cas. 1917E, 406.

Right to Resist Officer Arresting without Warrant.—Under Code 1907, § 6270, so providing, where an officer arrests one without warrant, he must, under penalty of being guilty of assault, inform the person of his authority and of the cause of the arrest, unless such person is actually committing a public offense or is being pursued, except when such person knows the official character of the officer, of the conditions for the exercise of such officer's authority, and of his purpose; and, although the person may know such officer's official character, unless he also knows, or is notified, of the purpose of the officer to arrest him, and the cause thereof, such officer may be resisted as a personal assailant, even when the officer has lawful cause for the exercise of official authority, since his official character protects him only when he purports to exercise it. *Ezzell v. State*, 13 Ala. App. 156, 68 So. 578.

§ 63 (4) Suspicion or Reasonable Grounds for Belief that Offense Has Been Committed.

Under Birmingham Code — Verbal Charge.—Birmingham City Code, § 839, declares that it shall be the duty of the chief of police and every policeman to arrest without warrant all persons against whom there is a charge made by any citizen for violating any city or state law. Const. 1901, § 7 declares that no person shall be accused or arrested or detained, except in cases ascertained by law, and according to the forms which the same has prescribed. Code 1907, §§ 6703, 6737, authorize one citizen to prefer a misdemeanor charge against another citizen by filing an affidavit in writing, and § 1221 makes such procedure applicable to prosecutions for misdemeanors before the recorders of cities and towns. A police officer of the city of Birmingham ar-

rested plaintiff on mere verbal charge by another citizen that plaintiff had trespassed on land when in fact plaintiff was merely entering on his own property. Held, that the Birmingham charter must be construed as allowing an arrest without warrant by a police officer only when a criminal charge has been preferred in the manner prescribed by law, the purpose being to allow any officer to arrest without requiring each one to be armed with a warrant, this conclusion being strengthened by Code 1907, § 6269, authorizing arrests without warrant upon a charge made on reasonable cause that the person arrested was guilty of a felony, and Const. 1901, § 89, declaring that the legislature shall not have power to authorize municipal corporations to pass any laws inconsistent with the general laws of the state as well as act of August 13, 1907 (Laws 1907, p. 790), conferring on municipalities power to adopt ordinances and resolutions not inconsistent with state laws. *Rhodes v. McWilson* (Ala. App.), 77 So. 465.

Statement Not Confession of Crime.—Statement to an officer by the owner of premises on which defendant by mistake had built a house that he had entered the house after being warned not to do so was not a confession of his violation of the criminal law. *Rhodes v. McWilson*, 192 Ala. 675, 69 So. 69.

§ 64. — Private Persons.

Arrest of Trespasser.—If one willfully trespassed on another's land and picked blackberries thereon with malicious intent, he was guilty of a public offense under Act 1911, p. 625, and under Code 1907, § 6273, might properly be arrested by a watchman, employed by the owner without warrant. *Du Pont de Nemours Powder Co. v. Hyde* (Ala.), 77 So. 733.

Reasonable Cause to Believe Defendant Committed the Felony.—*Sanders v. State*, 181 Ala. 35, 61 So. 336. See the title ARREST, § 64, vol. 1, p. 720.

§ 68. Mode of Making Arrest.

What Constitutes Arrest.—An arrest consists in taking, under real or assumed authority, custody of another person for purpose of holding or detaining him to answer a criminal charge or civil demand.

Central, etc., R. Co. v. Carlock, 196 Ala. 659, 72 So. 261.

Same—Necessity for Actual Force. — Arrest may be effected without touching the body or actual force; it being sufficient if the party is within the power of the officer and submits to arrest. Central, etc., R. Co. v. Carlock, 196 Ala. 659, 72 So. 261.

Same — Where There Is Resistance. — Bare words are not sufficient to constitute an arrest, where the party resists and refuses to be arrested. Gibson v. State, 193 Ala. 12, 69 So. 533.

Limitations on Officers and Statutes — Consideration of Hazard. — Though officers, in maintaining law and order, are held to strict accountability for the way in which they discharge their duties, the courts will consider their dangerous and hazardous calling in construing the limitations placed upon officers and statutes granting power to make arrests, so far as can be done without infringing upon the citizen's personal liberty. Tarwater v. State (Ala. App.), 75 So. 816.

Forcible Arrest without Warrant. — Where the person being arrested without

warrant has knowledge of the official character of the officer and is engaged in the actual commission of a public offense, the officer's duty is to make the arrest, and the citizen's duty is to submit; if the officer is resisted, he has the right to use just so much force as is necessary to accomplish the arrest and protect himself, but no more. Tarwater v. State (Ala. App.), 75 So. 816.

By Code 1907, § 6267, an officer acting as sheriff may make a lawful arrest without warrant, but he must comply with and conform to the law giving him the authority; by § 6269, when the arrest is made without warrant, it must be for a public offense committed, or a breach of the peace threatened, in his presence; and by § 6270, when arresting without a warrant, the officer must inform the person arrested of his authority and the cause of the arrest, otherwise the person is under no duty to submit, and, if the officer kills him, the officer is not protected by his office. Tarwater v. State (Ala. App.), 75 So. 816.

Arrest of Judgment.

See post, CRIMINAL LAW; JUDGMENT.

ARSON.

- § 1. Nature and Elements of Offense.
- § 2. — In General.
- § 5. — Character of Property.
- § 9. — Ownership or Possession of Property.
- § 12. Degrees.
- § 15. Persons Liable.
- § 17. Indictment or Information.
- § 20. — Description of Property.
- § 22. — Ownership or Possession of Property.
- § 25. — Issues, Proof, and Variance.
- § 26. Evidence.
- § 27. — Presumptions and Burden of Proof.
- § 28. — Admissibility in General.
- § 29. — Intent and Malice.
- § 31. — Motive.
- § 32. — Threats, Preparations, and Previous Attempts.
- § 37. — Weight and Sufficiency.
- § 38. Trial.
- § 40. — Questions for Jury.

Cross References.

See the title ARSON, vol. 1, p. 725, and references there given.
In addition, see post, INDICTMENT AND INFORMATION.

§ 1. Nature and Elements of Offense.

§ 2. — In General.

Offense against Security of Possession.—*Williams v. State*, 177 Ala. 34, 58 So. 921. See the title ARSON, § 2, vol. 1, p. 726.

§ 5. — Character of Property.

Building Other than Dwelling.—*Williams v. State*, 177 Ala. 34, 58 So. 921. See the title ARSON, § 5, vol. 1, p. 727.

§ 9. — Ownership or Possession of Property.

Sufficiency of Title.—*Williams v. State*, 177 Ala. 34, 58 So. 921. See the title ARSON, § 9, vol. 1, p. 728.

§ 12. Degrees.

Three Degrees of Offense.—*Williams v. State*, 177 Ala. 34, 58 So. 921. See the title ARSON, § 12, vol. 1, p. 729.

Statutory Provision—Second Degree — Dwelling Occupied as School House.— Under a statute providing that any person who willfully sets fire to or burns any church, meeting house, court-house, townhouse, college, academy, jail,

or other building erected for public use shall be guilty of arson in the second degree, a dwelling house occupied as a school building is not, under the rule of ejusdem generis, a building erected for public use. *Gilbreath v. State* (Ala. App.), 74 So. 723.

A dwelling house, temporarily used for school purposes, held an uninhabited dwelling house within a statute providing that the burning of uninhabited dwelling house shall be arson in the second degree. *Gilbreath v. State* (Ala. App.), 74 So. 723.

Same—Protection of Property Rather than Habitation or Person.— A statute, providing that any person who willfully sets fire to or burns any uninhabited dwelling house shall be guilty of arson in the second degree, manifests a legislative intent to protect the property rather than the habitation or person. *Gilbreath v. State* (Ala. App.), 74 So. 723.

§ 15. Persons Liable.

One in Rightful Possession.— *Williams v. State*, 177 Ala. 34, 58 So. 921. See the title ARSON, § 15, vol. 1, p. 729.

Owner Out of Possession.—*Williams v. State*, 177 Ala. 34, 58 So. 921. See the title ARSON, § 15, vol. 1, p. 729.

Owner Intending to Defraud Insurer.—*Williams v. State*, 177 Ala. 34, 58 So. 921. See the title ARSON, § 15, vol. 1, p. 729.

One Burning Property of His or Her Spouse.—*Williams v. State*, 177 Ala. 34, 58 So. 921. See the title ARSON, § 15, vol. 1, p. 730.

§ 17. Indictment or Information.

§ 20. — Description of Property.

Corncrib.—*Savage v. State*, 8 Ala. App. 334, 62 So. 999, certiorari denied in *Ex parte State*, 184 Ala. 1, 63 So. 1006, cited in note in *Ann. Cas.* 1916B, 145. See the title ARSON, § 25, vol. 1, p. 731.

§ 22. — Ownership or Possession of Property.

Must Be in Person Other than Defendant.—*Williams v. State*, 177 Ala. 34, 58 So. 921. See the title ARSON, § 22, vol. 1, p. 732.

Unoccupied Dwelling House — Owner of the Fee.—In a prosecution for burning an unoccupied dwelling house used as a school building, an indictment, laying the ownership of the property in the owner of the fee, held sufficient. *Gilbreath v. State* (Ala. App.), 74 So. 723.

§ 25. — Issues, Proof, and Variance.

Variance as to Nature of Building.—*Savage v. State*, 8 Ala. App. 334, 62 So. 999, certiorari denied in *Ex parte State*, 184 Ala. 1, 63 So. 1006, cited in note in *Ann. Cas.* 1916B, 145. See the title ARSON, § 25, vol. 1, p. 733.

Variance as to Ownership.—In a prosecution for arson, the state must prove the ownership of the property burned as alleged in the indictment, and testimony that a cotton house burned was the property of W. C. Harrison is insufficient under an indictment laying the ownership in W. C. Harrison, Sr., where it appeared that there was a W. C. Harrison, Jr., who testified in the case and might have been the owner. *Daniels v. State*, 12 Ala. App. 119, 68 So. 499.

Same—Joint Control.—In a prosecution for burning an uninhabited dwelling house used as a school building, and indictment, alleging the ownership thereof in a cer-

tain person, was not at variance with proof that such person and his son were interested in the property and had joint control thereof. *Gilbreath v. State* (Ala. App.), 74 So. 723.

Burning Property by Spouse.—*Williams v. State*, 177 Ala. 34, 58 So. 921, answering certified questions in 4 Ala. App. 92, 58 So. 925. See the title ARSON, § 25, vol. 1, p. 734.

§ 26. Evidence.

§ 27. — Presumptions and Burden of Proof.

Burden of Proving Ownership.—In a prosecution for arson, the burden was on the state to prove the ownership of the property burned, as alleged in the indictment. *Daniels v. State*, 12 Ala. App. 119, 68 So. 499.

§ 28. — Admissibility in General.

Conduct after Discovery of Fire.—In a prosecution for arson, evidence as to defendant's conduct after he was seen by a witness about the time the fire was discovered was admissible as tending to prove the corpus delicti and connect him with the crime. *Daniels v. State*, 12 Ala. App. 119, 68 So. 499.

Similarity of Prisoner's Footprints with Tracks on Scene.—See post, "Questions for Jury," § 40.

§ 29. — Intent and Malice.

Ill Will towards Owner of Building.—In a prosecution for arson, defendant's ill will toward the owner of the building burned is admissible in evidence. *Savage v. State*, 12 Ala. App. 116, 68 So. 498.

§ 31. — Motive.

Showing Prosecutor's Refusal to Sign Petition for Defendants' Pardon.—*Cooley v. State*, 7 Ala. App. 163, 62 So. 292. See the title ARSON, § 31, vol. 1, p. 736.

Prisoner Supplanted by Owner of Building in Renting Land.—*Savage v. State*, 8 Ala. App. 334, 62 So. 999, certiorari denied in *Ex parte State*, 184 Ala. 1, 63 So. 1006, cited in note in *Ann. Cas.* 1916B, 145. See the title ARSON, § 31, vol. 1, p. 735.

Ill Will towards Owner.—Ill will exhibited by the defendant against the owner or occupant of the burned house is

admissible in evidence to show motion for the crime of arson. *Cunningham v. State*, 14 Ala. App. 1, 69 So. 982.

§ 32. — Threats, Preparations, and Previous Attempts.

Threats against Owner. — Threats by the defendant against the owner or occupant of the burned house are admissible in evidence to show motive for the crime of arson. *Cunningham v. State*, 14 Ala. App. 1, 69 So. 982; *Savage v. State*, 12 Ala. App. 116, 68 So. 498.

§ 37. — Weight and Sufficiency.

Proof of Corpus Delicti. — In prosecution for arson, evidence held insufficient to prove corpus delicti. *Carr v. State* (Ala.), 76 So. 413.

Same—Circumstantial Evidence. — The corpus delicti of the offense of arson may be established by inference or from circumstances. *Cunningham v. State*, 14 Ala. App. 119, 68 So. 499, cited in notes in L. R. A. 1916D, 1299, 1300.

Same—Negating Accidental or Natural Burning. — The corpus delicti in arson consists, not alone of a building burned, but also of its having been willfully fired, and a burning by accidental and natural causes must be sufficiently excluded to constitute a sufficient proof of the crime. *Daniels v. State*, 12 Ala. App. 119, 68 So. 499, cited in notes in L. R. A. 1916D, 1299, 1300.

Ownership of Property. — Evidence, in a prosecution for burning a cotton house, held not to show ownership thereof as alleged in the indictment. *Daniels v. State*, 12 Ala. App. 119, 68 So. 499.

Exclusion of Natural Causes. — In arson, the corpus delicti consists, not alone of a building burned, but also of it having been wilfully fired by some responsi-

ble person, and burning by accidental and natural causes must be satisfactorily excluded, to constitute sufficient proof of crime. *Carr v. State* (Ala.), 76 So. 413.

§ 38. Trial.

§ 40. — Questions for Jury.

Intent. — In a prosecution for arson, held that the question of intent was for the jury. *Savage v. State*, 12 Ala. App. 116, 68 So. 498.

Buggy House Separated from Dwelling by Highway as within "Curtilage." — In general, the "curtilage" is the space of ground adjoining the dwelling house, used in connection therewith in the conduct of family affairs and for carrying on domestic purposes. It need not necessarily be separated from other lands by a fence, nor does the intersection of a divisional fence affect the relation of a building thus separated from it, but a buggy house disconnected from the dwelling by a public highway, with a yard between the dwelling and the highway, and the dwelling and yard inclosed by a paling fence, was not within the curtilage of the dwelling, as a matter of law, within an indictment charging arson in attempting to burn the buggy house, the property of H. within the curtilage of his dwelling and it was error to refuse a general charge to this effect requested by the defendant. *Holland v. State*, 11 Ala. App. 164, 65 So. 920.

Identification of Defendant—Weight of Evidence. — Evidence that tracks near the scene of the crime were similar or like or corresponded with those of defendant was proper to go to the jury to connect the defendant with the crime; the weight of such evidence being a question for the jury. *Cunningham v. State*, 14 Ala. App. 1, 69 So. 982.

ASSAULT AND BATTERY.

I. Civil Liability.

(A) Acts Constituting Assault or Battery and Liability Therefor.

- § 1. Nature and Elements of Assault and Battery.
- § 2. — In General.
- § 3. — Intent and Malice.
- § 4. — Excessive Force in Doing Lawful Act.
- § 5. Defenses.
- § 6. — In General.
- § 7. — Exercise of Authority or Duty.
- § 8. — Provocation.
- § 9. — Self-Defense.
- § 11. — Defense of Property.

(B) Actions.

- § 16. Pleading.
 - § 16 (1) Declaration, Petition or Complaint.
 - § 16 (2) Plea or Answer and Replication.
 - § 16 (3) Issues, Proof and Variance.
- § 17. Evidence.
- § 18. — Presumptions and Burden of Proof.
- § 19. — Admissibility in General.
- § 20. — Intent and Malice.
- § 21. — Character and Physical Condition of Parties.
- § 26. Damages.
- § 27. — Measure in General.
- § 29. — Exemplary.
- § 30. — Amount Awarded.
- § 31. Trial.
- § 32. — Questions for Jury.
- § 33. — Instructions.

II. Criminal Responsibility.

(A) Offenses.

- § 36. Nature and Elements of Criminal Assault.
- § 37. — In General.
- § 39. — Ability to Execute Intent.
- § 43. Assault with Dangerous or Deadly Weapon.
- § 46. Defenses.
- § 47. — In General.
- § 50. — Self-Defense.

(B) Prosecution and Punishment.

- § 53. Indictment, Information or Affidavit.
- § 56. — Issues, Proof, and Variance.
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- § 57½. Presumptions and Burden of Proof.
- § 58. — Admissibility in General.

- § 59. — Intent and Malice.
- § 61. — Provocation or Justification.
- § 62. — Motive.
- § 63. — Threats, Preparations, and Previous Attempts.
- § 67. Trial.
- § 70. — Instructions.
 - § 70 (1) In General.
 - § 70 (3) Self-Defense.
 - § 70 (5) Assault with Dangerous or Deadly Weapon.

Cross References.

See the title ASSAULT AND BATTERY, vol. 1, p. 740, and references there given.

In addition, see ante, ARREST; post, BREACH OF THE PEACE; CARRIERS; CRIMINAL LAW; EVIDENCE; INDICTMENT AND INFORMATION; TRESPASS; TRIAL.

As to election between offenses, see post, CRIMINAL LAW.

I. CIVIL LIABILITY.

(A) ACTS CONSTITUTING ASSAULT OR BATTERY AND LIABILITY THEREFOR.

§ 1. Nature and Elements of Assault and Battery.

§ 2. — In General.

Assault. — "Blackstone defines an 'assault' as: 'An attempt or offer to beat another, without touching him; as if one lifts up his cane or fist in a threatening manner at another, or strikes at him, but misses him.' An assault is a trespass for which a man shall have an action to recover damages, though there be no battery and therefore no physical hurt." Republic Iron, etc., Co. v. Self, 192 Ala. 403, 68 So. 328, 330.

Where the manager of defendant's store told plaintiff she was no lady, charged her with being a liar, and ordered her out, but did not use, or offer to use, any force, he was not guilty of an assault for which the defendant was liable, and so the insulted party's remedy is by action for slander. Republic Iron, etc., Co. v. Self, 192 Ala. 403, 68 So. 328.

Battery.—Laying hands on one in a hostile manner is a battery, though no damage follows. Singer Sewing Mach. Co. v. Methvin, 184 Ala. 554, 63 So. 997.

§ 3. — Intent and Malice.

Necessity of Intent to Injure.—Bir-

mingham R. etc., Co. v. Coleman, 181 Ala. 478, 61 So. 890. See the title ASSAULT AND BATTERY, § 3, vol. 1, p. 742.

§ 4. — Excessive Force in Doing Lawful Act.

Where Plaintiff Provokes Difficulty. — Bynum v. Jones, 177 Ala. 431, 59 So. 5. See the title ASSAULT AND BATTERY, § 4, vol. 1, p. 742.

§ 5. Defenses.

§ 6. — In General.

Frivolous Plea.—A plea setting up, as a waiver of right to maintain an action for assault and battery, committed in an attempt to collect for a machine sold plaintiff, a part of the contract of sale, waiving all rights of action growing out of any attempt by defendant to secure possession of the machine, is frivolous. Singer Sewing Mach. Co. v. Methvin, 184 Ala. 554, 63 So. 997.

§ 7. — Exercise of Authority or Duty.

Punishment of Child by Parent. — A parent is not criminally liable for excessively punishing his child unless the intent was malicious or the punishment cruel, or resulted in permanent injury. Haydon v. State (Ala. App.), 72 So. 586.

Evidence that accused whipped his 14 year old stepdaughter with a switch is insufficient to sustain a conviction. Haydon v. State (Ala. App.), 72 So. 586.

§ 8. — Provocation.

Obscene or offensive language can not preclude a recovery in an action for assault. *Jones v. Bynum*, 189 Ala. 677, 66 So. 639.

§ 9. — Self-Defense.

See post, "Instructions," § 33.

Elements.—There are three elements of self-defense within which party charged with assault must bring himself to invoke doctrine: First, freedom from fault in bringing on difficulty; second, a necessity to strike, real or apparent; and, third, retreat, unless there is no convenient mode of escape, or the peril will be increased. *Greenwood Café v. Walsh* (Ala. App.), 74 So. 82.

One who would justify an assault on the ground of self-defense must show that he acted under a real or reasonably apparent necessity of defending himself and that he used no more force than was reasonably necessary. *Murphy v. Coleman*, 9 Ala. App. 625, 64 So. 185.

For the purposes of self-defense which stops short of killing or attempting to kill, there is no duty to retreat and no need for apprehension of serious bodily harm. *Beyer v. Birmingham R., etc., Co.*, 186 Ala. 56, 64 So. 609.

Doctrine of Criminal Law Not Applicable in Civil Action.—The peculiar doctrines of the criminal law as to the maintenance of a plea of self-defense in cases of homicide and assault with intent to kill do not apply to a civil action for nonfelonious assaults being founded on the idea that a man shall flee rather than take the life of another. *Beyer v. Birmingham R., etc., Co.*, 186 Ala. 56, 64 So. 609.

Defendant sued for assault, to make out the defense of self-defense, need not show that he was reasonably impressed at the time, in good faith, as a reasonable man, that he was in imminent peril of life or limb, since the law of self-defense is not the same in its application to assault and battery cases as applied to homicide cases; the defense being complete in the former class, if defendant did not provoke the difficulty, did not fight willingly, but only to repel or prevent an attack, and used only such force as was

reasonably necessary. *Greenwood Café v. Walsh* (Ala. App.), 74 So. 82.

§ 11. — Defense of Property.

See post, "Instructions," § 33.

Expulsion of Trespasser.—Where a person in charge of premises requests another to leave, whom he has a right so to request, he may use such force as is necessary to remove such other, after allowing him a reasonable time to depart, without becoming liable for assault. *Jones v. Bynum*, 189 Ala. 677, 66 So. 639, cited in note in Ann. Cas. 1917D, 308.

One rightfully in the exclusive occupancy of realty, to protect his possession, may eject trespassers by the use of force reasonably necessary; though such right is not available to one at fault in bringing on the affray. *Hart v. Jones*, 14 Ala. App. 327, 70 So. 206, cited in note in Ann. Cas. 1917D, 308, petition for review denied in 195 Ala. 695, 70 So. 1012.

Same—From Public Road by Adjoining Landowner.—Where plaintiff stood his wagon and sold fruit therefrom in a public road, the owner of the land on both sides and of the fee was not justified in using force to protect his possession as against plaintiff's trespass since such possession was not exclusive, and plaintiff's use did not constitute an additional burden on the fee. *Hart v. Jones*, 14 Ala. App. 327, 70 So. 206, petition for review denied in 195 Ala. 695, 70 So. 1012, cited in note in Ann. Cas. 1917D, 308.

(B) ACTIONS.**§ 16. Pleading.****§ 16 (1) Declaration, Petition or Complaint.**

A count of plaintiff's complaint alleged that he was in defendant's restaurant, and that defendant wrongfully assaulted him, breaking his jawbone, bruising, crippling, mangling his head, face, limbs, and body, and permanently crippling and disfiguring him, etc. Held, that such count stated a good cause of action. *Greenwood Café v. Walsh* (Ala. App.), 74 So. 82.

§ 16 (2) Plea or Answer and Replication.

Self-Defense.—In a civil action for assault, a plea that it occurred in defend-

ant's place of business, where plaintiff had followed him, cursing and abusing him, with a drawn knife in his hand, and that defendant had not provoked the difficulty, was demurrable on the ground that it failed to show a justification on the ground of self-defense. *Murphy v. Coleman*, 9 Ala. App. 625, 64 So. 185.

Pleas that plaintiff and defendant's employee had a difficulty, in which the employee was not at fault, and that while attempting to repel an attack on him he used no more force than was reasonably necessary, stated the essential elements of self-defense and were not demurrable. *Beyer v. Birmingham R., etc., Co.*, 186 Ala. 56, 64 So. 609.

Defense of Property.—The defense of the protection of the exclusive possession of realty is in justification, and, to be available in a civil action for assault, must be specially pleaded. *Hart v. Jones*, 14 Ala. App. 327, 70 So. 206, petition for review denied in 195 Ala. 695, 70 So. 1012, cited in note in Ann. Cas. 1917D, 308.

§ 16 (3) Issues, Proof and Variance.

When a particular assault is proved as of a certain time, it is error to permit a recovery for a different assault at another time. *Lacy v. Louisville, etc., R. Co.*, 197 Ala. 539, 73 So. 81.

In an action for assault and battery, time of alleged assault, laid under *vide licet*, need not be proved strictly as laid. *Lacy v. Louisville, etc., R. Co.*, 197 Ala. 539, 73 So. 81.

§ 17. Evidence.

§ 18. — Presumptions and Burden of Proof.

Burden of Proof—Self-Defense. — See post, "Instructions," § 33.

Where defendant was not in fact being assaulted when he struck plaintiff, the burden was on him to show that he had reasonable grounds for apprehending a present assault, and his honest belief therein. *Beyer v. Birmingham R., etc., Co.*, 186 Ala. 56, 64 So. 609.

Defendant in an action for assault and battery who set up self-defense has the burden of proving he was free from fault in bringing on the difficulty, the rule as to the burden of proof not being changed,

because freedom from fault may be shown *prima facie* by proof of an imperative necessity for defendant's assault; such proof merely shifting the burden of going forward. *Riley v. Denegre (Ala.)*, 77 So. 335.

Same—Defense of Property. — Where a breach of the peace resulting in an assault follows the ejection of a trespasser, the one invoking the defense of his possession of the premises has the burden of showing that he used no more force than was reasonably necessary. *Hart v. Jones*, 14 Ala. App. 327, 70 So. 206, petition for review denied in 195 Ala. 695, 70 So. 1012, cited in note in Ann. Cas. 1917D, 308.

§ 19. — Admissibility in General.

In an action for assault, testimony as to the details of a dispute between defendant and plaintiff's son the day before the fight between plaintiff and defendant was improper. *Jones v. Bynum*, 189 Ala. 677, 66 So. 639.

Evidence as to Tone of Voice.—Where plaintiff sought to recover damages for the insults of the manager of defendant's commissary store, the tone of voice in which the words were spoken was admissible; for whether the act amounted to assault, largely depended on the tone. *Republic Iron, etc., Co. v. Self*, 192 Ala. 403, 68 So. 328.

Evidence in Rebuttal of Witness Who Testified He Had Seen Assault.—*Republic Iron, etc., Co. v. Passafume*, 181 Ala. 463, 61 So. 327. See the title ASSAULT AND BATTERY, § 19, vol. 1, p. 747.

§ 20. — Intent and Malice.

Where it appeared that defendant in assaulting plaintiff used a plumb bob, which was a pear-shaped metal piece attached to a chain, and used in defendant's office as a paper weight, testimony that several months before the assault defendant struck his hand with the plumb bob and remarked that he could make a nice round hole in a man's head with it was admissible to show defendant's consciousness of the efficiency of the plumb bob as a weapon of attack. *Riley v. Denegre (Ala.)*, 77 So. 335.

§ 21. — Character and Physical Condition of Parties.

Character. — Evidence of defendant's bad character for peace and quiet was inadmissible. *Jones v. Bynum*, 189 Ala. 677, 66 So. 639.

In a civil action for assault, evidence of defendant's general good character, and of his good character for peace and quiet, was inadmissible; character evidence being admissible only in criminal cases, on account of the different burden and measure of proof. *Greenwood Café v. Walsh* (Ala. App.), 74 So. 82.

Evidence That Plaintiff's Brother Resembled Plaintiff.—*Long v. Seigel*, 177 Ala. 338, 58 So. 380. See the title ASSAULT AND BATTERY, § 21, vol. 1, p. 748.

§ 22. Damages.

§ 27. — Measure in General.

In an action for assault, where the defendant's assault was not disputed, plaintiff was entitled to recover at least nominal damages, and such actual and compensatory damages as proximately resulted. *Hart v. Jones*, 14 Ala. App. 327, 70 So. 206, petition for review denied in 195 Ala. 695, 70 So. 1012, cited in note in Ann. Cas. 1917D, 308.

In an action for false imprisonment, malicious prosecution, and assault and battery, a charge that defendant can only show good faith to reduce or mitigate vindictive damages, but such good faith can not reduce the amount of actual damages suffered, and that actual or compensatory damages are such as are the natural and probable consequences of the arrest, etc., was proper. *Boshell v. Cunningham* (Ala.), 76 So. 937.

Hurt to Feelings, Mental Suffering, etc.—“An assault is a trespass for which a man shall have an action to recover damages, though there be no battery and therefore no physical hurt. 3 Bl. Comm. 120; Pollock, C. B., in *Corbett v. Gray*, 4 Exch. 729; 2 Modern American Law, Blackstone Inst. 8, 9, 17, 18. The law in such case allows the jury to assess damages for the insult and the indignity, and for the hurt to the feelings, and for mental suffering and fright caused by as-

sault.” *Republic Iron, etc., Co. v. Self*, 192 Ala. 403, 68 So. 328, 330.

Mitigation of Damages. — Obscene or offensive language may mitigate the damage for which defendant is liable in a civil action for assault. *Jones v. Bynum*, 189 Ala. 677, 66 So. 639, cited in note in Ann. Cas. 1917D, 583.

§ 29. — Exemplary.

In case of an assault, where there are facts of aggravation, it rests within sound discretion of jury to award punitive, as distinguished from actual, damages, in addition to compensatory damages; but no party can claim punitive damages as a matter of right. *Greenwood Café v. Walsh* (Ala. App.), 74 So. 82.

§ 30. — Amount Awarded.

A verdict for \$1,000 for assault and battery will not be disturbed as excessive where the assault was unjustifiable, and plaintiff was struck in the face, head, and body, and where punitive damages were also recoverable. *Avondale Mills v. Bryant*, 10 Ala. App. 507, 63 So. 932.

§ 31. Trial.

§ 32. — Questions for Jury.

Whether there was an assault and battery, the evidence being conflicting, is a question for the jury. *Singer Sewing Mach. Co. v. Methvin*, 184 Ala. 554, 63 So. 997.

Award of Punitive Damages.—See ante, “Exemplary,” § 29.

§ 33. — Instructions.

Instructions as to Self-Defense — Freedom from Fault.—In a civil action for assault, an instruction, that plaintiff could not recover if defendant used no more force than was reasonably necessary to protect himself from a threatened and impending assault, was erroneous because not predicated on defendant's freedom from fault in provoking the difficulty. *Jones v. Bynum*, 189 Ala. 677, 66 So. 639.

In a civil action for assault, where defendant relied upon self-defense, his requested charges that the burden was on plaintiff to show freedom from fault in bringing on the difficulty “on the part of defendant,” and that the burden was on

"plaintiff to show that defendant was free from fault in bringing on the difficulty," were plainly erroneous. *Murphy v. Coleman*, 9 Ala. App. 625, 64 So. 185.

Same — Argumentative, Involved and Misleading Instruction.—In a civil action for assault, an instruction, "that if plaintiff was a trespasser on the premises of defendant using abusive * * * language * * * and acting as if he * * * intended to assault and beat defendant, and that for * * * protecting himself defendant did hit plaintiff with the side, not the edge, of the ax, * * * and that in the struggle plaintiff was cut without purpose of defendant and defendant threw the ax away * * * and continued to hold plaintiff until plaintiff would promise to desist, * * * and defendant then let him up, and that what defendant did was no more than was apparently reasonably necessary to protect himself, * * * plaintiff would not be entitled to recover," was not only argumentative, involved, and misleading, but was defective in justifying defendant's battery on plaintiff by reason of "his acting as if he * * * intended to assault and beat the defendant," without predicating the defendant's bona fide belief in the imminence of such an assault. *Jones v. Bynum*, 189 Ala. 677, 66 So. 639.

Defense of Property — Applicability to Evidence.—Where, in a civil action for assault, it appeared not only that defendant was not on his own land or in possession of the land where the assault occurred, but that he attacked plaintiff for calling him bad names and not to eject him from the premises, an instruction that plaintiff could not recover if he went on the premises without invitation from defendant and used abusive language to and about defendant, and defendant used only such force as was reasonably necessary to remove plaintiff from the premises, was properly refused. *Jones v. Bynum*, 189 Ala. 677, 66 So. 639.

II. CRIMINAL RESPONSIBILITY.

(A) OFFENSES.

§ 36. Nature and Elements of Criminal Assault.

§ 37. — In General.

Assault Defined.—*Burton v. State*, 9

Ala. App. 295, 62 So. 394. See the title ASSAULT AND BATTERY, § 37, vol. 1, p. 752.

Instances of Assault.—Where accused, after being evicted from public entertainment and warned to stay out, sought to return, and in so doing attacked one in charge, he was guilty of assault or affray. *Winder v. State* (Ala. App.), 78 So. 416.

Where defendant had no legal right to take certain mules from prosecuting witness by force, and, to gain possession laid hands on her in a rough, or angry manner and thrust her aside, he was guilty of an assault. *Wilkerson v. State*, 12 Ala. App. 100, 68 So. 475.

§ 39. — Ability to Execute Intent.

Necessity. — *Burton v. State*, 8 Ala. App. 295, 62 So. 394. See the title ASSAULT AND BATTERY, § 39, vol. 1, p. 753.

§ 43. Assault with Dangerous or Deadly Weapon.

An officer having no right, to accomplish the arrest of a misdemeanant, to do him bodily harm, having shot him, is guilty of assault with deadly weapon, if he did it purposely, and not in self-defense. *Murkison v. State*, 11 Ala. App. 105, 65 So. 684.

An affidavit charging that accused assaulted and beat another with a half-gallon glass jug and a stick was sufficient to charge assault and battery with a weapon. *Wall v. State* (Ala. App.), 77 So. 977.

§ 46. Defenses.

§ 47. — In General.

That defendant possessed a mortgage on mules in possession of prosecuting witness and was acting as agent of another to take them, afforded no justification for committing an assault and battery upon witness in his attempt to take them. *Wilkerson v. State*, 12 Ala. App. 100, 68 So. 475.

Though one shoots another accidentally, if it is the result of gross carelessness in handling the pistol, he is guilty of assault with a deadly weapon. *Murkison v. State*, 11 Ala. App. 105, 65 So. 684.

§ 50. — Self-Defense.

See post, "Self-Defense," § 70 (3).

In a prosecution for assault and battery the defense of self-defense is complete where it appears that defendant did not provoke the difficulty and fought only to repel or prevent an attack on him, and that in doing so he used only so much force as was reasonably necessary. *Blankenship v. State*, 11 Ala. App. 125, 65 So. 860.

Freedom from Fault.—Self-defense can not be established unless defendant was free from fault in bringing on the difficulty. *Blankenship v. State*, 11 Ala. App. 125, 65 So. 860.

The doctrine of retreat, as applied to the plea of self-defense in cases of homicide, is not applicable to, and is not necessary to complete, the right of self-defense in assault and battery cases. *Blankenship v. State*, 11 Ala. App. 125, 65 So. 860.

Where there is a reasonable mode of escape open to accused, actually attacked or threatened, and an escape will not increase his real or apparent danger, he must, if he can in the exercise of reasonable prudence, avail himself of it, and avoid a combat with the prosecutor, though it will incur some inconvenience. *Smith v. State*, 13 Ala. App. 174, 69 So. 301.

For the purpose of self-defense which stops short of killing or attempting to kill, there is no duty to retreat. *Adams v. State* (Ala. App.), 75 So. 641.

Voluntary Entrance into Fight.—Where defendant entered the fight willingly, he had no right to plead self-defense when prosecuted for assault and battery. *Adams v. State* (Ala. App.), 75 So. 641.

Self-defense to an assault and battery is not complete, though accused did not provoke the difficulty, if he fought willingly. *McWilliams v. State*, 12 Ala. App. 92, 67 So. 735.

Unless accused believe he was in peril he can not justify his assault with a weapon in repelling an assault by the prosecuting witness. *Murray v. State*, 13 Ala. App. 175, 69 So. 354.

(B) PROSECUTION AND PUNISHMENT.**§ 53. Indictment, Information or Affidavit.****§ 56. — Issues, Proof, and Variance.**

Affidavit Charging Assault and Battery with a Knife.—*Wilson v. State*, 7 Ala. App. 66, 60 So. 983. See the title ASSAULT AND BATTERY, § 56, vol. 1, p. 758.

§ 57. Evidence.**§ 57½. Presumptions and Burden of Proof.**

In a prosecution for assault and battery the burden is on defendant to show that he fought from necessity, and used no more force than was necessary, and it then shifts to the state to show that he was not free from fault in bringing on the difficulty. *Blankenship v. State*, 11 Ala. App. 125, 65 So. 860.

§ 58. — Admissibility in General.

For showing the relation of the parties as an aid in identifying defendant as the perpetrator of the assault, he claiming an alibi, evidence that he had, over the objection of the assaulted person, been coming to the latter's house to see his wife is admissible. *Knott v. State*, 10 Ala. App. 77, 65 So. 83.

The theory of the prosecution being that accused entered a conspiracy to assault the prosecuting officer and was deputized and given a warrant to arrest him in carrying out such conspiracy, the state could show what was said on issuance of the warrant. *Dickey v. State* (Ala. App.) 72 So. 608.

Details of Prior Transaction.—In a prosecution for assault a question to prosecuting witness whether he had taken accused's horse from his wagon a day or two before the difficulty, and hitched his own horse thereto and driven accused's horse home, was properly excluded as calling for the details of a prior transaction. *Wall v. State* (Ala. App.), 77 So. 977.

§ 59. — Intent and Malice.

Conduct of Defendant Claiming Self-Defense.—In a prosecution for assault

and battery it was the solicitor's right on cross-examination to inquire as to whether defendant made any effort to avoid the difficulty by leaving the place where it occurred; it being pertinent to the question whether he entered the fight willingly. *Adams v. State* (Ala. App.), 75 So. 641.

Evidence of threats or declarations of hostility made by accused against the assaulted party about an hour and a half before the assault is admissible to show criminal intent. *McDaniel v. State*, 10 Ala. App. 79, 64 So. 641.

§ 61. — Provocation or Justification.

Evidence of threats or declarations of hostility made by accused against the assaulted party about an hour and a half before the assault is admissible to show who was at fault in provoking the quarrel, or in bringing on the difficulty. *McDaniel v. State*, 10 Ala. App. 79, 64 So. 641.

§ 62. — Motive.

Evidence that the complaining witness had discharged accused, who assaulted him with a weapon, is admissible to show motive. *Murray v. State*, 13 Ala. App. 175, 69 So. 354.

That the prosecuting officer seized liquors belonging to accused or his father on the morning before the assault by accused on such officer in connection with threats made by accused, is admissible to show motive. *Dickey v. State* (Ala. App.), 72 So. 608.

For showing the relation of the parties as tending to disclose a motive, evidence that defendants had, over the objection of the assaulted person, been coming to the latter's house to see his wife is admissible. *Knott v. State*, 10 Ala. App. 77, 65 So. 83.

§ 63. — Threats, Preparations, and Previous Attempts.

Threats.—In a prosecution for assault and battery no evidence of self-defense having been offered on the part of the defendant, it was not competent to introduce evidence of threats on the part of the prosecuting witness some days prior to the difficulty. *Wall v. State* (Ala. App.), 77 So. 977.

§ 67. Trial.

§ 70. — Instructions.

§ 70 (1) In General.

The requested charge, in a prosecution for assault with a deadly weapon, as to defendant's right to enter the house where the shooting occurred, if he had a warrant for arrest of one of the men therein, and had been deputized by C. to execute it, held faulty, in not hypothesizing that C. acted in his official capacity, and that defendant informed the occupants of his authority. *Murkison v. State*, 11 Ala. App. 105, 65 So. 684.

§ 70 (3) Self-Defense.

In a prosecution for assault and battery a charge for the state if defendant failed to show that he acted in self-defense he should be convicted, provided it appeared beyond a reasonable doubt that he assaulted and beat a person named, was erroneous because not defining self-defense. *Blankenship v. State*, 11 Ala. App. 125, 65 So. 860.

An instruction as to self-defense was not objectionable because it ignored the question of opprobrious words or abusive language used by the person assaulted towards defendant, as provided by Code 1907, § 6308, where the evidence in no way tended to show that defendant committed the offense because of such provocation. *Blankenship v. State*, 11 Ala. App. 125, 65 So. 860.

Belief in Peril.—A charge on self-defense is properly refused for failing to hypothesize accused's honest belief that he was in imminent peril. *Smith v. State*, 13 Ala. App. 174, 69 So. 301.

Freedom from Fault.—In a prosecution for assault and battery defendant's requested instructions ignoring the element of his freedom from fault in bringing on the difficulty were properly refused. *Blankenship v. State*, 11 Ala. App. 125, 65 So. 860.

§ 70 (5) Assault with Dangerous or Deadly Weapon.

In prosecution for assault and battery by using glass jug and a stick, it was not error to charge that the jury, to convict, need not find that accused used both the jug and the stick at the same time. *Wall v. State* (Ala. App.), 77 So. 977.

Assent.

See post, CONTRACTS; and other appropriate titles.

Assessments.

See post, COSTS; TAXATION; and other appropriate titles.

Assets.

See post, EXECUTORS AND ADMINISTRATORS; PARTNERSHIP; and other appropriate titles.

Assignment of Dower.

See post, DOWER.

Assignment of Error.

See ante, APPEAL AND ERROR; post, CRIMINAL LAW; EXCEPTIONS; BILL OF.

ASSIGNMENTS.

I. Requisites and Validity.

(A) Property, Estates, and Rights Assignable.

- § 2. Future and Contingent Estates or Interests.
- § 3. — Possibilities and Contingencies.
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Cross References.

See the title ASSIGNMENTS, vol. 1, p. 766, and references there given.

In addition, see post, ASSIGNMENTS FOR BENEFIT OF CREDITORS; CHATTEL MORTGAGES; FRAUDULENT CONVEYANCES; MORTGAGES.

As to garnishment against assignee, see post. GARNISHMENT.

I. REQUISITES AND VALIDITY.**(A) PROPERTY, ESTATES, AND RIGHTS ASSIGNABLE.****§ 2. Future and Contingent Estates or Interests.****§ 3. — Possibilities and Contingencies.**

Contingent rights are assignable at law when coupled with a present interest, but the assignee's rights depend, where the right to receive payment under an executory contract is assigned, upon the assignor's compliance with the contract. *Broadwell v. Imms*, 14 Ala. App. 437, 70 So. 294.

§ 3 1/2. Money Due or to Become Due.

No valid assignment can be made of an account which as yet has no potential existence. *Clanton Bank v. Robinson*, 195 Ala. 194, 70 So. 270.

§ 4. Future Profits or Earnings.**§ 5. — Under Existing Contract.**

Under Acts 1911, p. 370, § 2, excepting from the prohibition against assignment of wages to be earned in the future an assignment to secure payment for clothing, it is immaterial that the debt for the clothing was created before the enactment of the statute. *Winton v. Irwin*, 10 Ala. App. 390, 64 So. 525.

Acts 1911, p. 370, declaring all assignments of future wages or salaries void, does not include a contractor's assignment of the contract price for building railroads to become due in the future. *American Trust, etc., Bank v. O'Barr*, 12 Ala. App. 546, 67 So. 794, cited in note in L. R. A. 1916D, 369.

§ 8. Executory Contracts.

Purely personal contracts are not assignable. *Crawford v. Chattanooga Sav. Bank* (Ala.), 78 So. 58.

§ 10. Rights of Action.**§ 12. — On Contract.**

Rights against Telegraph Company for Error in Telegram. — *Jackson Lumber Co. v. Western Union Tel. Co.*, 7 Ala. App. 644, 62 So. 266, writ of certiorari denied in *Ex parte Western Union Tel. Co.*, 183 Ala. 451, 63 So. 88. See the title ASSIGNMENTS, § 12, vol. 1, p. 771.

§ 13. — For Tort.

Claims against railroads for setting fire to property near their rights of way, though tort actions for damages to or destruction of property, are assignable. *Parnell v. Southern R. Co.* (Ala.), 74 So. 437.

Constitutionality of Statute. — Code 1907, § 5159, providing that claims against railroad companies for injuries to property may be assigned in writing, and each successive assignee thereof may sue thereon in his own name, is not arbitrary, capricious, or without semblance of reason, and violative of Const. 1901, § 240, providing that all corporations shall have the right to sue and shall be subject to be used in all courts in like cases as natural persons. *Parnell v. Southern R. Co.* (Ala.), 74 So. 437.

(B) MODE AND SUFFICIENCY OF ASSIGNMENT.**§ 21. Assignments in Writing.****§ 22. — Form and Contents.**

Partial Invalidity—Benefit Reserved to Assignor.—Code 1907, § 4287, declares all assignments of goods or things in action, "made in trust for the use of the person making the same," void against existing and subsequent creditors, and § 4293 provides that all assignments of any real or personal estate "made with intent to hinder, delay, or defraud creditors" shall be void. Defendant debtor had funds in the hands of a named garnishee arising from the amounts due under a contract between defendant and the garnishee for construction work, but, before he had become indebted to plaintiff, assigned to claimant all sums due and payable under the contract, and the garnishee, assenting thereto, at time of process held a surplus over the amounts which the assignment was made to secure and more than sufficient to pay the debt. Held, that in the absence of fraud or insolvency, the mere fact that the assignment did not express that it was given as security did not make it void in toto, but only to the extent of the benefit reserved to the assignor, the excess over the amount necessary to pay the debt secured by the assignment.

American Trust, etc., *Bank v. O'Barr*, 12 Ala. App. 546, 67 So. 794, cited in note in L. R. A. 1916D, 369.

§ 25. Equitable Assignments.

§ 26. — In General.

In equity no particular form is essential to the validity of an assignment, but it is sufficient, whether by writing or by parol, if there is intentional transfer. *Venturi v. Silvio*, 197 Ala. 607, 73 So. 45.

§ 27. — Bill of Exchange, Check, or Order.

One who held possession as bailee, for a bank depositor, of his passbook, and who purchased the account, for which the depositor gave him a check in addition to the passbook, was the equitable transferee or assignee of the account and such assignment was not revocable by death of the depositor before the check could be presented for payment. *Venturi v. Silvio*, 197 Ala. 607, 73 So. 45.

Partnership Deposit—Check of Individual Partner.—Where a general deposit was made in bank in the name of a firm, plaintiff, a member of such firm, could not create the relation of creditor and debtor between himself and the bank by drawing a check in the first name, payable to himself, and presenting it for payment, unless the bank accepted such check or certified it, nor did the drawing of such check and its presentation work an equitable assignment of the deposit. *Tallapoosa County Bank v. Salmon*, 12 Ala. App. 589, 68 So. 542.

§ 30. Consideration.

Under Acts 1911, p. 370, § 2, providing that assignments of future wages, except those for wages to be earned within 30 days given to secure payment for necessities, shall be void, an assignment upon a stated consideration for "value received" is void. *Brown v. Long*, 192 Ala. 72, 68 So. 324.

(C) VALIDITY.

§ 35 ½. Partial Invalidity.

See ante, "Form and Contents," § 22.

That an assignment of fees of a public officer, incidental to a loan by the assignee to the assignor, is void as to un-

earned fees does not make it void as to earned fees, even if it was intended to include the unearned fees; it being severable. *Ex parte Stewart*, 185 Ala. 216, 64 So. 36.

§ 37. Right to Contest Validity.

An assignment of future wages not within exceptions of Acts 1911, p. 370, § 2, though void, became executed by merger into a judgment thereon and its payment by the employer, and the money paid can not be recovered. *Brown v. Long*, 192 Ala. 72, 68 So. 324.

II. OPERATION AND EFFECT.

§ 44. Priorities.

§ 46. — As between Assignees and Creditors.

Debtor's assignment of money to be earned under construction contract was valid as against the assignor's creditor without record, since the registration statutes have no applicability thereto. *American Trust, etc., Bank v. O'Barr*, 12 Ala. App. 546, 67 So. 794.

III. RIGHTS AND LIABILITIES OF PARTIES.

§ 48. Payment of Debt Assigned.

Where a contractor has performed an executory contract so that he is entitled to recover either in full or in part, the debtor, having knowledge of an assignment, is not discharged by payment to the assignor. *Broadwell v. Imms*, 14 Ala. App. 437, 70 So. 294.

Where a contractor who had assigned his right to compensation abandoned work before completion of the work, the debtor who was liable on quantum meruit could not discharge his liability by compromising with the contractor. *Broadwell v. Imms*, 14 Ala. App. 437, 70 So. 294.

§ 54. Equities and Defenses between Original Parties.

§ 55. — In General.

A contract for the delivery of cotton as rent, not being a negotiable instrument, was open to the same defenses in the hands of an assignee as in the hands of the original payee. *Davis v. Douglass*, 12 Ala. App. 581, 68 So. 528.

Where the amount due the contractor who had assigned was compromised, the debtor is bound to pay the assignee, and, on the assignee's refusal, can not pay the contractor, but must keep his tender good. *Broadwell v. Imms*, 14 Ala. App. 477, 70 So. 294.

§ 56½. Rights of Assignor as against Third Person.

Construction — Language Used. — Where subcontractors directed defendant, the principal contractor, to pay to plaintiff bank any and all amounts due, or which might thereafter become due them, after deducting any and all amounts due it, defendant, the principal contractor, was entitled to deduct, not only amounts then due, but those that thereafter should become due it from the subcontractors. *Jefferson County Sav. Bank v. Carland & Co. (Ala.)*, 77 So. 704.

IV. ACTIONS.

§ 68. Pleading.

§ 70. — Issues, Proof, and Variance.

Assignor's Good Faith.—*Gulf City Boiler Works Co. v. Falligant*, 6 Ala.

App. 178, 60 So. 510. See the title ASSIGNMENTS, § 70, vol. 1, p. 784.

Assignability of Claim as Raised by General Issue.—*Southern R. Co. v. Stonewall Ins. Co.*, 177 Ala. 327, 58 So. 313. See the title ASSIGNMENTS, § 70, vol. 1, p. 784.

§ 71. Evidence.

§ 73. — Admissibility in General.

In action on order or assignment directing defendant, principal contractor, to pay to plaintiff bank sums which might become due subcontractors, contract between defendant and railroad company, as well as subcontract, was admissible. *Jefferson County Sav. Bank v. Carland & Co. (Ala.)*, 77 So. 704.

§ 75. Trial, Judgment, and Review.

Instructions.—*Gulf City Boiler Works Co. v. Falligant*, 6 Ala. App. 178, 60 So. 510. See the title ASSIGNMENTS, § 75, vol. 1, p. 784.

Question for the Jury.—*Bohanan v. Darden*, 7 Ala. App. 220, 60 So. 955. See the title ASSIGNMENTS, § 75, vol. 1, p. 785.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

I. Requisites and Validity.

(A) Nature and Essentials of Trusts for Creditors.

§ 6. Constructive Assignments.

§ 7. — Conveyances or Payments to Favored Creditors.

§ 9. — Mortgages or Other Transfers as Security.

§ 9 (1) In General.

§ 9 (2) Debts Created Simultaneously.

§ 13. What Law Governs.

§ 14. — Assignments of Property in Another State or Country.

§ 20½. Validity as between Parties.

II. Construction and Operation in General.

§ 70. Foreign Assignments and Extraterritorial Effect of Assignments.

V. Rights and Remedies of Creditors.

(A) In Aid of Assignment.

§ 105½. Enforcement of Trust.

§ 106. Actions by Creditors.

§ 106 (5) Pleading.

§ 106 (6) Findings, Judgment and Relief.

(B) Presentation, Proof, and Payment of Claims.

§ 113½. Dividends.

VII. Accounting, Settlement, and Discharge of Assignee.

§ 134½. Compensation.

Cross References.

See the title ASSIGNMENT FOR BENEFIT OF CREDITORS, vol. 1, p. 785, and references there given.

In addition, see post, BANKS AND BANKING; FRAUDULENT CONVEYANCES.

As to assignment in general, see ante, ASSIGNMENTS.

I. REQUISITES AND VALIDITY.

(A) NATURE OF ESSENTIALS OF TRUSTS FOR CREDITORS.

§ 6. Constructive Assignments.

§ 7. — Conveyances or Payments to Favored Creditors.

Under the express provision of Code 1907, § 4295, a debtor's general assignment or conveyance of all of his property in payment of a pre-existing debt by which a preference is given to one or more creditors inures to the benefit of all the creditors equally, and is, in effect, a general assignment for the benefit of all creditors. *Mullen v. Palos Coal, etc., Co.*, 196 Ala. 261, 72 So. 76.

§ 9. — Mortgages or Other Transfers as Security.

§ 9 (1) In General.

Transaction Operating as General Assignment.—*Hicks v. Dadeville Oil Mill*, 177 Ala. 661, 59 So. 57. See the title ASSIGNMENTS FOR BENEFIT OF CREDITORS, § 9 (1), vol. 1, p. 792.

§ 9 (2) Debts Created Simultaneously.

Mortgage Held Assignment Except as to Stipulated Advance.—*Hicks v. Dadeville Oil Mill*, 177 Ala. 661, 59 So. 57. See the title ASSIGNMENTS FOR BENEFIT OF CREDITORS, § 9 (2), vol. 1, p. 793.

Separate Instruments of Preference.—Within Code 1907, § 4295, declaring a

conveyance by a debtor of substantially all his property, giving a preference to some of his creditors, shall constitute a general assignment for the benefit of all his creditors, three mortgages, executed at intervals of over a year, can not be construed as one, so as to have such effect, in the absence of proof that they were all in contemplation when the first was executed. *Dadeville Oil Mill v. Hicks*, 184 Ala. 367, 63 So. 970.

§ 13. What Law Governs.

§ 14. — Assignments of Property in Another State or Country.

Constructive Assignments — Conveyance to Preferred Creditor.—Under Code Ga. 1910, § 3230, providing that a debtor may prefer one creditor to another, and to that end may give a lien by mortgage or other legal means, or sell in payment of a debt, a conveyance of land in Georgia, constituting substantially all of the property of the grantor in payment of a debt due the grantee, was valid though the parties to the conveyance were domiciled in Alabama, and the conveyance was executed and delivered in this state, notwithstanding Code Ala. 1876, § 2126, providing that every general assignment by a debtor by which a preference or priority of payment is given to one or more creditors, over the remaining creditors of the grantor, shall inure to the benefit of all the creditors equally. *First Nat. Bank v. Henderson*, 187 Ala. 285, 65 So. 949.

§ 20½. Validity as between Parties.

Agreement Held Valid. — An agreement with his creditors by a debtor, not really insolvent, but unable to convert his property into cash with which to pay his creditors, that certain persons should take and administer it for the purpose of paying his debts in full, is valid. *Bickley, etc., Co. v. Porter*, 193 Ala. 607, 69 So. 565.

That certain creditors reserve right to reduce their claim to judgment does not prevent their being bound by agreement of the debtor with his creditors for administration of his property by a committee for payment of his debts. *Bickley, etc., Co. v. Porter*, 193 Ala. 607, 69 So. 565.

II. CONSTRUCTION AND OPERATION IN GENERAL.

§ 70. Foreign Assignments and Extraterritorial Effect of Assignments.

Requirement that Claims Be Filed—Effect of Decree.—If the Alabama court, in suit for sale for creditors by Mississippi creditors of Mississippi corporation which assigned for creditors its interest in an Alabama plantation, acted improvidently in requiring claims to be filed with it, such decree, not being made at the instance of a county of Mississippi, another creditor adverse to complainant creditors could not prejudice the county's right to a decree conserving its lawful interests, nor affect the duty of the court finally to make decree in accordance with the requirements of interstate comity. *Brown & Co. v. Tishomingo Banking Co. (Ala.)*, 76 So. 971.

Foreign Creditors Coming into Other State.—Where Mississippi creditors of a Mississippi corporation which assigned for creditors, with other matters, its interest in an Alabama plantation, a county of Mississippi being another creditor, came into the courts of Alabama to obtain an advantage by Alabama law which they could not obtain by Mississippi law, the creditors and county could not take advantage of Alabama law on account of comity between states, but must abide by the laws of Mississippi. *Brown & Co. v. Tishomingo Banking Co. (Ala.)*, 76 So. 971.

V. RIGHTS AND REMEDIES OF CREDITORS.

(A) IN AID OF ASSIGNMENT.

§ 105½. Enforcement of Trust.

Where P. executed note to his wife secured by crop mortgages which plaintiff thereafter purchased, allegations that P.'s wife fraudulently participated in destruction of plaintiff's security for such indebtedness held to show equity in a bill to declare a mortgage given by P.'s wife to secure her pre-existing debt to be a general assignment under Code 1907, § 4295, for benefit of all creditors. *Sheffield Nat. Bank v. Corinth Bank, etc., Co.*, 196 Ala. 275, 72 So. 127.

§ 106. Actions by Creditors.**§ 106 (5) Pleading.**

Sufficiency of Allegations.—*Hicks v. Dadeville Oil Mill*, 177 Ala. 661, 59 So. 57. See the title ASSIGNMENTS FOR BENEFIT OF CREDITORS, § 106 (5), vol. 1, p. 817.

§ 106 (6) Findings, Judgment and Relief.

Decree Held Not Erroneous.—*Aycock v. Ft. Branch Milling Co.*, 182 Ala. 326, 62 So. 94. See the title ASSIGNMENTS FOR BENEFIT OF CREDITORS, § 106 (6), vol. 1, p. 819.

(B) PRESENTATION, PROOF, AND PAYMENT OF CLAIMS.**§ 113½. Dividends.**

Declaration of Dividends.—An assignee need declare dividends only when the collections suffice for a substantial re-

duction of the indebtedness with some regard for the cost and inconvenience of distribution. *Horst v. Pake*, 195 Ala. 620, 71 So. 430.

Delay in Payment.—An assignee for the benefit of creditors can not excuse delay in paying dividends on the ground that creditors have not resorted to compulsory proceedings against him. *Horst v. Pake*, 195 Ala. 620, 71 So. 430.

VII. ACCOUNTING, SETTLEMENT, AND DISCHARGE OF ASSIGNEE.**§ 134½. Compensation.**

The right of a trustee to whom a debtor assigned his property for benefit of creditors, to compensation, is a mere incident of the trust, and not a property right. *Ex parte Jonas*, 186 Ala. 567, 64 So. 960.

Assigns.

See ante, ASSIGNMENTS; ASSIGNMENTS FOR BENEFIT OF CREDITORS; post, DEEDS.

ASSISTANCE, WRIT OF.

- § 1. Nature and Scope of Remedy.
- § 3. Persons Entitled to Writ.
- § 4. Persons against Whom Writ May Issue.
- § 5. Jurisdiction to Issue.
- § 6. Proceedings to Procure.

Cross References.

See the title ASSISTANCE, WRIT OF, vol. 1, p. 827, and references there given. In addition, see post, EJECTMENT.

§ 1. Nature and Scope of Remedy.

Definition.—Long v. Morris, 176 Ala. 371, 58 So. 274. See the title ASSISTANCE, WRIT OF, § 1, vol. 1, p. 827.

Only Granted in Clear Cases.—The issuance of a writ of assistance is largely discretionary, and will not be granted, save in clear cases. Cooper v. Cloud, 194 Ala. 449, 69 So. 928.

§ 3. Persons Entitled to Writ.

Purchaser's Right to Possession.—Long v. Morris, 176 Ala. 371, 58 So. 274. See the title ASSISTANCE, WRIT OF, § 3, vol. 1, p. 828.

Purchaser at Partition Sale.—Where appellants entered as tenants of one holding a life estate, and only some of the remaindermen ratified their tenancy, their estate by reason of the life tenant's lease terminated on her death, and, as those remaindermen who did not ratify their lease were entitled to demand partition of the premises, the purchaser at sale for partition is entitled to a writ of assistance, though appellants were not parties to the partition suit. Cooper v. Cloud, 194 Ala. 449, 69 So. 928.

§ 4. Person against Whom Writ May Issue.

In General.—Long v. Morris, 176 Ala. 371, 58 So. 274. See the title ASSISTANCE, WRIT OF, § 4, vol. 1, p. 828.

Strangers to Judgment.—A writ of assistance will not be issued against strangers to the judgment unless they are trespassers or intruders, or acquired possession pendente lite, nor can it be substituted for an action of ejectment. Cooper v. Cloud, 194 Ala. 449, 69 So. 928.

§ 5. Jurisdiction to Issue.

Equity Courts—Statute.—Under Code 1907, § 3217, courts of chancery may enforce their decrees by writs of assistance placing litigants entitled thereto in possession against parties to the suits, or those who came into possession pendente lite, or against mere intruders or trespassers. Cooper v. Cloud, 194 Ala. 449, 69 So. 928.

§ 6. Proceedings to Procure.

Necessity for Notice.—While it is the better practice to give notice before issuing a writ of assistance, notice is not a prerequisite. Cooper v. Cloud, 194 Ala. 449, 69 So. 928.

ASSOCIATIONS.

§ 2½. Rights and Liabilities of Association as to Persons Not Members.

Cross References.

See the title ASSOCIATIONS, vol. 1, p. 829, and references there given. In addition, see post, TRUSTS.

§ 2½. Rights and Liabilities of Association as to Persons Not Members.

Action by Association—Right to Question Right or Capacity of Association.—Defendants, in a suit by a farmers' union to be reinvested as trustee with title to stock claimed to have been fraudulently secured by defendants, could not be

heard to question the right or capacity of the union, either as a corporation or a charitable organization or association, to act as trustee, nor to maintain the suit as complainant. Teal v. Pleasant Grove Local Union No. 204, etc. (Ala.), 75 So. 335.

ASSUMPSIT, ACTION OF.

- § 1. Nature and Scope of Remedy.
- § 2. Grounds.
- § 3. — In General.
- § 4. — Common Counts.
- § 5. — Express Contract.
- § 7. — Tort.
- § 8. Defenses.
- § 15. Pleading.
- § 16. — Declaration.
- § 17. — Plea or Affidavit of Defense.
- § 20. — Issues, Proof, and Variance.
- § 22. Evidence.
- § 24. Trial.
- § 24½. — Questions for Jury.
- § 25. — Verdict.

Cross References.

See the title ASSUMPSIT, ACTION OF, vol. 1, p. 830, and references there given.

§ 1. Nature and Scope of Remedy.

General assumpsit is an equitable action. *Albertville v. Hooper*, 196 Ala. 642, 72 So. 258.

In general assumpsit, no recovery can be had of money which ex aequo et bono belongs to defendant. *Albertville v. Hooper*, 196 Ala. 642, 72 So. 258.

§ 2. Grounds.

§ 3. — In General.

Money in Bank Received on Rescinded Mortgage.—*Batson v. Alexander City Bank*, 179 Ala. 490, 60 So. 313. See the title ASSUMPSIT, ACTION OF, § 3, vol. 1, p. 832.

§ 4. — Common Counts.

Contract—Recovery of Certain Sum.—Where one party to a contract has done all the contract requires him to do, and nothing remains to be done but the payment of a sum of money by the other party, such sum may be recovered in an action upon the common counts. *Williams v. Shows*, 187 Ala. 132, 65 So. 839.

Same—Agency Contract.—Under the common counts, plaintiff, a general insurance agent, could recover of his sub-agent all that was due him under the evidence, where nothing remained to be done under the agency contract, except the payment to the agent of certain liq-

uidated sums of money. *Barnes v. Marshall*, 193 Ala. 94, 69 So. 436.

Agreed Price for Work.—Where the evidence showed an express contract to do certain work for a stipulated sum, and that the work had been done according to the contract, the contractor was entitled to recover the agreed price upon the common counts for work and labor. *St. Louis, etc., R. Co. v. Hall*, 186 Ala. 353, 65 So. 33.

Freight Overcharges.—A shipper's claim against a carrier for freight overcharges, being founded on an executed consideration, might be declared on upon the common indebitatus counts. *Priebe v. Southern R. Co.*, 189 Ala. 427, 66 So. 573.

§ 5. — Express Contract.

Balance of Price at Contract Rates.—An action of indebitatus assumpsit lies for recovery on the common counts, at contract rates, of balance of price; the contract being executed. *Montgomery County v. New Farley Nat. Bank (Ala.)*, 75 So. 918.

§ 7. — Tort.

Assumpsit may be maintained for money received by one co-owner from the sale of the interest of another co-owner in the common property, although such sale amounted to a conversion.

Howton v. Mathias, 197 Ala. 457, 73 So. 92.

§ 8. Defenses.

General assumpsit for money had and received is an "equitable action," and admits of equitable defenses. *Traweek v. Hagler* (Ala.), 75 So. 152.

§ 15. Pleading.

§ 16. — Declaration.

Special counts in assumpsit, which allege that the plaintiff sold materials to a contractor at the request and upon the credit of the owner, do not allege a promise by defendant with the consent of the contractor as an inducement to plaintiff to furnish the materials to the contractor on credit, that defendant would pay therefor out of the money due the contractor. *Park-Robertson Hdw. Co. v. Copeland*, 11 Ala. App. 447, 66 So. 880.

§ 17. — Plea or Affidavit of Defense.

In assumpsit, defendant's plea that he was not indebted to plaintiff in any sum whatever, though technically inapt, is in effect a plea of general issue, and demurrer thereto on the ground that "it is no more than the general issue" was properly overruled. *Traweek v. Hagler* (Ala.), 75 So. 152.

§ 20. — Issues, Proof and Variance.

Issues.—Where a complaint in assumpsit alleged that the demand was due and unpaid, the defendant's plea of the general issue put that fact in issue. *Outcault Advertising Co. v. Hooten & Co.*, 11 Ala. App. 454, 66 So. 901.

Under the common counts, there can be a recovery upon a promise by defendant, as an inducement to plaintiff to furnish materials to a contractor, to pay for such materials from money due the contractor. *Park-Robertson Hdw. Co. v. Copeland*, 11 Ala. App. 447, 66 So. 880.

Variance.—Where plaintiff sues on the common counts and shows only a right to damages for defendant's breach of an executory contract, he fails to make out a case and can not recover. *Elrod Lumber Co. v. Moore*, 186 Ala. 430, 65 So. 175.

§ 22. Evidence.

Burden of Proof.—Although the plain-

tiff in assumption proved indebtedness due from defendant to another, she could not recover where she failed to show any indebtedness to herself, or how or why she should recover a judgment or recover on an indebtedness due the other. *Mobile West Shore Tract. Co. v. Austill*, 197 Ala. 432, 73 So. 4.

A count of the complaint in assumpsit averred that on a specified date the charter of a vessel stood in the name of a company, and that plaintiff then contracted with the charterer and another whereby the charterer transferred and assigned the charter to defendant, the consideration for the transfer being defendant's promise to pay to a bank as trustee a certain sum, half to be paid for the use and benefit of the charterer company, the other half for the use and benefit of plaintiff, and the count further averred that the charterer made the transfer of the charter in accordance with the contract, but that defendant failed and refused to pay. Held, that under the averments plaintiff assumed the affirmative obligation to show a promise to the bank. *Martin v. Powell* (Ala.), 75 So. 358.

Admissibility.—In an action of assumpsit for money due plaintiff under an agreement to pay defendant the debt of a third person, it was proper to permit defendant to show by debtor's testimony how much the debtor owed defendant. *Williams v. Shows*, 197 Ala. 596, 73 So. 99.

In an action of assumpsit based on plaintiff's agreement to pay a debt of a third person to defendant, there was no reversible error in allowing debtor to testify as to what property was included in his mortgage to defendant, and by the defendant transferred to plaintiff at the time plaintiff agreed with defendant to pay the debt. *Williams v. Shows*, 197 Ala. 596, 73 So. 99.

In an action of assumpsit, evidence as to whether a third party suing defendant had a landlord's lien on cotton involved was immaterial. *Williams v. Shows*, 197 Ala. 596, 73 So. 99.

In an action on common counts for money due plaintiff under an agreement relating to certain bales of cotton, evidence as to where the cotton was raised

was immaterial and inadmissible. *Williams v. Shows*, 197 Ala. 596, 73 So. 99.

§ 24. Trial.

§ 24½. — Questions for Jury.

In an action on the common counts for money due plaintiff under an agreement with defendant that, if plaintiff would pay the debt of a third person, he should, in case defendant was successful, have cotton raised by the debtor, and in defendant's possession, but claimed by another, evidence held to raise a question

for the jury. *Williams v. Shows*, 187 Ala. 132, 65 So. 839.

§ 25. — Verdict.

Direction of Verdict.—Under the facts in this case plaintiff was not entitled to recover whether the jury believed the evidence or did not believe it or whether it believed parts of it and rejected other parts and hence it was proper for the court to direct that plaintiff was not entitled to recover. *Jarrell v. Birmingham Water Works Co.*, 179 Ala. 503, 60 So. 835.

Assumption.

See post, **CONTRACTS**. And see the particular appropriate titles. As to assumption of risk, see post, **CARRIERS; MASTER AND SERVANT; NEGLIGENCE; RAILROADS**.

ATTACHMENT.

I. Nature and Grounds.

(A). Nature of Remedy, Causes of Action, and Parties.

- § 1. Nature and Purpose of Remedy.
- § 2. Constitutional and Statutory Provisions.
- § 3. Actions in Which Attachment Is Authorized.
- § 7. — On Demands Not Liquidated.

(B) Grounds of Attachment.

- § 29. Evidence as to Grounds.
 - § 29 (1) Admissibility.
 - § 29 (2) Weight and Sufficiency.

II. Property Subject to Attachment.

- § 39. Interests of Devisees or Legatees.

III. Proceedings to Procure.

(A) Jurisdiction and Venue.

- § 42½. Authority of Courts in General.
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(B) Affidavits.

- § 57. Averments as to Nature of Demand.
- § 72. Failure to Make.

V. Levy, Lien, and Custody and Disposition of Property.

- § 98. Property Levied on under Other Process.
- § 114. Delivery of Property on Forthcoming or Delivery Bond.

VI. Proceedings to Support or Enforce.

- § 123. Process in Action and Service on Defendant.
- § 124½. — Publication or Other Notice.
- § 128. Trial in General.
- § 130. Judgment.
- § 132½. Actions by Plaintiff in Aid of Attachment.

VII. Quashing, Vacating, Dissolution, or Abandonment.

- § 142. Time for Attacking Attachment.
- § 147. Pleading in Abatement, or Traverse of Grounds of Attachment.
- § 148. — Grounds in General.
- § 151. — Judgment or Order.

VIII. Claims by Third Persons.

- § 162. Claims or Liens Prior or Superior to Attachment.
- § 163. — Right to Assert.
- § 170. Rights of Claimants of Property Attached in General.
- § 174. Proceedings for Establishment and Determination of Claims to Property.
- § 178. — Issues and Questions Considered.
- § 179. — Evidence.
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§ 184. — Judgment and Enforcement Thereof.

X. Liabilities on Bonds or Undertakings.

§ 193. Accrual or Release of Liability by Breach or Fulfillment of Conditions.

§ 194. — Bonds or Undertakings to Procure Attachment.

§ 196. — Bonds or Undertakings for Release of Property.

§ 197. — Claimants' Bonds for Possession.

§ 200. Enforcement in Attachment Suit, or Claimant's Suit.

XI. Wrongful Attachment.

§ 213. Nature and Grounds of Liability.

§ 214. — Wrongful Suing Out of Attachment.

§ 214½. — Wrongful or Excessive Levy.

§ 218. Persons Liable.

§ 219½. Actions.

§ 220. — Nature and Form.

§ 227. — Questions for Jury.

Cross References.

See the title ATTACHMENT, vol. 2, p. 1, and references there given.

As to priority between attachment and chattel mortgage, see post, CHATTEL MORTGAGES. As to action for malicious prosecution for wrongful attachment, see post, EVIDENCE; MALICIOUS PROSECUTION. As to effect of invalid levy on jurisdiction of nonresident, see post, JUDGMENT.

I. NATURE AND GROUNDS.

(A) NATURE OF REMEDY, CAUSES OF ACTION AND PARTIES.

§ 1. Nature and Purpose of Remedy.

Harsh and Extraordinary Remedy.—Attachment is in some respects both a harsh and an extraordinary remedy, and for this reason statutes authorizing and regulating the proceedings are construed strictly in favor of those against whom such statutes are employed. *Herrick v. Herrick*, 186 Ala. 439, 65 So. 146, 147.

§ 2. Constitutional and Statutory Provisions.

Attachment proceedings are statutory, being unknown at the common law. *Herrick v. Herrick*, 186 Ala. 439, 65 So. 146, 147.

Statutes Strictly Construed.—Statutes regulating attachment proceedings are to be strictly construed in favor of those against whom they are directed. *Herrick v. Herrick*, 186 Ala. 439, 65 So. 146.

§ 3. Actions in Which Attachment Is Authorized.

§ 7. — On Demands Not Liquidated.

Suit for purchaser's breach of con-

tract to buy specified number of tons of cotton seed at agreed price per ton, held for moneyed demand amount of which could be certainly ascertained within Code 1907, § 2926, authorizing issuance of writ of attachment by clerk of circuit court when claim is for moneyed demand amount of which can be certainly ascertained, as specified by § 2924, subd. 2. *Georgia Cotton Oil Co. v. Carlisle Seed Co. (Ala.)*, 75 So. 984.

(B) GROUNDS OF ATTACHMENT.

§ 29. Evidence as to Grounds.

§ 29 (1) Admissibility.

Prior Conveyances to Show Fraud.—Where defendant's property was attached upon claim that he was fraudulently disposing of it, evidence of conveyances made shortly after the attachment was admissible to prove this intent. *Jackson v. Roanoke Banking Co.*, 197 Ala. 349, 72 So. 530.

§ 29 (2) Weight and Sufficiency.

Proof of Fraud—Instruction.—In attachment for fraudulently disposing of property, a requested instruction that

fraud is not lightly imputed, but must be plainly proved, requires too high a degree of proof. *Jackson v. Roanoke Banking Co.*, 197 Ala. 349, 72 So. 530.

II. PROPERTY SUBJECT TO ATTACHMENT.

§ 39. Interests of Devises or Legatees.

Conditional Devise.—Under Code 1907, § 2940, authorizing the levy of an attachment upon the land of defendant whether he own a fee-simple or less legal estate, the interest of a son under the will of his father devising land to him under certain conditions, being some kind of a legal estate, held subject to attachment. *Tatum v. Commercial Bank, etc., Co.*, 185 Ala. 241, 64 So. 561.

III. PROCEEDINGS TO PROCURE.

(A) JURISDICTION AND VENUE.

§ 42½. Authority of Courts in General.

No Presumption of Jurisdiction.—In attachment proceedings no presumptions are indulged in favor of jurisdiction—the jurisdictional facts must appear of record. *Herrick v. Herrick*, 186 Ala. 439, 65 So. 146, 147.

§ 43½. Jurisdiction of Particular Courts.

Superior Courts.—The jurisdiction exercised by superior courts in attachment proceedings is special and statutory, and nothing is intended to be within their jurisdiction in such special and statutory proceedings but that which is expressly shown. *Herrick v. Herrick*, 186 Ala. 439, 65 So. 146, 147.

(B) AFFIDAVITS.

§ 57. Averments as to Nature of Demand.

Compliance with Statute.—Affidavit on which attachment was based, averring facts which showed suit was on moneyed demand, amount of which could be certainly ascertained, and that defendant resided out of state, and was about to remove property, so that plaintiffs would probably lose debt, etc., was in compliance with Code 1907, § 2927. *Georgia Cotton Oil Co. v. Carlisle Seed Co.* (Ala.), 75 So. 984.

§ 72. Failure to Make.

Affects Levy Not Writ.—The failure to

make the additional affidavit for an attachment required by Code 1907, § 2929, affects the levy only, and not the issuance of the writ, and a proper complaint or count should not be stricken for that reason. *Corona Coal, etc., Co. v. Moore Stave Co.*, 186 Ala. 593, 65 So. 51.

Waiver by General Appearance.—A general appearance by a nonresident defendant, made subsequent to the levy of an attachment, was a waiver of the failure to require plaintiff to file the additional affidavit required by Code 1907, § 2929; it being a mere irregularity. *Corona Coal, etc., Co. v. Moore Stave Co.*, 186 Ala. 593, 65 So. 51.

V. LEVY, LIEN, AND CUSTODY AND DISPOSITION OF PROPERTY.

§ 98. Property Levied on under Other Process.

Property Already Attached.—An attempted attachment levy upon property in the hands of a sheriff, without the consent of the court which issued the attachment under which the property was held is void and creates no lien. *Remington Typewriter Co. v. Hall*, 183 Ala. 519, 63 So. 74.

§ 114. Delivery of Property on Forthcoming or Delivery Bond.

Clerical Error in Bond.—Use of the name "Moody" in the condition of a forthcoming bond different from that of "Woody" in the attachment writ, replevin bond, and elsewhere in the forthcoming bond, held, in view of the papers, to be a clerical error, not affecting the instrument as a statutory bond. *Friel v. North Birmingham Bldg. Ass'n*, 6 Ala. App. 223, 60 So. 552.

VI. PROCEEDINGS TO SUPPORT OR ENFORCE.

§ 123. Process in Action and Service on Defendant.

§ 124½. — Publication or Other Notice.

Necessity of Recital in Record.—Under Code 1907, § 2931, providing, that on attachment against a nonresident the clerk shall advertise the attachment and levy in some newspaper and mail a copy to the defendant, if his residence is known or can be ascertained, default

judgment, in a suit against a nonresident begun by attachment, held valid, though the record did not affirmatively show that a copy of the advertisement was mailed to defendant. *Herrick v. Herrick*, 186 Ala. 439, 65 So. 146.

§ 128. Trial in General.

Misleading Instructions.—In an attachment for fraudulently disposing of property, a requested instruction that unless a ground alleged in the attachment affidavit existed, the jury should not consider conveyances made after the levy and should find for defendant, held misleading. *Jackson v. Roanoke Banking Co.*, 197 Ala. 349, 72 So. 530.

A requested instruction in attachment against two partners for fraudulently disposing of property, that if the partnership's assets exceeded its indebtedness, one partner had as much control over the assets as the other, held misleading and argumentative. *Jackson v. Roanoke Banking Co.*, 197 Ala. 349, 72 So. 530.

§ 130. Judgment.

Judgment against Nonresident as in Rem or in Personam.—Judgment against nonresident defendant, served only by publication, with attachment and sale of property, held a judgment in rem, and not in personam, affecting only property seized under attachment. *Hood v. Commercial Germania Trust, etc., Bank*, 12 Ala. App. 511, 67 So. 721, certiorari denied in *Ex parte Hood*, 191 Ala. 663, 67 So. 1017.

§ 132½. Actions by Plaintiff in Aid of Attachment.

Equitable Relief.—Where property has been attached in a suit against one not the owner, an attaching creditor of the owner, who has acquired no lien or judgment against the debtor by his attempted attachment, can not maintain a bill in equity against the other attaching creditor for the property, but must look alone to the attachment statute for his remedy. *Remington Typewriter Co. v. Hall*, 183 Ala. 519, 63 So. 74.

VII. QUASHING, VACATING, DIS-SOLUTION, OR ABANDONMENT.

§ 142. Time for Attacking Attachment.

Time to Plead in Abatement.—A plea

in abatement, questioning the existence of the ground on which an attachment was sued out, which was not filed for more than a year after defendant had replevied the property, was not filed in time, under Code 1907, § 5347, *Id.*, p. 1520, rule 12, and the court could properly refuse to consider it. *Wilson v. Callan*, 9 Ala. App. 265, 63 So. 27.

§ 147. Pleading in Abatement, or Traverse of Grounds of Attachment.

See ante, "Time for Attacking Attachment," § 142.

§ 148. — Grounds in General.

Statutory Provisions.—Omission from Code 1907, § 2966, of the provision of the Code of 1896, § 565, that "the defendant must not deny or put in issue the cause for which the attachment issued," revives the law, as it existed before the enactment of that provision, that matter in abatement, not appearing on the face of attachment proceedings, should be presented by, plea in abatement. *Wilson v. Callan*, 9 Ala. App. 265, 63 So. 27.

§ 151. — Judgment or Order.

Upon the return of a verdict in favor of defendant on a plea in abatement attacking a writ of attachment, the court could not grant a motion to dismiss the suit, where the issue raised only went to the question of the existence of a lien, since by the express provisions of Code 1907, § 4770, plaintiff could still recover judgment for the debt. *Pitard v. McDowell*, 6 Ala. App. 236, 60 So. 555.

VIII. CLAIMS BY THIRD PERSONS.

§ 162. Claims or Liens Prior or Superior to Attachment.

§ 163. — Right to Assert.

A surety on a replevy bond who before forfeiture and according to its terms delivered the property to the sheriff notwithstanding any interest in the property which he may have had, might then assert any claim which he could have asserted before the bond was executed. *Brothers v. Russell*, 195 Ala. 643, 71 So. 450.

Mortgagee Claiming against Landlord's Lien.—Under Code 1907, §§ 6039-6043, complainant, the mortgagee of cotton, not claiming primary ownership thereof,

could intervene in attachment suit to enforce a landlord's lien, only to assert a lien paramount to the landlord's lien. *Brothers v. Russell*, 195 Ala. 643, 71 So. 450.

§ 170. Rights of Claimants of Property Attached in General.

Excessive Levy or Wrongful Levy.—

A right of a claimant of goods attached as the goods of another against the attaching creditor depends on the fact of the levy and not on an excessive levy, which is but an abuse of the process for which a stranger to the writ of attachment can not recover. *Brock v. Young*, 7 Ala. App. 631, 62 So. 326.

Estoppel to Question Levy.—Filing of claim suit and bond in attachment estops claimant from disputing or questioning levy, or mere irregularities in process, and matters which do not affirmatively show on their face that process was void. *Hill v. Rentz* (Ala.), 78 So. 881.

§ 174. Proceedings for Establishment and Determination of Claims to Property.

§ 178. — Issues and Questions Considered.

Priority of Liens and Value of Property.—On the trial of attachment suit, intervener was entitled to have determined question whether his lien should be first satisfied, and, if it was determined that landlord had prior lien, to have determined value of property. *King v. Central Hdw. Co. (Ala.)*, 75 So. 967.

Same—Transfer of Right of Action.—That right of action was transferred pending attachment suit, and that complaint was amended to show that thereafter suit would be prosecuted for benefit of transferee, was of no concern to intervener claiming prior lien. *King v. Central Hdw. Co. (Ala.)*, 75 So. 967.

§ 179. — Evidence.

Admissibility.—Where vendor of land claimed lien on cotton raised thereon and sought attachment, claimant of cotton under chattel mortgage from vendee of land could introduce evidence tending to show nonexistence of relation of landlord and tenant between vendor and

mortgagor. *Herzfeld v. Hayne* (Ala.), 76 So. 973.

§ 182. — Instructions.

Defining Excessive Levy.—An instruction defining excessive levy of attachment as on goods of value, more than sufficient to satisfy the debt, should have included cost of levy, care of goods, etc. *Brock v. Young*, 7 Ala. App. 631, 62 So. 326.

Authorizing Recovery by Claimant.—In conversion for goods attached as those of another, an instruction held erroneous as authorizing recovery against the attaching creditor, though plaintiffs' claim to the goods, while bona fide, may have been fraudulent as to such creditor because based on insufficient consideration. *Brock v. Young*, 7 Ala. App. 631, 62 So. 326.

§ 184. — Judgment and Enforcement Thereof.

Value of Property.—Under Code 1907, § 6041, value of property attached should have been assessed as of time of claim by intervener. *King v. Central Hdw. Co. (Ala.)*, 75 So. 967.

X. LIABILITIES ON BONDS OR UNDERTAKINGS.

§ 193. Accrual or Release of Liability by Breach or Fulfillment of Conditions.

§ 194. — Bonds or Undertakings to Procure Attachment.

A surety on the bond of an attachment creditor is not liable for a wrongful attachment of goods belonging to a third person, even though his principal ratified the tort of the attaching officer. *Walker & Co. v. Norris*, 10 Ala. App. 515, 63 So. 935.

§ 196. — Bonds or Undertakings for Release of Property.

Bond by Stranger—Real Defendant.—Where bond by stranger, who replevied attached property under Code 1907, § 2955, was conditioned as though the action was against the stranger, held, that there could be no recovery on such bond as a common law or statutory obligation on showing that real defendant had failed in the action, since this showed no breach of the bond. *Donaldson v. Wilkerson*, 192 Ala. 100, 68 So. 812.

§ 197. — Claimants' Bonds for Possession.

Bond Invalid as Statutory Bond.—Under Code 1907, § 2955, requiring bond for replevy of attached goods, to be conditioned for return of specific property within 30 days after judgment, bond requiring delivery 60 days after its issuance was not good as a statutory bond, and can not be forfeited summarily by the sheriff. *Gaut v. Beatty* (Ala.), 77 So. 28.

§ 200. Enforcement in Attachment Suit, or Claimant's Suit.

Under Code 1907, § 4313, providing that if judgment is rendered against the attachment defendant the court must also render judgment against the obligors on the bond for release of the attachment, a recital in the judgment entry that the defendant executed a bond for the discharge with a certain surety is sufficient, in the absence of a showing to the contrary, to sustain the jurisdiction of the court to render judgment against the surety. *Bank v. Arnold & Co.*, 13 Ala. App. 462, 68 So. 699.

XI. WRONGFUL ATTACHMENT.

§ 213. Nature and Grounds of Liability.

§ 214. — Wrongful Suing Out of Attachment.

Injury to Credit.—It is a legitimate ground for the recovery of actual damages for wrongful attachment that there has been an injury to one's credit. *Bell v. Seals Piano, etc., Co.* (Ala.), 78 So. 806.

§ 214½. — Wrongful or Excessive Levy.

See ante, "Rights of Claimants of Property Attached in General," § 170; "Instructions," § 182.

Liability for Acts of Officer.—Though an officer levying a valid attachment is liable as a trespasser where he seizes the goods of a person not named in the writ, the party suing out the writ is not accountable for the acts of the officer, though receiving the proceeds of the levy and sale, unless he participated in or ratified the unlawful act. *Walker &*

Co. v. Norris, 10 Ala. App. 515, 63 So. 935.

Same—Receipt of Proceeds.—Mere appropriation of the proceeds of a sale of property taken under attachment by the attaching creditor will not, in the absence of evidence showing full knowledge on his part of the tortious nature of the seizure, show ratification of the officer's wrongful act. *Walker & Co. v. Norris*, 10 Ala. App. 515, 63 So. 935.

Same — Ratification after Notice.—Where attaching creditors were notified by plaintiff before the sale of the property on attachment that it did not belong to the debtor, but belonged to plaintiff, and the creditors were present at and participated in the sale, their conduct was a ratification of the unlawful levy of the sheriff, and rendered them equally liable as trespassers. *Walker & Co. v. Norris*, 10 Ala. App. 515, 63 So. 935.

§ 218. Persons Liable.

See ante, "Wrongful or Excessive Levy," § 214½.

§ 219½. Actions.

§ 220. — Nature and Form.

In an action of trespass by plaintiff, whose goods were seized under writ of attachment directed against another, judgment can not be rendered in favor of plaintiff on the attachment bond where it had not been assigned to him so that he could declare upon a breach thereof. *Walker & Co. v. Norris*, 10 Ala. App. 515, 63 So. 935.

§ 227. — Questions for Jury.

In trespass against officer and party plaintiff for wrongful attachment, where the law and the evidence entitled plaintiff to at least nominal damages, held that plaintiff was entitled to general affirmative charge. *Hood v. Commercial Germania Trust, etc., Bank*, 12 Ala. App. 511, 67 So. 721, certiorari denied in *Ex parte Hood*, 191 Ala. 663, 67 So. 1017.

Whether Damages Sustained. — Whether a party was damaged by a wrongful attachment, held, under the evidence, for the jury. *Bell v. Seals Piano, etc., Co.* (Ala.), 78 So. 806.

Attempt.

See the particular appropriate criminal titles.

Attestation.

See post, WILLS.

ATTORNEY AND CLIENT.

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(B) Privileges, Disabilities, and Liabilities.

§ 12. Regulation of Professional Conduct.

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Cross References.

See the title ATTORNEY AND CLIENT, vol. 2, p. 106, and references there given.

In addition, see post, CHAMPERTY AND MAINTENANCE. As to validity of provision in mortgage for attorney's fee for collection, see post, MORTGAGES. As to privilege of attorney against revealing identity of client, see post, WITNESSES.

I. THE OFFICE OF ATTORNEY.

(B) PRIVILEGES, DISABILITIES, AND LIABILITIES.

§ 12. Regulation of Professional Conduct.

Good faith of counsel will be presumed in the absence of tangible indication to the contrary. *Beatty v. Palmer*, 196 Ala. 67, 71 So. 422.

Criticisms of Court Held Prima Facie Misconduct.—A publication as to a decision of the court as follows: "I accepted the decision in this case, however, with patience, barring possible temporary observations more or less vituperative, and finally concluded that, as my clients were foreigners, it might have been expecting too much to look for a

decision in their favor against a widow residing here"—transcends the bounds of privileged criticism, and is improper attack upon the integrity of the court, and makes out a prima facie case of improper conduct. *In re Mitchell*, 196 Ala. 430, 71 So. 467.

A publication as to a decision of the court as follows: "It looks like the court was groping around in the dark hunting for some pretext under which the complainant's rights could be defeated. It is difficult to conceive what the considerations would be which would actuate a court of last resort to go to such lengths to beat a man out of his money which he had loaned the defendant in good faith in order to build a home for her which had sheltered her

and her family for many years"—transcends the bounds of privileged criticism, and is improper attack upon the integrity of the court, and makes out a prima facie case of improper conduct. In re Mitchell, 196 Ala. 430, 71 So. 467.

Same — Contempt and Disclaimer Thereof.—See post, CONTEMPT.

(C) SUSPENSION AND DISBARMENT.

§ 13½. Jurisdiction of Courts.

See post, "Reinstatement," § 24½.

Circuit Courts.—"Under the statutes of this state (Code, §§ 2991-3008) jurisdiction of proceedings for the disbarment of licensed attorneys is vested in circuit courts, or courts of like jurisdiction." Ex parte Peters, 195 Ala. 67, 70 So. 648, 649.

Supreme Court.—Under Code, 1907, § 3008, the jurisdiction of the supreme court in disbarment proceeding is strictly appellate. Ex parte Peters, 195 Ala. 67, 70 So. 648.

§ 14. Grounds for Suspension or for Striking from Roll.

§ 15. — Character and Conduct in General.

Offering Valuable Consideration to Obtain Claim — Statute.—Under Code 1907, § 6312, providing for disbarment of any attorney offering or promising to give a valuable consideration to another person as an inducement for placing in such attorney's hands a demand of any kind, the act of an attorney in offering to vote for another as trustee in bankruptcy in consideration of the other's placing in his hands a certain claim is ground for cancellation of his license. Worthen v. State, 189 Ala. 395, 66 So. 686.

Same — "Person" — "Demand" — "Claim."—As used in Code 1907, § 6312, the word "person" includes any entity or individuals against which or against whom a liability may be made or established, and the terms "demand of any kind" and "claim against another" include a claim against a bankrupt. Worthen v. State, 189 Ala. 395, 66 So. 686.

§ 16½. — Misconduct as to Client.

Misappropriation of Funds Collected.

—Under Code 1907, § 2992, an attorney, who collected notes for his client and thereafter advised the client that the money had not been collected, held guilty of deceit and of willful misconduct, justifying a disbarment. Peters v. State, 193 Ala. 598, 69 So. 576.

"Deceit" — Willful Misconduct—Statute.—Under Code 1907, § 2992, providing for the removal or suspension of an attorney guilty of any deceit or willful misconduct in his profession, "deceit" means concealment or false suggestion by an attorney in his professional capacity or employment, to injure a person or to mislead a court. Peters v. State, 193 Ala. 598, 69 So. 576.

§ 17. Proceedings.

§ 19. — Nature and Form in General.

Penal and Quasi Criminal Statute. — Code 1907, § 2997, authorizing the institution of proceedings to revoke an attorney's license, being highly penal and quasi criminal in character, should be strictly construed. Worthen v. State, 189 Ala. 395, 66 So. 686.

§ 20. — Charges and Answers Thereto.

Verification of Complaint — Information and Belief.—A verification of a complaint on information and belief held sufficient to comply with Code 1907, § 2997, providing that the accusation in disbarment proceedings shall be verified by an oath stating that the facts therein contained are true. Worthen v. State, 189 Ala. 395, 66 So. 686.

Insufficient Verification — Motion to Strike Complaint.—A motion to strike a complaint in disbarment proceedings, because the verification is insufficient to comply with Code 1907, § 2997, is the proper method of invoking the court's ruling on the objection. Worthen v. State, 189 Ala. 395, 66 So. 686.

§ 20½. — Evidence.

Claim Secured in Consideration of Valuable Promise.—Evidence in an action to disbar an attorney held to show that he procured a claim against a bankrupt in consideration of a promise that he would vote for another for trustee in bankruptcy in violation of Code 1907, § 6312. Worthen v. State, 189 Ala. 395, 66 So. 686.

§ 22. — Judgment or Order.

Conclusiveness of Judgment. — Under Code 1907, §§ 2991-3008, judgment of trial court in proceeding to remove and disbar attorney held final and conclusive, unless reversed or modified on appeal. *Ex parte Peters*, 195 Ala. 67, 70 So. 648.

§ 23. — Review.

Failure to Object below—Statutes. — Under Code 1907, §§ 2992, 3002, relating to disbarment of attorneys, § 3008, governing appeals, and § 4143, inhibiting arrest of judgment for any matter not previously objected to where the complaint contains a substantial cause of action, held, that an appeal from a judgment of disbarment would not be tried de novo in the supreme court, and that to obtain a review of the trial court's decision to disbar, rather than to suspend, it was necessary to save the question in the trial court. *Peters v. State*, 193 Ala. 598, 69 So. 576, cited in note in Ann., Cas. 1918B, 837.

§ 24½. Reinstatement.

Jurisdiction—Court Which Disbarred. — While the statutes are silent as to the reinstatement of attorneys against whom a judgment of disbarment has been rendered, the court which has power to disbar has also the power to reinstate, which will be exercised in proper cases. *Ex parte Peters*, 195 Ala. 67, 70 So. 648.

Same—Supreme Court. — A disbarred attorney's petition for reinstatement can only be addressed and must be addressed to the court which rendered the judgment of disbarment, and hence the supreme court had no jurisdiction of an original petition for reinstatement by an attorney disbarred by a judgment of the circuit court which had been affirmed by the supreme court. *Ex parte Peters*, 195 Ala. 67, 70 So. 648.

Reinstatement after Term of Judgment of Disbarment. — The reinstatement of a disbarred attorney is not a modification or vacation of the judgment within the rule that judgments pass beyond the court's power and control after the lapse of the term at which they were rendered. *Ex parte Peters*, 195 Ala. 67, 70 So. 648.

II. RETAINER AND AUTHORITY.**§ 52. Receiving Payment or Security.****§ 53. — Mode or Form of Payment or Security.**

Assignment of Running Account as Credit on Note. — An attorney has no authority merely by virtue of his employment and relationship of attorney and client to accept in lieu of cash a transfer of a running account against a third person as a credit on a promissory note held by his client. *Hoover v. Miller* (Ala.), 73 So. 817.

§ 57. Notice to Attorney.

Knowledge Imputed to Client. — Knowledge of the pertinent facts received by an attorney while in the authorized particular service of his client is imputed to the client. *Silvey & Co. v. Cook*, 191 Ala. 228, 68 So. 37.

Court Papers Withdrawn by Attorney—Presumption of Knowledge. — Where certain papers, which were withdrawn by a party's attorney with consent of the court, disclosed the existence of a vendor's lien, such attorney presumably acquired an actual notice of the existence of such lien, which must be imputed to his client. *Silvey & Co. v. Cook*, 191 Ala. 228, 68 So. 37.

Notice before Employment. — Where a husband notified his creditor's attorney that his wife owned land, title to which stood in his name, but it did not appear when the notice was given, whether before or after the creditor instituted suit, such notice is not notice to the creditor of the wife's equity, as notice to an attorney only binds client when given after the relation began. *Marshall v. Lister*, 195 Ala. 591, 71 So. 411.

III. DUTIES AND LIABILITIES OF ATTORNEY TO CLIENT.**§ 58. Negligence or Malpractice.****§ 65½. — Fraud.**

Good Faith—Mistake of Judgment. — The good faith of an attorney in giving an opinion on the validity of a title to land can not be impeached by mistake or errors of judgment, either as to the law or its application to the facts. *Sellers v. Knight*, 185 Ala. 96, 64 So. 329, cited in note in Ann. Cas. 1917B, 10.

§ 67. Accounting and Payment to Client.**§ 68½. — Individual Interest of Attorney.**

Deduction of Fee from Collections.—The total sum of money collected by an attorney for his client, and not the balance after deducting the attorney's fee, belongs to the client, and it is the attorney's duty to pay the same over without unreasonable delay. *Peters v. State*, 193 Ala. 596, 69 So. 576.

§ 72. Dealings between Attorney and Client.**§ 73. — In General.**

Burden of Upholding Mortgage.—Where mortgage, executed by mortgagor while in jail to his attorney, is sought to be set aside, the attorney has burden of showing the good faith of transaction, and that no fraud or undue influence was practiced on the mortgagor. *Long v. Powell*, 194 Ala. 438, 69 So. 585.

IV. COMPENSATION AND LIEN OF ATTORNEY.**(A) FEES AND OTHER REMUNERATION.****§ 83. Employment of Attorney.**

See post, "Contracts for Division between Attorneys, and Apportionment," § 92½.

Implied Contract.—One who accepts legal services performed for him with his knowledge by an attorney is liable on an implied contract to pay the reasonable value of such circumstances. *Martin v. Henderson*, 12 Ala. App. 564, 68 So. 478, cited in note in Ann. Cas. 1917A, 423.

Necessity of Contract—Beneficial Services Insufficient.—That an attorney's services may have been beneficial will not obligate the person benefited to pay therefor in the absence of a contract of employment. *Tyson v. Thompson*, 195 Ala. 230, 70 So. 649.

Same—Acceptance of Substituted Services.—Where defendant accepted legal services, performed for him by plaintiff, with the understanding that such services were being rendered to fulfil the contract of another lawyer, one S., with defendant, after such lawyer had been appointed circuit judge, having neither

employed plaintiff himself, nor through S., as agent, plaintiff could not maintain his action against defendant for payment for the services, since the defendant had the right to choose his creditor. *Martin v. Henderson*, 12 Ala. App. 564, 68 So. 478, cited in note in Ann. Cas. 1917A, 423.

Same—Simultaneous Hiring by Two Parties.—Where defendant attorney performed services for defendant, being hired by such defendant to do so, and also being hired by one S., formerly attorney for defendant, who had been appointed circuit judge, to complete his, S.'s contract with defendant, plaintiff had a right of action against both S. and defendant for the value of his services until he was paid by one. *Martin v. Henderson*, 12 Ala. App. 564, 68 So. 478, cited in note in Ann. Cas. 1917A, 423.

§ 85. Value of Services.**§ 86. — In General.**

In Absence of Agreement.—One who hires an attorney, nothing being said as to the amount of compensation, is liable for the reasonable value of the attorney's services. *Martin v. Henderson*, 12 Ala. App. 564, 68 So. 478.

§ 87. — Specific Services and Particular Cases.

Foreclosure of Mortgage.—Where a mortgage provides for the payment of a reasonable attorney's fee in case it should be necessary to employ one in the collection of the debt, it is a contract of indemnity in favor of the creditor, and entitles his attorney to reasonable compensation, taking into consideration the nature of the employment and the skill and labor requisite to its discharge. *Faulk & Co. v. Hobbie Grocery Co.*, 178 Ala. 254, 59 So. 450.

Same—Ten Per Cent. of Amount Secured.—Where a note secured by mortgage provided for a reasonable attorney's fee, and the mortgage was foreclosed, an allowance of 10 per cent. on the amount of the face of the mortgage was not improper, as a matter of law, nor palpably excessive, although after the proceedings were begun, part of the mortgage debt was discharged. *Faulk & Co. v. Hobbie Grocery Co.*, 178 Ala. 254, 59 So. 450.

§ 88. Contracts for Compensation.**§ 89. — Making, Requisites, and Validity.**

Validity of Contract. — See post, CHAMPERTY AND MAINTENANCE.

§ 91. Contingent Fees.**§ 91½. — Construction and Operation of Contract.**

Amount of Fee.—A contract by which a client agreed to pay contingent fee of half of recovery "if trial of cause is had" and one-third if compromise was made, the word "trial" meant trial on merits, and where there was no trial on the merits, attorney was entitled to one-third only and the client could recover the difference between one-third and one-half paid. *Denson v. Caddell* (Ala.), 77 So. 720.

§ 92½. Contracts for Division between Attorneys, and Apportionment.

See post, "In General," § 99 (1).

Employment on Shares of Contingent Fee—Liability of Client.—If an attorney employed on a contingent fee agrees to pay other attorneys out of his share for their aid, the client is not liable for the fees of such attorneys. *Denson v. Caddell* (Ala.), 77 So. 720.

Employment for Appellate Practice—Right to Compensation.—Where attorneys employed by another firm as associate counsel were to have a half of fees if the case went to the supreme court, and the case went to such court, the associates are entitled to their half, unless they abandoned the contract, or declined, refused, or failed without excuse to perform. *Smith v. Waldrop* (Ala.), 77 So. 331.

Counsel Not Contracting with Client—Interpleader.—The principle that associate counsel having no contractual relation with the client can have no claim to any part of the fund recovered has no application to a bill of interpleader to determine rights to fees left by the client with the clerk of court, in which case the fund will be awarded according to the agreement for division between the attorneys. *Smith v. Waldrop* (Ala.), 77 So. 331.

§ 95. Actions for Compensation.**§ 99. — Evidence.****§ 99 (1) In General.**

Division of Fees—Local Custom.—In determining the proper division of fees between attorneys and associate counsel employed by them, evidence of a custom among members of the city's bar where an attorney engaged an associate, as had been done, to divide the fees equally, and evidence of other employments between the parties in other similar cases, wherein the fees were equally divided, was admissible. *Smith v. Waldrop* (Ala.), 77 So. 331.

Time Third Person Spent—Materiality.—In attorney's action for compensation, evidence regarding time third party spent on litigation in question held immaterial. *Lang v. Leith* (Ala. App.), 77 So. 445.

§ 99 (2) Employment.

Presumption of Implied Contract—Rebuttal.—The presumption arising, in the absence of an express contract, from the acceptance of an attorney's services of an obligation to pay what the services are reasonably worth may be rebutted by proof of facts and circumstances showing that the parties otherwise intended. *Tyson v. Thompson*, 195 Ala. 230, 70 So. 649.

Admissibility of Entries in Attorney's Books.—In attorney's action for compensation, where defendant introduced entry in plaintiff's book showing that defendant's wife was party to action involved, plaintiff may introduce further entry indicating his employment by defendant. *Lang v. Leith* (Ala. App.), 77 So. 445.

§ 99 (3) Value of Services or Amount of Compensation.

Members of the bar are competent as experts to give their opinion of the reasonable value of services shown to have been rendered by an attorney. *Faulk & Co. v. Hobbie Grocery Co.*, 178 Ala. 254, 59 So. 450, cited in notes in Ann. Cas. 1914D, 369, 371.

Amount Involved in Suit.—In attorney's action for work and labor, evidence regarding amount involved in controversy for which charge was made is

competent to establish amount of responsibility assumed by plaintiff. *Lang v. Leith* (Ala. App.), 77 So. 445.

Customary Fee to Show Reasonable Fee.—Where services of the same general character and extent are of such frequent recurrence among the legal profession that a certain basis for estimation is customary, evidence of such custom becomes admissible to show what is a reasonable attorney's fee. *Faulk & Co. v. Hobbie Grocery Co.*, 178 Ala. 254, 59 So. 450.

§ 99 (4) Performance.

Attorney's Conferences with Other Parties.—In attorney's action for compensation, evidence of conferences with other parties in defendant's absence regarding pending litigation was competent to show that plaintiff was doing work for which he was employed. *Lang v. Leith* (Ala. App.), 77 So. 445.

§ 99 (5) Payment.

Burden of Proving Application.—See post, "Trial," § 100.

Admissibility of Receipt Dated before Services Rendered.—In action for legal services in arbitration proceeding, exclusion of receipt bearing date a year before such proceeding commenced was not error. *Pollak v. Winter*, 197 Ala. 173, 72 So. 386.

§ 100. — Trial.

Misleading Instructions. — Where, in an attorney's action against an optionee for examining an abstract, there was evidence that plaintiff's services were to be paid for by the owner, requested instructions that, if the services were rendered for defendant and accepted by him, plaintiff was entitled to recover, being misleading, were properly refused. *Tyson v. Thompson*, 195 Ala. 230, 70 So. 649.

Burden of Showing Application of Payments Pledged.—In action for services, instruction that defendant must show to reasonable satisfaction of jury that any payments claimed as credits were made on claim asserted in present suit, and not for services in other matters, held not erroneous. *Pollak v. Winter*, 197 Ala. 173, 72 So. 386.

(B) LIEN.

§ 101. Nature of Attorney's Lien.

The theory upon which an attorney's lien rests is that from the day of the rendition of a judgment the attorney or solicitor procuring it is regarded as an equitable assignee thereof, to the extent of the compensation and disbursements justly due him. *Williams v. Bradley*, 187 Ala. 158, 65 So. 534.

The office and effect of an attorney's lien is to assure the attorney's compensation for services rendered in the particular matter progressing to the judgment. *Williams v. Bradley*, 187 Ala. 158, 65 So. 534, cited in note in Ann. Cas. 1916E, 387.

§ 102. Statutory Provisions.

Constitutionality of Statute.—"Appellant argues the unconstitutionality of the statute (Code, § 3011), which declares that attorneys at law shall have a lien for their fees 'upon suits, judgments, and decrees for money,' and 'shall have the same right and power over said suits, judgments and decrees, to enforce their liens, as their clients had or may have for the amount due thereon to them.' The constitutional validity of acts of this sort has been generally affirmed by the courts in states where such acts have been adopted." *Western Railway v. Foshee*, 183 Ala. 182, 192, 62 So. 500.

Code 1907, § 3011, giving an attorney a lien on the suit, is a general law, and makes no essentially arbitrary and unreasonable classification. *Denson v. Alabama Fuel, etc., Co.* (Ala.), 73 So. 526.

Time When Statute Effective.—The statute (Code 1907, § 3011) making provision for liens in favor of attorneys became effective in 1908, although the right to a lien had been long recognized prior thereto. *Williams v. Bradley*, 187 Ala. 158, 65 So. 534.

§ 103. Right to Lien.

§ 104. — In General.

Stipulated or Reasonable Compensation.—An attorney has a lien on a judgment obtained by him for his client to the extent of his agreed compensation or for a reasonable compensation in the absence of specific agreement. *Williams*

v. Bradley, 187 Ala. 158, 65 So. 534, cited in note in Ann. Cas. 1916E, 387.

§ 105. Services or Fees Covered.

Services in Particular Proceeding.—The lien of an attorney is to assure his compensation for services rendered in the particular matter progressing to judgment. *Williams v. Bradley*, 187 Ala. 158, 65 So. 534, cited in note in Ann. Cas. 1916E, 387.

§ 106. Subject Matter to Which Lien Attaches.

§ 106 (3). Judgment or Proceeds Thereof.

The lien of an attorney being to secure compensation in the particular matter progressing to judgment, is therefore a charge alone upon the client's property in the judgment in the client's favor. *Williams v. Bradley*, 187 Ala. 158, 65 So. 534.

§ 106 (4) Land.

Statute.—Code 1907, § 3011, giving attorney's liens upon suits, judgments and decrees for money or personal property, made no change in the rule that an attorney has no lien on the real estate of his client. *Harton v. Amason*, 195 Ala. 594, 71 So. 180.

§ 109. Waiver, Loss, or Discharge.

Extinguished by Payment of Judgment.—Where property of a judgment debtor was sold under execution on a judgment on which an attorney had a lien for fees and, the property being bought by the judgment creditor, the judgment was used in part payment of the price, the attorney's lien was lost, his remedy being by an action at law against his client for compensation. *Williams v. Bradley*, 187 Ala. 158, 65 So. 534.

Property Conveyed to Corporation with Attorney's Consent.—A solicitor who approved a settlement agreement calling for conveyance of property to his client or a corporation of which his client was president, can not claim that conveyance to the corporation was in fraud of his rights to his fee. *Harton v. Amason*, 195 Ala. 594, 71 So. 180.

§ 111. Protection against Settlement between Parties.

§ 112. — In General.

Necessity of Separate Petition or Mo-

tion by Attorney.—Neither a party nor his attorney should be heard to say that an agreement of compromise made by the parties was in actual or legal fraud of the attorney's right to a lien; at least the attorney should be required to show by petition or motion in his own name his right to proceed with the suit, notwithstanding the compromise, as the courts are not bound to inquire whether the attorney would be satisfied with the compromise. *Western Railway v. Foshee*, 183 Ala. 182, 62 So. 500, cited in note in Ann. Cas. 1917A, 571. See ante, ACCORD AND SATISFACTION; post, COMPROMISE AND SETTLEMENT.

§ 113. — Remedies of Attorney.

Prosecution of Suit—Release Pending Second Trial.—Under Code 1907, § 3011, subd. 2, giving attorneys liens upon judgments, etc., for money, the attorney of plaintiff in action for personal injuries against railroad, who secured judgment which was reversed, could prosecute plaintiff's right of action to secure his charges for procuring judgment, though plaintiff, without attorney's consent, and to defraud him, gave defendant a release pending second trial. *Lowery v. Illinois Cent. R. Co.*, 195 Ala. 144, 69 So. 954, citing *Fuller v. Lanett Cotton Mills*, 186 Ala. 117, 65 So. 61.

Same—Settlement Pending Appeal.—Under Code 1907, § 3011, subd. 2, giving attorneys liens on suits, judgments, and decrees for money, and declaring that no person shall satisfy the suit, judgment or decree until the lien of the attorney is satisfied, etc., an attorney for plaintiff has a lien on the cause of action, and may intervene to prosecute an appeal from a judgment for defendant, notwithstanding a settlement of the cause pending the appeal. *Fuller v. Lanett Cotton Mills*, 186 Ala. 117, 65 So. 61.

Defense of Champertous Contract—How Set up.—See post, CHAMPERTY AND MAINTENANCE.

§ 115. Enforcement.

Necessity of Service of Process.—Under Code 1907, §§ 3011, 3092, 4853, an attorney's lien on the suit is not dependent on service of process, since filing of complaint at law or bill in chancery is commencement of the suit. *Denson v.*

Alabama Fuel, etc., Co. (Ala.), 73 So. 525.

Intervention by Attorney.—On intervention to enforce attorney's lien, liability will be determined as in the original suit; proof of settlement being admissible only to show acquittance to extent of client's interest. *Denson v. Alabama Fuel, etc., Co. (Ala.), 73 So. 525.*

Admissibility of Evidence—Settlement by Parties.—On intervention by attorney to enforce lien, where there was evidence

of agreement that original plaintiff should receive one-half of amount recovered by attorney, contract of settlement between original parties was admissible in evidence. *Denson v. Alabama Fuel, etc., Co. (Ala.), 73 So. 525.*

Question for Jury.—In proceedings to establish an attorney's lien, conflicting evidence held to present a question of fact as to the existence or waiver of the lien. *Denson v. Alabama Fuel, etc., Co. (Ala.), 73 So. 525.*

ATTORNEY GENERAL.

§ 1. Powers and Duties.

§ 2½. — Bringing and Prosecution of Actions.

Cross References.

See the title ATTORNEY GENERAL, vol. 2, p. 141, and references there given.

§ 1. Powers and Duties.

§ 2½. — Bringing and Prosecution of Actions.

Directing Solicitor to Prosecute Cases in Another Circuit—Necessity for Written Order.—Under Acts 1915, p. 719, au-

thorizing the Attorney General to direct a solicitor of one circuit to prosecute cases in another, no written order is required to show the authority of such visiting solicitor. *Jones v. State (Ala. App.), 75 So. 830.*

Attorney in Fact.

See post, PRINCIPAL AND AGENT.

Attorneys' Fees.

See ante, ATTORNEY AND CLIENT; post, BILLS AND NOTES.

AUCTIONS AND AUCTIONEERS.

§ 3. Licenses and Taxes.

Cross References.

See the title AUCTIONS AND AUCTIONEERS, vol. 2, p. 142, and references there given.

§ 3. Licenses and Taxes.

Since Acts 1915, p. 490, § 1, subsec. 2, imposes a license tax on auctioneers only when doing business in cities and

towns, a person conducting a public outcry outside any city or town is not liable for the tax. *State v. Pearce (Ala. App.), 75 So. 275.*

Audita Querela.

See the title AUDITA QUERELA, vol. 2, p. 143, and references there given.

Authentication.

See the particular appropriate titles.

Authority.

See post, PRINCIPAL AND AGENT; and other appropriate titles.

Automobiles.

See post, HIGHWAYS; MASTER AND SERVANT; NEGLIGENCE.

Avoidance.

See the particular appropriate titles.

Award.

See ante, ARBITRATION AND AWARD; post, COSTS.

Baggage.

See post, CARRIERS.

BAIL.

II. In Criminal Cases.

- § 17. Right to Release on Bail.
- § 19. — Bailable Offenses.
- § 25. Proceedings to Admit to Bail.
- § 42. Relief from Liability or Forfeiture.
- § 44. — Surrender of Principal.
- § 45. Action or Scire Facias on Bond, Undertaking, or Recognizance.
- § 56. — Judgment and Enforcement Thereof.
- § 57. — Appeal and Error.

Cross References.

See the title BAIL, vol. 2, p. 145, and references there given.

As to suspension of sentence by bail on appeal, see post, CRIMINAL LAW. As to admissibility of bail bond in evidence in action for false imprisonment, see post, FALSE IMPRISONMENT. As to review of order admitting to bail, see post, CRIMINAL LAW.

II. IN CRIMINAL CASES.

§ 17. Right to Release on Bail.

§ 19. — Bailable Offenses.

Capital Cases—Constitutional Provision.—Under Const. § 16, allowing bail, except in capital cases, "when the proof is evident or the presumption great," held, that the proof was not evident or the presumption great, where from the evidence adduced a well-founded doubt existed as to murder in the first degree, or where the court could not sustain a conviction in that degree. *Franks v. State*, 11 Ala. App. 70, 65 So. 857.

§ 25. Proceedings to Admit to Bail.

A probate court's action in admitting one indicted for murder to bail on oral testimony will not be reversed, unless contrary to the great weight of evidence. *State v. Reeves* (Ala. App.), 72 So. 509.

§ 42. Relief from Liability or Forfeiture.

§ 44. — Surrender of Principal.

When Bail May Arrest Principal.—The

bail of one accused of crime are not entitled to arrest him without a warrant, except under a certified copy of the bond, as prescribed by Code 1907, § 6351. *Nicholson v. Killpatrick*, 188 Ala. 258, 66 So. 8.

§ 45. Action or Scire Facias on Bond, Undertaking, or Recognizance.

§ 56. — Judgment and Enforcement Thereof.

Judgment in Excess of Bond.—A judgment on a forfeited bail bond rendered against the sureties for more than the face of the bond is erroneous. *Graham v. State*, 12 Ala. App. 502, 67 So. 624.

§ 57. — Appeal and Error.

See post, CRIMINAL LAW.

Correction of Judgment on Appeal.—Where a judgment on a forfeited bail bond is appealed from because rendered for more than the face of the bond, the judgment will be corrected at the expense of appellee and affirmed. *Graham v. State*, 12 Ala. App. 502, 67 So. 624.

BAILMENT.

- § 1. Nature and Elements in General.
- § 5. Title and Rights to Property.
- § 7. — Estoppel of Bailee to Deny Title of Bailor.
- § 8. Care and Use of Property, and Negligence of Bailee.
- § 10. — Bailments for Sole Benefit of Bailor.
- § 12. Conversion by Bailee.
- § 12½. Wrongful Delivery by Bailee.
- § 13. Compensation and Lien of Bailee.
 - § 13 (1) Right to Compensation.
 - § 13 (2) Lien in General.
 - § 13 (3) Possession of Property.
 - § 13 (4) Waiver or Loss of Lien.
- § 15. Rights and Liabilities as to Third Persons.
- § 18. Actions between Bailor and Bailee.
- § 19. — Nature and Form.
- § 21. — Defenses.
- § 22. — Time to Sue, and Limitations.
- § 23. — Pleading.
- § 24. — Evidence.
- § 26. — Trial.
- § 28. Actions by or against Third Persons.

Cross References.

See the title BAILMENT, vol. 2, p. 168, and references there given.
 In addition, see ante, ANIMALS; post, MASTER AND SERVANT.

§ 1. Nature and Elements in General.

A bailee is a species of agent to whom something movable is committed in trust, not for the bailee, but for another. *Cowart v. State* (Ala. App.), 75 So. 711.

What Constitutes a Bailment in General.—*Cook, etc., Contracting Co. v. Bell*, 177 Ala. 618, 59 So. 273. See the title BAILMENT, § 1, vol. 2, p. 169.

§ 5. Title and Rights to Property.

§ 7. — Estoppel of Bailee to Deny Title of Bailor.

A bailee employed for a compensation to keep possession of property can not show as a defense to an action against him for its conversion that he repudiated his trust, and was holding possession of such property for himself. *Plummer v. Hardison*, 6 Ala. App. 525, 60 So. 502.

§ 8. Care and Use of Property, and Negligence of Bailee.

§ 10. — Bailments for Sole Benefit of Bailor.

Liable for Gross Negligence or Bad

Faith Only.—Where a mechanic agreed to repair an automobile gratuitously, and, after making the repairs, took the car on a trial trip to ascertain whether they were successful, he was still acting as a bailee without reward, and, as such, was liable for damages only in case they resulted from his gross negligence or bad faith. *Thomas v. Hackney*, 192 Ala. 27, 68 So. 296.

§ 12. Conversion by Bailee.

See post, "Wrongful Delivery by Bailee," § 12½.

Ordinarily a bailee's use of a chattel in a different way or to greater extent than authorized constitutes "conversion" for which trover may be maintained. *Burns v. Cline* (Ala. App.), 77 So. 429.

An attempted assignment by a bailee contrary to the terms of a bailment is a conversion. *Gwin v. Emerald Co.* (Ala.), 78 So. 758.

§ 12½. Wrongful Delivery by Bailee.

See post, "Rights and Liabilities as to

Third Persons," § 15; "Actions by or against Third Persons," § 28.

Delivery to Wrong Bailor as Conversion.—When a bailee wrongfully delivers property of one bailor to another bailor, who mistakenly but in good faith receives it as his own and converts it to his own use, the bailee is himself guilty of wrongful conversion and liable to the true owner, and he can not maintain that the reception of the chattel by one other than the true owner was tortious. *Pope & Co. v. Union Warehouse Co.*, 195 Ala. 309, 70 So. 159.

§ 13. Compensation and Lien of Bailee.

§ 13 (1) Right to Compensation.

See post, "Pleading," § 23.

Storage Charges.—Where the owner of a boom notifies a company, which has stored cross-ties therein under a contract entitling it to do so free of charge for an indefinite time, that a certain charge will be made for storage of all ties left in the boom or thereafter placed therein, the act of the company in permitting its ties to remain in the boom for more than a reasonable time thereafter obligates it to pay the storage charge specified in the notice. *American Tie, etc., Co. v. Naylor Lumber Co.*, 190 Ala. 319, 67 So. 246.

Where the buyer agreed that the seller could store ties in a boom free of charge for an indefinite time, the seller was entitled to a reasonable time within which to remove its ties, after notice of termination of the contract, before it could be charged for storage. *American Tie, etc., Co. v. Naylor Lumber Co.*, 190 Ala. 319, 67 So. 246.

§ 13 (2) Lien in General.

A conditional bill of sale by seller prevents attaching of a materialman's lien in his favor during time title is retained under the conditional bill of sale. *Alexander v. Mobile Auto Co.* (Ala.), 76 So. 944.

§ 13 (3) Possession of Property.

There can be no common-law blacksmith's lien without continuous possession of the property repaired. *Alexander v. Mobile Auto Co.* (Ala.), 76 So. 944.

§ 13 (4) Waiver or Loss of Lien.

Common-law right to retain property until lien is discharged is waived or lost by release of property without enforcement, and the artisan or machinist can not thereafter retake property and hold it under common-law right. *Alexander v. Mobile Auto Co.* (Ala.), 76 So. 944.

§ 15. Rights and Liabilities as to Third Persons.

See post, "Actions by or against Third Persons," § 28.

A bailee can recover from one to whom he wrongfully delivers bailed goods when such person secured the chattel by deception or fraud upon the bailee. *Pope & Co. v. Union Warehouse Co.*, 195 Ala. 309, 70 So. 159.

§ 18. Actions between Bailor and Bailee.

§ 19. — Nature and Form.

Loss of Goods from Negligence after Sale.—*Cook, etc., Contracting Co. v. Bell*, 177 Ala. 618, 59 So. 273. See the title BAILMENT, § 25, vol. 2, p. 179.

§ 21. — Defenses.

Payment to Bailee as Estoppel.—The owner of an automobile which was damaged while in the custody of a mechanic who was repairing it is not estopped by making payment for the repairs from setting up a cross-demand for the damages. *Thomas v. Hackney*, 192 Ala. 27, 68 So. 296.

§ 22. — Time to Sue, and Limitations.

Limitation does not begin to run against the bailor, and in favor of the bailee until the bailee does some act in repudiation of the bailment with knowledge or sufficient fact to put the bailor on notice. *Plummer v. Hardison*, 6 Ala. App. 525, 60 So. 502.

§ 23. — Pleading.

In an action for storage charges, counts of the complaint, alleging merely that plaintiff had agreed for defendant to store cross-ties in plaintiff's boom for an indefinite time, and had terminated this contract by a notice stating that a certain storage charge would be made thereafter, and alleging that defendant, notwithstanding such notice, continued to store ties in the boom, were demurra-

ble. for failure to allege that defendant permitted the ties to remain in the boom for more than a reasonable time after the notice was given. *American Tie, etc., Co. v. Naylor Lumber Co.*, 190 Ala. 319, 67 So. 246.

§ 24. — Evidence.

Burden Showing Misuse of Article. — In an action for conversion against a bailee for misusing an article, plaintiff has burden of proof. *Burns v. Cline* (Ala. App.), 77 So. 429.

Burden of Showing Possibility of Saving Property. — Where a mutual benefit bailee, when sued for loss or injury to the goods, shows that the property was destroyed or injured as the result of an accidental fire not due to his own negligence, the burden shifts to the bailor to show that the property could nevertheless have been saved but for the want of proper care on the part of the bailee in failing to take proper measures for its protection against loss in case of fire. *Bricken v. Sikes*, 14 Ala. App. 187, 68 So. 801.

Burden of Showing Freedom from Negligence. — Where a gratuitous bailee of an automobile merely showed that the car was injured in a collision, the owner is entitled to damages; since the burden was on the bailee to show that he exercised the slight care required of him. *Thomas v. Hackney*, 192 Ala. 27, 68 So. 296.

Where a bailor sues a bailee for hire for loss or injury to the goods, and proves the bailment and the injury, or a failure to redeliver the goods on demand, or redelivery in a damaged condition, the burden of proof shifts to the

bailee to prove his freedom from negligence, which he may satisfy by showing that the loss was caused by an accidental fire not due to his own negligence. *Bricken v. Sikes*, 14 Ala. App. 187, 68 So. 801.

§ 26. — Trial.

Questions for Jury—Care Required of Bailee. — What constitutes the ordinary care for the preservation and protection of the goods in case of fire that will relieve a mutual benefit bailee from liability for their loss in an accidental fire not due to his own negligence is for the jury, when there is substantial evidence on the issue. *Bricken v. Sikes*, 14 Ala. App. 187, 68 So. 801.

Same—Reasonable Time for Gratuitous Storage after Notice. — In an action on a contract obligating defendant to pay storage charges on cross-ties permitted to remain in a boom for more than a reasonable time after notice that a charge would be made for storage, the question of reasonable time is for the jury. *American Tie, etc., Co. v. Naylor Lumber Co.*, 190 Ala. 319, 67 So. 246.

§ 28. Actions by or against Third Persons.

See ante, "Rights and Liabilities as to Third Persons," § 15.

Trover Where Delivery to Wrong Bailor. — Where a bailee mistakenly, and wrongfully delivers property of one bailor to another bailor, who mistakenly receives and converts it as his own, the conversion, though wrongful as to the true owner, is not wrongful as to the bailee, who can not maintain trover therefor. *Pope & Co. v. Union Warehouse Co.*, 195 Ala. 309, 70 So. 159.

Ballots.

See post, ELECTIONS.

BANKRUPTCY.

II. Petition, Adjudication, Warrant, and Custody of Property.

(C) Involuntary Proceedings.

§ 13. Acts of Bankruptcy.

§ 14½. — Assignment for Benefit of Creditors, Trust, or Receivership.

§ 19. Adjudication.

III. Assignment, Administration, and Distribution of Bankrupt's Estate.

(A) Assignment, and Title, Rights, and Remedies of Trustee in General.

§ 24. Property and Rights Vesting in Trustee.

§ 28. — Property Fraudulently Conveyed.

§ 35. Rights as to Pending Actions.

(B) Preferences and Transfers by Bankrupt, and Attachments and Other Liens.

§ 36. Preferences Voidable.

§ 39. — Time of Giving Preference.

§ 41½. Rights of Trustees as to Preferences.

§ 44. Fraudulent Transfers.

§ 44½. — Time of Making.

§ 46. Rights of Trustee as to Transfers.

§ 47. Liens in General.

§ 48. — Validity as against Trustee.

§ 51. Liens Acquired by Legal Proceedings Prior to Bankruptcy.

§ 52. — In General.

(B½) Administration of Estate.

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(C) Actions by or against Trustee.

§ 68. Actions by Trustee.

§ 70. — Relating to Property or Proceeds Thereof.

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§ 81. Evidence.

§ 81 (1) Presumptions and Burden of Proof.

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(D) Claims against and Distribution of Estate.

§ 86. Allowance or Disallowance of Claims.

(E) Accounting and Discharge of Trustee.

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V. Rights, Remedies, and Discharge of Bankrupt.

- § 91. Actions against Bankrupt.
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- § 93. Exemptions.
- § 95. — Property Exempt.
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- § 107. Debts and Liabilities Discharged.
- § 109. — Debts Not Duly Scheduled.
- § 110. — Debts Created by Fraud, Embezzlement, Misappropriation, or Defalcation in Official or Fiduciary Capacity.
- § 111. Effect of Discharge as to Codebtors, Guarantors, and Sureties.
- § 113. — Sureties.
- § 114. Effect of Discharge as to Securities and Liens.
 - § 114 (½) In General.
 - § 114 (2) Mortgages.
- § 116. Pleading Discharge.
- § 118. Reversion of Property or Surplus to Debtor on Dismissal, Composition, or Discharge.

Cross References.

See the title BANKRUPTCY, vol. 2, p. 181, and references there given.

In addition, see ante, ASSIGNMENTS FOR BENEFIT OF CREDITORS; post, CONSPIRACY; CONSTITUTIONAL LAW; COURTS; INSOLVENCY.

As to effect of decision of federal court as to effect of discharge in bankruptcy, see post, COURTS.

II. PETITION, ADJUDICATION, WARRANT, AND CUSTODY OF PROPERTY.

(C) INVOLUNTARY PROCEEDINGS.

§ 13. Acts of Bankruptcy.

§ 14½. — Assignment for Benefit of Creditors, Trust, or Receivership.

A general assignment, though not such in terms, but in legal effect under Code 1907, § 4295, is an act of bankruptcy under federal Bankruptcy Act, insuring an adjudication of bankruptcy and distribution of debtor's assets by bankruptcy court. *Anders Bros. v. Latimer* (Ala.), 73 So. 925.

§ 19. Adjudication.

The adjudication of bankruptcy is a determination of insolvency and the existence of creditors, not necessarily creditors antecedent to a conveyance, but at least subsequent thereto. The debts mature under the bankruptcy act imme-

diately upon adjudication. *Cartwright v. West*, 185 Ala. 41, 64 So. 293.

III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF BANKRUPT'S ESTATE.

(A) ASSIGNMENT, AND TITLE, RIGHTS, AND REMEDIES OF TRUSTEE IN GENERAL.

§ 24. Property and Rights Vesting in Trustee.

§ 28. — Property Fraudulently Conveyed.

Rule under Bankruptcy Act, § 70, subd. 4, vesting in trustee in bankruptcy title to property transferred in fraud of creditors, applies to all property transferred by the bankrupt at any time, in fraud of creditors existing at the time of the bankruptcy. *Barrett v. Kaigler* (Ala.), 76 So. 320.

§ 35. Rights as to Pending Actions.

The right of a trustee in bankruptcy

to intervene in a cause pending in a state court must be determined in and under the practice and rules of the state court. *Drew v. Fort Payne Co.*, 186 Ala. 285, 65 So. 71.

A trustee in bankruptcy, who assumes to proceed as a party in a cause in a state court before the court has either affirmatively or tacitly allowed him to intervene acts prematurely, and papers filed by him in the cause may be on motion stricken out. *Drew v. Fort Payne Co.*, 186 Ala. 285, 65 So. 71.

(B) PREFERENCES AND TRANSFERS BY BANKRUPT, AND ATTACHMENTS AND OTHER LIENS.

§ 38. Preferences Voidable.

§ 39. — Time of Giving Preference.

Bankr. Act, § 60, as to preferences and time of recording transfers, was designed to extend the time within which a conveyance or assignment or preference could be assailed and the property conveyed or assigned subjected as assets for the benefit of all the creditors alike, but it did not make void any mortgage, conveyance, assignment, or preference which would not otherwise have been voidable had it been made within the four months of the filing of a petition in bankruptcy, but had the effect of making the date from which the four months run start from the recording or filing for registration, rather than from the date of its execution. *Gray, etc., Hdw. Co. v. Guthrie (Ala.)*, 75 So. 318.

Mortgage Held Valid—Failure to File.—Under Bankr. Act, § 60, as to preference and time of recording preferential transfers, if a mortgage given by one later becoming bankrupt is valid when made and would not create a preference prohibited by the Bankruptcy Act had bankruptcy petition been filed within four months from its execution, the mere failure to file for record will not destroy its validity or the lien created thereby. *Gray, etc., Hdw. Co. v. Guthrie (Ala.)*, 75 So. 318.

Mortgage Held Preferential.—Where a chattel mortgage upon a stock of lumber of one who became bankrupt was not filed for record four months before

the petition in bankruptcy was filed, and by agreement between the parties was withheld from record for the interest and protection of the mortgagor, the mortgage was void because within the preferential class prohibited by Bankr. Act July 1, 1898, c. 541, § 60, 30 Stat. 562 (U. S. Comp. St. 1916, § 9644), which provides that where a preference consists in a transfer, the period of four months shall not expire until four months after the date of the recording or registering of the transfer. *Gray, etc., Hdw. Co. v. Guthrie (Ala.)*, 75 So. 318.

§ 41½. Rights of Trustees as to Preferences.

The trustee in bankruptcy of an insolvent corporation may recover from former shareholders moneys received by them upon the sale of their shares to the corporation with knowledge of its insolvency for the trustee as such stands in the place of the creditors. *Sherrill v. Hutson*, 187 Ala. 189, 65 So. 538.

§ 44. Fraudulent Transfers.

§ 44½. — Time of Making.

A deed of a lot and store dated March 31, 1905, and not recorded until December 28, 1906, was fraudulent and void as to all creditors of the grantor, whose petition for adjudication as a bankrupt was filed in April, 1906. *Cartwright v. West*, 185 Ala. 41, 64 So. 293.

§ 46. Rights of Trustee as to Transfers.

Setting Aside.—Trustee in bankruptcy of corporation was entitled to maintain bill to set aside transfers of property by corporation to one of its directors as in fraud of its creditors. *Henderson v. Garner (Ala.)*, 75 So. 387.

Under Bankruptcy Act July 1, 1898, c. 541, § 70, subd. 4, 30 Stat. 565 (U. S. Comp. St. 1916, § 9654), vesting in the trustee in bankruptcy the title which the bankrupt had in property transferred by him in fraud of creditors, the trustee takes the title and also the right of action of the creditors, and he may assail the fraudulent conveyance to the same extent as the creditor, as though the debtor had not been declared bankrupt. *Barrett v. Kaigler (Ala.)*, 76 So. 320.

§ 47. Liens in General.**§ 48. — Validity as against Trustee.**

Code 1907, § 3481, subd. 3, relating to mortgage of corporation's property, was enacted for the benefit of stockholders, and can not be raised by the mortgagor corporation's trustee in bankruptcy. *Stuart v. Holt* (Ala.), 73 So. 390.

§ 51. Liens Acquired by Legal Proceedings Prior to Bankruptcy.**§ 52. — In General.**

Attachment.—Where an attachment is sued out against a defendant within four months of his bankruptcy, and is dissolved, a garnishment in aid of such attachment falls with it. *Hobson-Starnes Coal Co. v. Alabama Coal, etc., Co.*, 189 Ala. 481, 66 So. 622.

(B½) ADMINISTRATION OF ESTATE.**§ 63. Collection of Assets.**

Under Bankruptcy Act, § 70, subd. 4, it is duty of trustee to reduce to possession all property of bankrupt subject to the payment of debts, for distribution among the unsecured class. *Barrett v. Kaigler* (Ala.), 76 So. 320.

§ 63½. Redemption of Property.

Although a trustee in bankruptcy is an assignee as contemplated by the redemption statute, right to redeem lands from a mortgage sale does not extend under the statute to a grantee or assignee of trustee in bankruptcy. *Wittmeier v. Cranford* (Ala.), 73 So. 981.

§ 64. Sale of Property.**§ 65. — In General.**

Incumbered Property.—The right of a mortgagor to redeem under Code 1907, § 5746, from foreclosure within two years, not being subject to sale under execution, does not pass to a purchaser from the mortgagor's trustee in bankruptcy. *Leith v. Galloway Coal Co.*, 189 Ala. 204, 66 So. 149.

§ 67. — Rights of Purchasers.

After 43 years from the adjudication in bankruptcy, and 39 years from bankrupt's discharge, on his verified petition that he had surrendered all his property, it may be presumed that land of bank-

rupt was assigned to his assignee, and that there was an order of sale, though there is no proof of actual possession of the land since institution of the bankruptcy proceedings, and no direct evidence of the assignment or order, aside from the recital thereof in the assignee's deed, purporting to have followed from a sale by him, in the course of the bankruptcy proceedings, and the possible inference of approval by the court of the sale, from a docket entry showing that the register and assignee certified fees paid, when, if the exemption claimed be excepted, there was no source other than the sale from which the sum so paid as fees could have been derived. *Lacey v. Southern Mineral Land Co.*, 180 Ala. 57, 60 So. 283.

(C) ACTIONS BY OR AGAINST TRUSTEE.**§ 68. Actions by Trustee.****§ 70. — Relating to Property or Proceeds Thereof.**

Bill on behalf of creditors by trustee in bankruptcy to enforce constructive trust in real estate held by debtor's wife may be maintained though there is only one creditor entitled to benefit of suit. *Duncan v. Lum* (Ala.), 77 So. 718.

Statutory Provisions.—*Sparks v. Weatherly*, 176 Ala. 324, 58 So. 280. See the title BANKRUPTCY, § 70, vol. 2, p. 199.

§ 71. Leave to Sue.

Under Bankr. Act July 1, 1898, § 47, cl. 2, 30 Stat. 557 (U. S. Comp. St., 1913, § 9631) requiring trustees to collect and reduce to money the property of the estate for which they are trustees, the trustee in bankruptcy of insolvent corporation could bring bill to recover unpaid stock subscriptions without specific authority from bankruptcy court to file bill in state court. *Porter v. Hughes* (Ala.), 73 So. 400.

§ 73. Defenses.

Set-Off—Statutory Provisions.—Under Code 1907, §§ 5858, 5859, providing that mutual debts may be set off one against the other, etc., a defendant in an action by a trustee in bankruptcy of a corporation for the value of stock alleged to

have been transferred to defendant and paid for out of the funds of the corporation, and for a loss sustained by the corporation by the purchase of a business, may by cross-bill set off a claim for salary for services rendered for the corporation, and for money advanced to it for the payment of debts due from it. *West v. Cowan*, 189 Ala. 138, 66 So. 816, cited in note in *Ann. Cas.* 1916C, 975.

§ 74. Jurisdiction.

§ 76. — State Courts.

In a suit in the state court by a trustee in bankruptcy to set aside voidable conveyances by the bankrupt, it is immaterial as to how the fund is to be administered, or who is to get the benefit of it, and hence the validity of all other claims can not be litigated. *Cartwright v. West*, 185 Ala. 41, 64 So. 293.

A bill in a state court by a trustee to set aside a voluntary conveyance by the bankrupt need only show one existing creditor who could have avoided the conveyance, and the court will set it aside in favor of all existing creditors who file and prove their claims in the bankruptcy court. *Cartwright v. West*, 185 Ala. 41, 64 So. 293.

§ 78½. Parties.

A bill by the trustee in bankruptcy of an insolvent corporation to recover from a former shareholder money received from the corporation upon purchase of his shares is not objectionable because joining other stockholders charged with similar transactions. *Sherrill v. Hutson*, 187 Ala. 189, 65 So. 538.

§ 80. Pleading.

Trustee's Action to Set Aside Conveyances.—A bill alleging that stock of a corporation was mainly paid for by stock-worn merchandise at inflated values turned over to it by the stockholders in payment of their stock, and that only a small portion of the capital stock issued was paid for in cash, did not indicate that the bill was filed for the purpose of collecting any unpaid subscription, but, taken with the allegations of the insolvency of the corporation, the bill was plainly for the purpose of setting aside transfers of property both real and personal by the corporation to the defend-

ant, one of its directors, as in fraud of rights of creditors. *Henderson v. Garner* (Ala.), 75 So. 387.

Averment of Existing Creditor or Fraudulent Intent.—A bill by a trustee in bankruptcy, attacking a conveyance as voluntary, must show that there were existing creditors, or charge a fraudulent intent. *Cartwright v. West*, 185 Ala. 41, 64 So. 293.

Existence of Creditors and That Demands Are Due.—In a bill by a trustee in bankruptcy to set aside a bankrupt's conveyance as fraudulent as to subsequent as well as existing creditors, the averment of bankruptcy is sufficient to charge the existence of creditors, and that their demands are due. *Cartwright v. West*, 185 Ala. 41, 64 So. 293.

A bill filed by a trustee to set aside conveyance by the bankrupt need not aver that the demands of creditors are due, since the debts mature under the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) immediately upon adjudication. *Cartwright v. West*, 185 Ala. 41, 64 So. 293.

Specifying Creditors and Respective Debts.—A bill by a trustee in bankruptcy, charging such fraudulent intent as would avoid the bankrupt's conveyances as against subsequent creditors, need not name all of such creditors, or specify or describe their respective debts. *Cartwright v. West*, 185 Ala. 41, 64 So. 293.

Same—Unsecured Creditors.—In a bill by a trustee in bankruptcy to reduce to possession property fraudulently transferred, there is no necessity to aver the names of the several simple contract creditors represented by the trustee, or the amount due each, or to aver which creditors were unsecured. *Barrett v. Kaigler* (Ala.), 76 So. 320.

§ 81. Evidence.

§ 81 (1) Presumptions and Burden of Proof.

Bad Faith.—In a suit by a trustee in bankruptcy to set aside a conveyance by the bankrupt to his wife as in fraud of subsequent creditors, the trustee had the burden of proving the bad faith of the

parties. *McCrory v. Donald*, 192 Ala. 312, 68 So. 306.

Consideration.—In a suit by a trustee in bankruptcy to set aside the bankrupt's conveyance made to his wife after insolvency, the burden of proof was on the wife to show payment of a valuable consideration. *McCrory v. Donald*, 192 Ala. 312, 68 So. 306.

§ 81 (3) Weight and Sufficiency.

In a suit by a trustee in bankruptcy to set aside conveyances of the bankrupt to his wife as in fraud of subsequent creditors, evidence held insufficient to show fraudulent intent and bad faith in the transaction. *McCrory v. Donald*, 192 Ala. 312, 68 So. 306.

In a suit by a trustee in bankruptcy, evidence held insufficient to sustain a decree that a conveyance three years before the grantor's bankruptcy was fraudulent as to his creditors. *Cartwright v. West*, 185 Ala. 41, 64 So. 293.

(D) CLAIMS AGAINST AND DISTRIBUTION OF ESTATE.

§ 86. Allowance or Disallowance of Claims.

Effect of Decree Allowing Claim.—*Elmore, etc., Co. v. Henderson-Mizell Mercantile Co.*, 179 Ala. 548, 60 So. 820. See the title BANKRUPTCY, § 86, vol. 2, p. 204.

(E) ACCOUNTING AND DISCHARGE OF TRUSTEE.

§ 86½. Close of Estate and Reopening of Proceedings.

Reopening of Estate—Grounds.—Under Bankruptcy Act July 1, 1898, c. 541, § 2, subd. 8, 30 Stat. 545 (U. S. Comp. St. 1913, § 9586), authorizing the court of bankruptcy to reopen estates whenever it appears that they were closed before being fully administered, the court should reopen an estate on timely application whenever it shall be alleged and shown that the estate was closed before full administration. *Duncan v. Watson* (Ala.), 73 So. 448.

Petition to Reopen—Limitation of Actions.—An application made under Bankruptcy Act, § 2, subd. 8 (Comp. St. 1913, § 9586), to reopen a bankrupt's estate was made in time, though more than two

years had elapsed since the estate was closed, and notwithstanding § 11d (§ 9595), providing that "suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after an estate has been closed," where the petition to reopen was filed immediately after the recording of the alleged fraudulent conveyances from the bankrupt to his wife and to his attorney, and the bankruptcy proceedings were had in a part of the state distant from the land conveyed. *Duncan v. Watson* (Ala.), 73 So. 448.

V. RIGHTS, REMEDIES AND DISCHARGE OF BANKRUPT.

§ 91. Actions against Bankrupt.

§ 91 (3) Injunction and Stay.

In suit, under Code 1907, § 4295, to have mortgage declared general assignment, where respondents asked abatement on account of pendency against them of bankruptcy proceedings, the proceedings should have been stayed, as directed by federal Bankruptcy Act. *Anders Bros. v. Latimer* (Ala.), 73 So. 925.

Concurrent Jurisdiction—Effect on Suit in State Court.—Under Bankr. Act, July 1, 1898, c. 541, § 11, subsec. "a," 30 Stat. 549 (U. S. Comp. St. 1913, § 9595), providing that certain actions and suits be stayed until after the adjudication or dismissal of the petition, etc., where involuntary bankruptcy proceedings had been instituted against respondents, and were pending against them when complainants' bill against them, under Code 1907, § 4295, to have a mortgage declared to be a general assignment, was filed, on filing of respondents' special plea, praying a stay on account of the pendency of bankruptcy proceedings, the suit should have been stayed until the bankruptcy proceedings were determined, or until the bankruptcy court, after making the trustee a party to the suit, directed him to proceed. *Anders Bros. v. Latimer* (Ala.), 73 So. 925.

§ 91 (4) Vacation of Stay.

If bankruptcy proceedings against respondents, in suit, under Code 1907, § 4295, to have their mortgage declared a general assignment, have been dismissed, suit may proceed to final judgment. *Anders Bros. v. Latimer* (Ala.), 73 So. 925.

§ 93. Exemptions.**§ 95. — Property Exempt.**

Life Insurance.—*Young v. Thomason*, 179 Ala. 454, 60 So. 272, cited in note in Ann. Cas. 1915B, 1290. See the title BANKRUPTCY, § 95 (2), vol. 2, p. 207.

§ 105. Conclusiveness and Effect of Discharge in General.

Neither bankruptcy nor discharge of bankrupt necessarily pays or extinguishes his debt, even though it is a provable debt, but merely destroys remedy for enforcing it and the debt, though provable, may be revived by a promise to pay after discharge. *Butler Cotton Oil Co. v. Collins (Ala.)*, 75 So. 975.

§ 107. Debts and Liabilities Discharged.**§ 109. — Debts Not Duly Scheduled.**

If creditor had knowledge or notice, however acquired, of proceedings in bankruptcy, against his debtor in time to prove his claim, his claim, whether scheduled or not, was barred by debtor's discharge. *Davis v. Findley (Ala.)*, 78 So. 869.

§ 110. — Debts Created by Fraud, Embezzlement, Misappropriation, or Defalcation in Official or Fiduciary Capacity.

Debts Created in Official or Fiduciary Capacity.—*Williams v. Virginia-Carolina Chemical Co.*, 182 Ala. 413, 62 So. 755. See the title BANKRUPTCY, § 110 (2), vol. 1, p. 213.

Statute—"Fiduciary Capacity."—Under Bankruptcy Act July 1, 1898, c. 541, § 17, 30 Stat. 550 (U. S. Comp. St. 1913, § 9601), providing that a discharge in bankruptcy relieves the bankrupt from all provable debts, except where created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer, or in any fiduciary capacity, where plaintiff consigned goods to defendants for sale on commission, and defendants converted the goods or their proceeds to their own use, defendants' discharge in bankruptcy barred plaintiff's action, since a commission merchant selling for others is not indebted in a fiduciary capacity within the bankruptcy acts by withholding the money received for property sold, and a debt founded on contract is provable in

bankruptcy, though the creditor may have elected to sue in trover as for a fraudulent conversion. *Butler-Kyser Mfg. Co. v. Mitchell & Co.*, 195 Ala. 240, 70 So. 665.

§ 111. Effect of Discharge as to Codebtors, Guarantors, and Sureties.**§ 113. — Sureties.**

Sureties on Appeal Bond.—Where bankrupts voluntarily submitted to the supreme court a case on their appeal from an adverse judgment rendered before their bankruptcy without calling the court's attention thereto, the remedy of a surety on the supersedeas bond must be sought in the bankruptcy court. *Vandiver v. American Can Co.*, 190 Ala. 352, 67 So. 299.

Where judgment has been obtained against the principal upon an appeal bond, his subsequent discharge in bankruptcy relieves him, but not the sureties on the bond. *James v. Kitzinger & Co.*, 13 Ala. App. 448, 68 So. 582.

The sureties on an appeal bond can be proceeded against, though judgment against principal was barred by his discharge in bankruptcy, unless discharge was successfully pleaded in suit between obligee and the principal in which bond was given. *Chewning v. Knight (Ala. App.)*, 77 So. 969.

Where a case is tried on appeal and the principal on the appeal bond prevents judgment from being obtained against him by pleading a discharge in bankruptcy, the sureties are released from the bond. *James v. Kitzinger & Co.*, 13 Ala. App. 448, 68 So. 582.

§ 114. Effect of Discharge as to Securities and Liens.**§ 114 (½) In General.**

All liens and mortgages are not annulled or avoided by bankruptcy or discharge, but only those coming within Bankruptcy Act, § 17. *Butler Cotton Oil Co. v. Collins (Ala.)*, 75 So. 975.

Though courts of equity enforce liens after personal action to enforce debt is barred, they will not enforce those which come into existence after such actions are barred by bankrupt laws. *Butler Cotton Oil Co. v. Collins (Ala.)*, 75 So. 975.

§ 114 (2) Mortgages.

Where the only debt secured by a chattel mortgage on after-grown crops was a provable debt, the mortgagor, who became bankrupt, was personally discharged therefrom, and the lien of the mortgage did not continue to exist so as to attach to after-grown crops with the right of enforcement against them, since there was no enforceable debt or demand to support the mortgage lien when the crops came into existence, and the law will not allow a lien to attach to property acquired by a bankrupt after his discharge as security for a debt of which he was discharged. *Butler Cotton Oil Co. v. Collins* (Ala.), 75 So. 975.

If chattel mortgagee had acquired lien on after-grown crops covered by mortgage, and lien was in existence when mortgagor was discharged a bankrupt, it was not destroyed or extinguished, though no personal action could be maintained for the debt secured by the lien. *Butler Cotton Oil Co. v. Collins* (Ala.), 75 So. 975.

Where debt secured by chattel mortgage on crops to be grown was provable debt under Bankruptcy Act, § 17, bankrupt was personally discharged therefrom. *Butler Cotton Oil Co. v. Collins* (Ala.), 75 So. 975.

§ 116. Pleading Discharge.

In action against surety on appeal bond, who set up discharge of principal in bankruptcy, demurrer to such plea because it does not appear that plaintiff was ever party to bankruptcy proceed-

ings or presented his claim therein is not well taken, since such matter was properly the subject for special plea. *Chewning v. Knight* (Ala. App.), 77 So. 969.

In action against surety on appeal bond, who set up discharge of the principal in bankruptcy, demurrer to a plea of the discharge, failing to point out the defect that such plea failed specifically to allege that the discharge had been successfully pleaded in the principal suit was insufficient in view of Code 1907, § 5340, providing that no objection may be allowed which is not distinctly stated in the demurrer. *Chewning v. Knight* (Ala. App.), 77 So. 969.

§ 118. Reversion of Property or Surplus to Debtor on Dismissal, Composition, or Discharge.

Debtor's fund in bank, not scheduled as asset in his bankruptcy, nevertheless passed to him on his discharge. *Davis v. Findley* (Ala.), 78 So. 869.

Where after bankrupt had been discharged attorney recovered for him in litigated suit a sum of money, attorney had a lien for his services, and could retain an admitted reasonable fee which in absence of fraud could not be recovered on reopening of bankrupt's estate. *Watson v. Motley* (Ala.), 75 So. 147.

After bankrupt has been discharged he may sue for and recover property not administered, and attorney who prosecutes such suit and pays over to bankrupt money received is not in absence of fraud, liable for amount so paid on estate being reopened. *Watson v. Motley* (Ala.), 75 So. 147.

BANKS AND BANKING.

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Cross References.

See the title BANKS AND BANKING, vol. 2, p. 222, and references there given.

In addition, see ante, ASSIGNMENTS FOR BENEFIT OF CREDITORS; BILLS, NOTES AND CHECKS; EMBEZZLEMENT; USURY.

II. BANKING CORPORATIONS AND ASSOCIATIONS.

(B) CAPITAL, STOCK AND DIVIDENDS.

§ 10. Subscription to and Issue of Stock.

§ 10 (1) In General.

Contract of Promoters.—Where a bank availed itself of a subscription to its stock made before it was formed, and received the price paid, and issued the stock to the subscriber, thereafter treating him as a shareholder, the subscriber

and also the bank were bound by the subscription contract as if the bank had made the original contract of subscription when in existence by legally authorized agents. *Stone v. Walker (Ala.)*, 77 So. 554.

§ 10 (2) Rescission of Subscription in General.

Subscription Induced by Fraud or Misrepresentation.—Where the promoters of a bank induced plaintiff to subscribe to its stock, prior to organization, by false representations, and the bank issued the

stock to plaintiff, and recognized him as a shareholder, thus adopting the subscription contract, it adopted the burdens as well as the benefits of the contract, and was liable to suit for rescission for fraud. *Stone v. Walker* (Ala.), 77 So. 554.

Where the promoters of a bank formed to take over the business of an insolvent bank, to induce a stockholder in such insolvent bank to take stock in the new bank, misrepresented the assets which would be acquired from the old bank, the liabilities assumed, and the incumbrances upon the property acquired, the fraudulent representations were such as to authorize the rescission of the subscription contract. *Stone v. Walker* (Ala.), 77 So. 554.

Where the promoters of a bank were guilty of misrepresentations in inducing plaintiff to subscribe to the bank's stock before organization, plaintiff, not guilty of laches, guilty of no negligence in discovering the fraud, and who had not ratified the contract of subscription or waived the fraud, could maintain his bill for rescission of the subscription contract against the bank and the state bank superintendent in whose hands its affairs were for liquidation. *Stone v. Walker* (Ala.), 77 So. 554.

Where Bank Has No Funds to Repay Subscribers. — That bank whose stockholder is seeking rescission of subscription for fraud of promoters has no funds availing to repay all or part of money paid by stockholder should not prevent stockholder's obtaining relief. *Stone v. Walker* (Ala.), 77 So. 554.

Stockholder Becomes Creditor. — If a contract of subscription to bank stock is rescinded for fraud of bank's promoters at suit of stockholder, he becomes a creditor, but his rights may or may not be secondary to others. *Stone v. Walker* (Ala.), 77 So. 554.

§ 10 (3) Actions for Rescission of Subscription.

As to right of action, see ante, "Rescission of Subscription in General," § 10 (2).

Pleading—Clear, Definite and Certain. —Averments of a bill against a corporation and some of its stockholders to

rescind a purchase of stock in defendant corporation for fraud must be clear, definite and certain. *Drennen v. Cooper* (Ala.), 76 So. 94.

Facts and Not Conclusions. —Averments of a bill against a corporation and some of its stockholders to rescind a purchase of stock in defendant corporation for fraud must state facts to show fraud, and not mere conclusions. *Drennen v. Cooper* (Ala.), 76 So. 94.

Bill Held Demurrable. —A bill against a banking corporation and some of its stockholders to rescind a purchase of stock for fraud is demurrable, where it shows that neither the corporation nor one who made fraudulent representations received the benefit of the sale, and that those who received it did not make representations, and does not clearly allege whether the one who made fraudulent representations was agent of those who received the consideration, of the bank, of the purchaser, or was acting for himself. *Drennen v. Cooper* (Ala.), 76 So. 94.

Negating Prior Rights of Creditors. —In suit by a stockholder in bank against bank and state bank superintendent to rescind subscription for fraud of bank's promoters, it is not necessary bill negative prior rights of creditors; such matter being peculiarly within the knowledge of the bank and the superintendent. *Stone v. Walker* (Ala.), 77 So. 554.

Averment That Bank in Failing Condition. —Averment of bill of stockholder in bank against bank and state bank superintendent for rescission of stockholder's subscription to stock of bank that bank was in failing condition, and was being liquidated by state superintendent, was necessary only to give bill equity as against officer, not as against bank. *Stone v. Walker* (Ala.), 77 So. 554.

(C) STOCKHOLDERS.

§ 13. Liability for Debts and Acts of Bank.

§ 14. — Nature and Extent.

Liability on Insolvency. —*Drennen v. Jenkins*, 180 Ala. 261, 60 So. 856. See the title BANKS AND BANKING, § 14, vol. 2, p. 228.

§ 15. — Actions and Proceedings to Enforce.

Creditor's Bill.—Drennen *v.* Jenkins, 180 Ala. 261, 60 So. 856. See the title BANKS AND BANKING, § 15, vol. 2, p. 228.

(E) INSOLVENCY AND DISSOLUTION.

§ 21½. In General.

Taking over by State Bank Superintendent.—Bank need not be insolvent before it can be taken over by state bank superintendent for liquidation. Stone *v.* Walker (Ala.), 77 So. 554.

Same—Priority of Right of Administration.—Under the provisions of Acts 1911, p. 50, creating a banking department to regulate, examine, and supervise banks and banking, the superintendent of banks, pursuant to the order of the banking board, has a priority of right in the administration of the assets of a bank drawn into liquidation, and when asserted by him his rights are superior to those of an assignee of the bank, notwithstanding the assignee has by his bill sought the administration of a trust in the chancery court. McDavid *v.* Bank, 193 Ala. 341, 69 So. 452.

Same—Validity of Statute.—Acts 1911, p. 88, § 49, giving the superintendent of banks and the banking board exclusive jurisdiction to liquidate a bank and a priority of the right of administration over an assignee selected by the bank itself, is valid. McDavid *v.* Bank, 193 Ala. 341, 69 So. 452, cited in note in L. R. A. 1915E, 675.

§ 26. Assets and Receivers on Insolvency.

§ 26 (1) Appointment and Removal.

Superintendent of Banks—Constitutionality of Statute.—Montgomery Bank, etc., Co. *v.* Walker, 181 Ala. 368, 61 So. 951, cited in notes in L. R. A. 1915E, 675, 676. See the title BANKS AND BANKING, § 26 (1), vol. 2, p. 232.

Statutory Receivership.—Oates *v.* Smith, 176 Ala. 39, 57 So. 438. See the title BANKS AND BANKING, § 26 (1), vol. 2, p. 232.

§ 26 (2) Operation and Effect.

Effect of Appointment of Receiver.—Oates *v.* Smith, 176 Ala. 39, 57 So. 438.

See the title BANKS AND BANKING, § 26 (2), vol. 2, p. 232.

§ 26 (3) Powers and Duties of Receivers in General.

State superintendent of banks, as receiver having acted in the matter of compromising a debt to the bank, and his action having been approved by the court and parties in interest, could not set up the invalidity of his acts. Walker *v.* Mutual Alliance Trust Co., 196 Ala. 154, 71 So. 697.

Power of Suit.—Montgomery Bank, etc., Co. *v.* Walker, 181 Ala. 368, 61 So. 951. See the title BANKS AND BANKING, § 26 (3), vol. 2, p. 233.

§ 26 (4) Collection and Protection of Assets.

Assets as Trust Fund—Authority of Officers.—Montgomery Bank, etc., Co. *v.* Walker, 181 Ala. 368, 61 So. 951. See the title BANKS AND BANKING, § 26 (4), vol. 2, p. 233.

Administration by Superintendent of Banks—Right of Creditor.—Where a bank, unable to meet its engagements promptly, if not actually insolvent, was taken charge of by the chancery court of the county, by and through the agency of the state superintendent of banks vested by statute with powers and duties to such end, and the superintendent, as agent or quasi trustee or receiver, settled an indebtedness to the bank by accepting the debtor's conveyance of a lot of land, and such settlement was ratified by the court, the court, on petition of a creditor of the bank secured by notes and mortgages held by the bank against its debtor, might protect the interests of all the parties by enforcing the creditor's lien at least to the amount of the debt for which it held the collateral and which the bank owed it, or to its aliquot part thereof, among other creditors having a lien, as the law would imply a promise and a duty to so account. Walker *v.* Mutual Alliance Trust Co., 196 Ala. 154, 71 So. 697.

Same—Ratification by Creditor.—Proceeding in chancery, administering the business of an embarrassed bank by a creditor of the bank to enforce a lien against property received from bank's debtor, held a ratification of such settle-

ment. *Walker v. Mutual Alliance Trust Co.*, 196 Ala. 154, 71 So. 697.

§ 26 (6) Actions by or against Receivers.

Collection of Debts—Set-Off—Interest Bearing Certificate.—Under Const. 1901, § 250, providing that depositors who have not stipulated for interest shall, for such deposits, be entitled in case of insolvency to a preference of payment over other creditors, a party defending an action on a note by the superintendent of banks as statutory receiver was not entitled to set-off against the demand sued on the amount due from the bank to him represented by an interest-bearing certificate, since having stipulated for interest his claim was subject to the preferred claims of depositors who had not stipulated for interest, and since such procedure would allow a non-preferred creditor to secure his nonpreferred debt which otherwise would diminish the fund from which preferred creditors would be paid. *Walker v. McCrary Co.*, 197 Ala. 638, 73 So. 342.

Venue.—Under Acts 1911, p. 83, proceeding to enforce lien of bank's creditor upon property received in settlement of debt to bank might be maintained in county where state superintendent of banking was administering the bank's business, and in the court for which he was quasi receiver. *Walker v. Mutual Alliance Trust Co.*, 196 Ala. 154, 71 So. 697.

§ 26½. Assignments for Benefit of Creditors.

§ 26½ (1) Compensation of Assignee.

Under Code 1907, § 6071, giving an assignee for the benefit of creditors a 5 per cent. commission on the amount of money with which he is charged, an assignee of a bank is not entitled to commission on securities which had been hypothecated by the bank with other banks and which were collected by the latter and appeared on the assignee's books as cross-entries. *Horst v. Pake*, 195 Ala. 260, 71 So. 430.

Effect of Illegal Claim.—Where a bank made an assignment for the benefit of creditors, the claim by the assignee to commission to which he was not entitled does not, in the absence of fraud, require

the disallowance of all compensation. *Horst v. Pake*, 195 Ala. 620, 71 So. 430.

Laches in Presentation of Claim.—See post, "Presentation and Payment of Claims," § 28.

Removal of Assignee.—A bank's assignee for benefit of creditors, who was removed because of his relationship to persons to whom he made payments without fraud or gross neglect as preferred claims which were not entitled to rank as such, should not be allowed a commission on the funds turned over by him to his successor, who would also be entitled to a commission thereon, since the change of trustee was made necessary by his own situation. *Horst v. Pake*, 195 Ala. 620, 71 So. 430.

The removal of the assignee for the benefit of creditors from his trust, because, since his appointment, the necessity of bringing actions against certain stockholders with whom the assignee was on intimate personal relations to recover payments made by him to them as preferred creditors renders it to the interest of the estate to intrust such matters to a mere disinterested trustee, does not deprive the assignee of his right to compensation for services theretofore rendered in the absence of a showing of bad faith, willful deceit, or gross neglect. *Horst v. Pake*, 195 Ala. 620, 71 So. 430.

Fraud—Burden of Proof.—Under Code 1907, § 6071, allowing assignees for the benefit of creditors 5 per cent. commission and empowering the court to increase or diminish the amount, the burden is on creditors of a bank which has made an assignment for their benefit to show that an assignee, who has kept and made an ostensibly full and fair account of his acts, was guilty of fraud or such gross neglect in the execution of his trust as to be denied all compensation. *Horst v. Pake*, 195 Ala. 620, 71 So. 430.

Same—Sufficiency of Evidence.—On objection by the creditors of a bank which made an assignment for their benefit to an allowance of compensation to the assignee, evidence held not to show any fraud or gross neglect by the assignee in paying as preferred claims deposits by stockholders which were the

proceeds of dividends declared after the insolvency of the bank, and by a relative of the stockholder which was in fact an interest deposit made in the form of a general deposit to entitle it to preference where those facts did not obviously appear on the books of the bank, but were only determined after a thorough expert examination. *Horst v. Pake*, 195 Ala. 620, 71 So. 430.

§ 26½ (2) Settlement of Accounts.

Charge against Assignee—Expense of Recovery of Improper Payments.—A bank's assignee for the benefit of creditors, who paid, without strict compliance with the statutory requirements, claims by certain stockholders as preferred creditors which were not entitled to preference, can not be charged with the attorney's fee in the suit to recover such payments from stockholders where there was no fraud shown in making the payments, and no showing that they would not have been made had the statute been strictly complied with. *Horst v. Pake*, 195 Ala. 620, 71 So. 430.

Interest on Undistributed Funds.—Under Code 1907, § 6069, requiring an assignee for benefit of creditors to account within 3 months after the expiration of the time for the filing of objections to claims and every 6 months thereafter, which was enacted after the rendering of a decision that an assignee should be chargeable with interest prior to the expiration of 12 months after the creation of the trust, an assignee of a bank who failed to ask for an order declaring a dividend for 17 months when the funds on hand were constantly increasing, and he should have paid 10 per cent. dividends 7 and 13 months previously, and still had a safe margin, he can be charged with interest on the amounts of such dividends. *Horst v. Pake*, 195 Ala. 620, 71 So. 430.

Same—Acceptance of Dividend by Creditors.—Creditors do not, by accepting the payment of a dividend from a bank's assignee for the benefit of creditors, waive their right to claim that the payment was unnecessarily delayed so as to charge the assignee with interest thereon. *Horst v. Pake*, 195 Ala. 620, 71 So. 430.

Same—When Not Charged with In-

terest.—Under Code 1907, § 6074, which, though relating especially to the powers of an assignee to sell real estate, was enacted in contemplation of the court's power with reference to all powers granted by the deed of assignment, and which provides that nothing therein contained shall prevent the assignee from exercising the powers of sale or other powers conferred by the deed of assignment, unless specially restrained from so doing by an order of the chancellor, an assignee of a bank for the benefit of creditors under an assignment which authorized him to retain a reasonable compensation can not be charged with interest on 5 per cent. commissions retained by him from all collections, though not specifically authorized by the court to retain such commissions as would have been the better practice. *Horst v. Pake*, 195 Ala. 620, 71 So. 430.

A bank's assignee for the benefit of creditors is not chargeable with interest on undistributed funds retained by him with permission of the court, after declaring a dividend which gave him a liberal, but not unreasonable, margin to meet certain uncalled-for preferred claims, contested claims, a large undetermined claim of his counsel, and the costs of administration yet to accrue. *Horst v. Pake*, 195 Ala. 620, 71 So. 430.

Same—Prior to Dismissal of Assignee's Appeal.—Where a bank's assignee for the benefit of creditors attempted to appeal from a decree removing him and was granted supersedeas, he was not chargeable with interest on the funds on hand prior to the dismissal of his appeal, since during that time he could not have made any payments to the creditors. *Horst v. Pake*, 195 Ala. 620, 71 So. 430.

Same—Review on Appeal.—In determining whether a bank's assignee for the benefit of creditors is chargeable with interest on undistributed funds, where there was no question as to the amounts on hand, but the whole course of administration was involved, the chancellor and the supreme court on appeal can look to the whole record as well as to the register's report. *Horst v. Pake*, 195 Ala. 620, 71 So. 430.

§ 28. Presentation and Payment of Claims.

§ 28 (1) In General.

Right to Set-Off.—*Oates v. Smith*, 176 Ala. 39, 57 So. 438. See the title BANKS AND BANKING, § 28, vol. 2, p. 234.

"Laches" in Presentation of Claim.—

A bank's assignee for the benefit of creditors accepted the trust, and on his petition the law and equity court took jurisdiction thereof, and before he made and filed the inventory required by Code 1907, § 6058, he perfected a reorganization plan which the court approved, and, after his reconveyance to the bank, the cause was expressly retained in order to fix his compensation. Thereafter the bank's receiver obtained an order requiring creditors to file their claims by a certain day or be forever barred, and the assignee failed to file his claim, but thereafter, and before settlement of the receivership, his petition for a reference to fix his compensation was denied; no person having been injured by the delay. Held, that the claim was not barred by "laches," which does not, like limitations, grow out of the mere passage of time, but is founded upon the inequity of permitting a claim to be enforced, which inequity is founded upon some change in the condition or relation of the property or the parties. *De Graf-fenried v. Breitling*, 192 Ala. 254, 68 So. 265.

§ 28 (2) Priorities.

Priorities.—*Nixon State Bank v. First St. Bank*, 180 Ala. 291, 60 So. 868. See the title BANKS AND BANKING, § 28, vol. 2, p. 234.

Holder of "Bank Note"—Deposit without Stipulation for Interest.—Where money was collected by a bank for the holder of a note through his forwarding bank and not paid to the forwarding bank by reason of intervening insolvency, the holder could not claim an alternative preference under Const. 1901, § 250, providing that holders of bank notes and depositors who have not stipulated for interest shall, in case of insolvency, be entitled to preference in payment over other creditors, since the cashier's check by which the insolvent bank undertook to remit to the hold-

er's bank the money collected for its account, though payable to the holder or his indorsee on demand and not subject to countermand, was not a "bank note," nor a note intended to circulate as money or to become a part of the common currency of the country; nor claim as a depositor not stipulating for interest. *Lummus Cotton Gin Co. v. Walker*, 195 Ala. 552, 70 So. 754.

Where an insolvent bank passed into the hands of the state banking department, its whole assets became, eo instanti, a trust fund for the equal payment of creditors, subject only to a preference in favor of the holder of bank notes and depositors who had not stipulated for interest, and the holder of a note forwarded by his bank and collected by the insolvent bank but not remitted by reason of its insolvency could not adopt the unauthorized act of the insolvent bank in converting the collection into its general fund so as to acquire a preference over other creditors. *Lummus Cotton Gin Co. v. Walker*, 195 Ala. 552, 70 So. 754.

Constitutional Provision—Obligations of Contracts.

—Where after the insolvency of a bank Const. 1901, § 250, giving holders of bank notes and depositors who had not stipulated for interest preference in payment, was eliminated, the elimination does not affect the rights of the depositors, for constitutional provisions and statutes always operate prospectively, and not retrospectively unless the words used clearly indicate that a retrospective operation was intended, and to construe the elimination as having a retrospective effect would violate Const. U. S. art. 1, § 10, prohibiting the passage by a state of any law impairing the obligation of contracts. *Harris v. Walker (Ala.)*, 74 So. 40.

Holder of Note Held Mere Contract

Creditor of Bank.—Holder of note forwarded to its bank and collected by receiving bank which did not remit on account of its insolvency held a mere simple contract creditor of its agent or bailee, the insolvent bank. *Lummus Cotton Gin Co. v. Walker*, 195 Ala. 552, 70 So. 754.

Petition Not Showing Preferred Depositor.—A petition alleging that peti-

tioner procured a cashier's check covering the amount of his deposit, that he indorsed the same over to another, that the check was returned unpaid to the bank in which the indorsee deposited it, the drawer bank in the meantime having been closed, and that the sum was charged back to the petitioner, does not state facts establishing petitioner's claim as that of a depositor preferred by Const. 1901, § 250; for, while the relation of depositor and creditor existing between petitioner and the bank continued as long as he retained the check, yet when indorsed over, title passed to the indorsee, who became entitled to collect the proceeds, and, upon dishonor and the closing of the bank, to recover as a creditor, and hence no recovery by petitioner can be allowed. *Walker v. Sellers* (Ala.), 77 So. 715.

III. FUNCTIONS AND DEALINGS.

(A) BANKING FRANCHISES AND POWERS, AND THEIR EXERCISE IN GENERAL.

§ 33½. Agency of Bank.

Ultra Vires Contract—Contract to Secure Insurance.—Where its charter gave a bank power "to act as agent for fire insurance companies, associations, or corporations," its contract for valuable consideration to secure valid insurance for a year in a certain amount of plaintiff's property against loss by fire was ultra vires and void. *Alabama Red Cedar Co. v. Tennessee Valley Bank* (Ala.), 76 So. 980.

Bank's charter power "to act as agent for fire insurance companies, associations, or corporations" did not comprehend capacity to insure property against loss by fire, or to indemnify owners against such loss. *Alabama Red Cedar Co. v. Tennessee Valley Bank* (Ala.), 76 So. 980.

(B) REPRESENTATION OF BANK BY OFFICERS AND AGENTS.

§ 40. Disposition of Property.

Authority of President and Cashier.—*Montgomery Bank, etc., Co. v. Walker*, 181 Ala. 368, 61 So. 951. See the title **BANKS AND BANKING**, § 40, vol. 2, p. 237.

§ 44. Bills, Notes and Securities.

Cashier—Refusing Payment of Check.

—A cashier of a bank as such has authority to refuse payment of a check so as to bind the banker, and presentment and demand for payment is properly made upon him. *Hooper v. Herring*, 14 Ala. App. 455, 70 So. 308.

Protest of Check.—Where a cashier of a bank on which a check was drawn, who refused payment, secured its protest, the bank can not dispute the authority of the notary to make protest, or that proper presentation was made. *Hooper v. Herring*, 14 Ala. App. 455, 70 So. 308.

Where a bank cashier delivered a check drawn on his bank to a notary public for the purpose of making a protest, his agency for the holder was at an end. *Hooper v. Herring*, 14 Ala. App. 455, 70 So. 308.

Transfer of Note.—The cashier of a bank has prima facie authority, by virtue of his office, to transfer negotiable promissory notes belonging to the bank in the transaction of the usual business of the bank and his transfer of such a note to a person who receives it in good faith confers on the transferee a valid title. *Choctaw Bank v. Gewin* (Ala. App.), 78 So. 96.

While transfer of notes by cashier is presumed prima facie to be in due course of business and binding upon bank, this presumption may be rebutted and if it shows on its face that transferee must have known cashier was assuming a power outside of his duties, not for purposes of the bank, the transfer will be regarded as unauthorized and not binding on the bank, even though the transferee paid value therefor. *Choctaw Bank v. Gewin* (Ala. App.), 78 So. 96.

Accommodation Indorsement.—The mere fact that a cashier of a bank made an accommodation indorsement in the usual course of business and before maturity of the note does not relieve the bank from liability. *Choctaw Bank v. Gewin* (Ala. App.), 78 So. 96.

§ 47. Estoppel to Deny Authority of Officer or Agent.

It is possible for a bank corporation to create the de jure office of assistant

cashier, but there need not be such de jure officer in order to have such de facto officer, and one elected by the directors and held out to the public for eight years as assistant cashier is a de facto, if not a de jure, officer of the bank. *Ex parte State (Ala.)*, 77 So. 353.

§ 48. Ratification.

Bank could not ratify loans made to its cashier without at the same time ratifying the acts of the cashier in making them to himself. *Bank v. American Nat. Bank (Ala.)*, 75 So. 310.

§ 48½. Rights Acquired by Bank.

Cashier Acting in Own Behalf.—The general rule of agency that no person can act as an agent in a transaction in which he has a personal or pecuniary interest applies to the cashier of the bank who assumed to act as cashier in a personal loan to his kinsmen to pay a note which he had indorsed. *Choctaw Bank v. Gewin (Ala. App.)*, 78 So. 96.

Bank whose cashier in personal transaction indorsed note affixing "cashier" to his signature, if liable on the indorsement, held entitled to credit in the amounts paid by the cashier. *Choctaw Bank v. Gewin (Ala. App.)*, 78 So. 96.

§ 49. Notice to Officer or Agent.

Information Acquired in Private Capacity.—Information acquired by the officers of a bank in their private capacity is not notice to the bank. *Bruce v. Citizens' Nat. Bank*, 185 Ala. 221, 64 So. 82.

Notice to President of Pledge of Stock.—Where the president and director of a bank, whose stock was pledged by a stockholder to another bank, was an active officer and agent of the first bank, having duties to perform in respect to the business of the bank, and performing them at least in part, notice to him of the stockholder's pledge of the stock was chargeable to the bank; the ownership of the stock being *prima facie* within the scope and line of the president's duty and authority to know. *Bank v. American Nat. Bank (Ala.)*, 75 So. 310.

Same — Sufficiency of Evidence.—In bank's suit to enjoin other bank from foreclosing statutory lien on shares of

its stock, evidence held sufficient to show that president of defendant bank had notice that stock had been pledged to plaintiff bank. *Bank v. American Nat. Bank (Ala.)*, 75 So. 310.

Cashier's Pledge of Stock.—Where the cashier of a bank had pledged his stock therein to another bank, and, as cashier, he loaned his bank's money to himself without submitting the loans for approval to the board of directors or finance committee, and his bank, in the pledgee bank's suit to enjoin it from foreclosing its statutory lien on the cashier's stock, by its answer, with full knowledge of the facts, elected to hold the cashier to his obligations, and in virtue thereof claimed a lien on his stock, the cashier's bank was chargeable with notice of his pledge of his stock to the pledgee bank. *Bank v. American Nat. Bank (Ala.)*, 75 So. 310.

Fraud or Interest of Officer.—In a bank's action on notes made by defendant payable to one W. and indorsed in blank to it by the payee, it appeared that the notes had been given in a transaction carried out as part of a conspiracy between its president and W., whereby W. was receiving accommodations from the bank, for which he otherwise was paying the president personally, in fraud of the bank, but that defendant, when he made the notes for W.'s accommodation, had no notice of such conspiracy, and that the notes were not made by him in furtherance of the fraudulent conspiracy. Held, that notice to the president that the defendant had signed the notes as an accommodation to W., and that his liability was that of a surety, and not that of a principal debtor, was notice thereof to the bank, in spite of the president's interest in the transaction; he being the bank's sole representative in the matter. *Tatum v. Commercial Bank, etc., Co.*, 193 Ala. 120, 69 So. 508.

(C) DEPOSITS.

§ 51. Relation between Bank and Depositor in General.

A "depositor," generally, is one who delivers to or leaves with a bank money subject to his order either upon time deposit or subject to check. *Lummus*

Cotton Gin Co. v. Walker, 195 Ala. 552, 70 So. 754.

A general deposit of money in bank creates the relation of creditor and debtor between the depositor and the bank. *Tallapoosa County Bank v. Salmon*, 12 Ala. App. 589, 68 So. 542.

§ 53. Deposits Other than Money.

§ 56. — Title and Rights of Bank.

Bills, checks, drafts, or other evidences of debt in the ordinary course of business may be accepted and credited by a bank as the equivalent of money in which case it becomes the owner of the paper, although it has the right to charge dishonored paper back to the depositor instead of proceeding against the maker. *Lummus Cotton Gin Co. v. Walker*, 195 Ala. 552, 70 So. 754.

§ 57. Title to and Disposition of Deposits.

§ 58. — In General.

Notice that Deposit in Capacity of Agent.—Where a debtor deposited funds in a bank the account being entered "J. L. B., Agent," the bank was chargeable with notice that the funds were deposited in the capacity of agent only. *Bank v. Crayter* (Ala.), 75 So. 7.

Relation of Debtor and Creditor.—*Batson v. Alexander City Bank*, 179 Ala. 490, 60 So. 313. See the title BANKS AND BANKING, § 58, vol. 2, p. 241.

§ 60. Repayment in General.

What Constitutes Payment.—*Batson v. Alexander City Bank*, 179 Ala. 490, 60 So. 313. See the title BANKS AND BANKING, § 60, vol. 2, p. 242.

§ 61. Application of Deposits to Debt Due Bank or Set-Off by Bank.

Claim for Unliquidated Damages.—In an action against a banker for unliquidated damages for refusal to honor plaintiff's check against his deposit, a plea alleging that such deposit constituted a credit for the agreed price of certain cotton sold by plaintiff to defendant, and that by reason of a breach of warranty of quality thereof there was a difference of \$3,000 between the agreed price and the value of the cotton delivered, which amount defendant had charged back against plaintiff's account,

thereby making a balance against him, was in effect a plea of recoupment or set-off and available under Code 1907, § 5858, providing that mutual debts, liquidated or unliquidated demands not sounding in damages merely, subsisting between the parties at the commencement of the suit, whether arising ex contractu or ex delicto, may be set off one against the other. *Hooper v. Herring*, 9 Ala. App. 292, 63 So. 785.

Deposit by Agent.—Where agent of a money lender deposited funds in a bank, the account being entered as "J. L. B., Agent," and borrowed money from the bank, the bank could not before its debt was due apply such deposit to payment thereof as against the money lender since it had notice of the special character of the deposit. *Bank v. Crayter* (Ala.), 75 So. 7.

Set-Off.—Where defendant, at the time the bank was garnished, had a balance on deposit, but was indebted to the bank on notes not yet due, the bank can not set off the unmatured indebtedness against the claim of plaintiff for such indebtedness could not be off-set in an action by defendant for his balance. *First Nat. Bank v. Minge*, 186 Ala. 405, 64 So. 957.

§ 61½. Set-Off by Depositor.

Where maker of a note makes deposits in payee bank to credit of her minor children for purpose of accumulating funds for payment of note, they are lost to depositor where bank fails before they are transferred as credit on it. *Vogler v. Manson* (Ala.), 76 So. 117.

§ 62. Lien of Bank on Deposits.

In General.—*Batson v. Alexander City Bank*, 179 Ala. 490, 60 So. 313. See the title BANKS AND BANKING, § 62, vol. 2, p. 243.

To establish a lien upon deposits, bank must have given credit upon the faith of a general deposit, when it may if the debt is past due and without consent of the depositor apply such deposit to the debt, but it can not set off a fund as against a debt not due. *Bank v. Crayter* (Ala.), 75 So. 7.

When Lien Arises.—*Batson v. Alexander City Bank*, 179 Ala. 490, 60 So. 313. See the title BANKS AND BANKING, § 62, vol. 2, p. 243.

Special Deposits.—No lien in favor of the bank exists as to special deposits except as to the particular special matter or dealing which the deposit affects. *Bank v. Crayter* (Ala.), 75 So. 7.

Application to Debt of Depositor.—As to a general deposit, a bank has a right to set-off as for the balance of the general account of the depositor, and while as long as that balance is in the depositor's favor it has no lien, yet when any advance or loan is made by the bank to the depositor, in the form of an overdraft, etc., the lien against the deposit comes into existence, and it may be applied by the bank to the payment of the depositor's indebtedness, until it is fully discharged. *Tatum v. Commercial Bank, etc., Co.*, 193 Ala. 120, 69 So. 508.

§ 63. Payment of Checks.

§ 65. — Notice Not to Pay or Revocation of Check.

Cashier's Check.—“A cashier's check, being merely a bill of exchange drawn by a bank on itself, and accepted in advance by the act of its issuance, is not subject to countermand by the payee after indorsement, as is an ordinary check by the drawer, and the relations of the parties to such an instrument are analogous to those of the parties to a negotiable note payable on demand.” 2 Michie on Banks and Banking, § 139 (2); 5 R. C. L. 528, 529. But “when such a check is given to a depositor to cover the amount of a withdrawal, it is merely an acknowledgment of an indebtedness on the part of the bank to the payee of the order. The change thereby made is not in the nature of the debt, but in the evidence of it.” 5 R. C. L. 483, 484.” *Walker v. Sellers* (Ala.), 77 So. 715.

§ 66. — Obligation of Bank to Payee or Holder.

Partnership Deposit—Check of Individual Partner.—Where a general deposit was made in bank in the name of a firm, plaintiff, a member of such firm, could not create the relation of creditor and debtor between himself and the bank by drawing a check in the firm name, payable to himself, and presenting it for payment, unless the bank accepted such check or certified it, nor did the drawing

of such check and its presentation work an equitable assignment of the deposit. *Tallapoosa County Bank v. Salmon*, 12 Ala. App. 589, 68 So. 542.

§ 68. — Liability of Bank to Drawer for Refusal to Pay.

Duty of Bank to Pay.—By the acceptance of a deposit, the banker subjects himself to the obligation of paying on the order or demand of the depositor, whether by check or otherwise. *Hooper v. Herring*, 9 Ala. App. 292, 63 So. 785.

Right of Action for Dishonor of Check.—Presentation of a check to a banker and his refusal to pay is sufficient to authorize an action for unwarranted dishonor. *Hooper v. Herring*, 14 Ala. App. 455, 70 So. 308.

Recovery of Deposit and Substantial Damages.—Where a banker fails or refuses to pay on the order of a depositor when the depositor has sufficient funds and no excuse exists, the depositor may recover against the banker for the money, and is entitled to recover substantial damages. *Hooper v. Herring*, 14 Ala. App. 455, 70 So. 308.

One giving a check on a bank in which he has funds may, where the bank wrongfully dishonors the check, recover substantial damages without proving any special injury. *Hooper v. Herring*, 14 Ala. App. 455, 70 So. 308.

Defense.—Where a banker gave plaintiff credit on his books for the purchase price of cotton, but, the cotton proving inferior in quality and deficient in quantity, reduced the credit, that fact is a good defense to an action for nonpayment of checks drawn on the credit. *Hooper v. Herring*, 14 Ala. App. 455, 70 So. 308.

Actions—Pleading.—In an action by a depositor against a banker for refusal to pay a deposit on demand, counts of the complaint alleging that plaintiff's deposit was subject to his check or demand were not demurrable for failure to show whether the sum was payable only on presentation of a proper check or on demand otherwise made. *Hooper v. Herring*, 9 Ala. App. 292, 63 So. 785.

In a depositor's action against his banker to recover unliquidated damages for the latter's refusal to honor checks,

a plea of payment in the form specified by Code 1907, § 5383, form 35, was inappropriate and demurrable. *Hooper v. Herring*, 9 Ala. App. 292, 63 So. 785.

Same—Variance.—Where, in assumption by a depositor against his banker for refusal to pay a deposit on demand, the complaint alleged that the sum deposited by plaintiff with defendant was subject to plaintiff's check or demand, and plaintiff testified that the account in question was of several years' standing, that he had the same with defendant as a banker, and that he made general deposits with him subject to check and drew checks thereon, such evidence was sufficient to support the conclusion that plaintiff's deposit was a general one, so that there was no variance as to its nature. *Hooper v. Herring*, 9 Ala. App. 292, 63 So. 785.

Admissibility of Evidence.—Where a bank refused to honor a check though the drawer had on deposit sufficient funds, the fact that the check was returned to the drawer and was in his possession is admissible to show the drawer's damages in an action for wrongful dishonor. *Hooper v. Herring*, 14 Ala. App. 455, 70 So. 308.

§ 70. Certified Checks or Notes.

"Cashier's Check." — As between the bank and the payee a "cashier's check," being merely bill of exchange drawn by bank on itself, and accepted in advance by act of its issuance, has same legal effect as certificate of deposit or certified check. *Walker v. Sellers* (Ala.), 77 So. 715.

A "cashier's check" issued on request of a depositor is the substantial equivalent of a "certified check," and the deposit represented by the check passes to the credit of the check holder, who is thereafter a depositor to that amount. *Lummas Cotton Gin Co. v. Walker*, 195 Ala. 552, 70 So. 754.

§ 76. Actions by Depositors or Others for Deposits.

Pleading.—In a general creditor's suit against a bank in which the debtor deposited funds of the creditor as agent for him, which the bank applied to a debt which it held against the agent, the

strict rules of pleading should not be applied; no bona fide purchaser being involved. *Bank v. Crayter* (Ala.), 75 So. 7.

Burden of Proof—Deposit in Name of Partnership.—Where a general deposit in bank was made in the name of "R. V. Salmon's Son," the fact was prima facie proof of the relation of creditor and debtor between the bank and the depositor, and the burden was on an individual plaintiff, suing to recover such deposit as his, to show that he used that name in his individual business, and that the funds so deposited were his individual property. *Tallapoosa County Bank v. Salmon*, 12 Ala. App. 589, 68 So. 542.

Admissibility of Evidence.—In an action to recover a deposit alleged to have been made, where the bank's books which did not show the deposit were introduced, evidence of defalcations by the cashier which raised an inference that he converted the deposit is admissible. *Bank v. Taylor*, 196 Ala. 665, 72 So. 264.

Same — Hearsay — Declarations of Agent.—In an action against a bank to recover a sum of money alleged to have been left on deposit, where the deposit was denied, evidence of a statement by the cashier to the witness that it was remarkable how business kept up, and that he had that morning received a deposit from P. for plaintiff, is not admissible against the bank, though the cashier exhibited to the witness rolls of bills, for the declaration did not relate to a matter in the course of the cashier's duties, but was merely narrative of past events, and so was not binding on his principal, the bank; the question at issue being the making of the deposit, and not the title of the bank thereto. *Bank v. Taylor*, 196 Ala. 665, 72 So. 264.

In such case, evidence that the cashier stated to another witness that P. made the deposit for his own benefit instead of for plaintiff is inadmissible. *Bank v. Taylor*, 196 Ala. 665, 72 So. 264.

(D) COLLECTIONS.

§ 80. Title to Paper Received for Collection.

- Where the drawer of a draft, when depositing it with a bank for collection, in-

dorsed it to the bank, and the bank credited the drawer as a depositor, with the amount, the bank did not thereby become the purchaser of the draft, since its liability was not absolute, but conditioned upon the collection of the draft; hence the proceeds of the draft, in the hands of another bank to whom it had been forwarded for collection, belonged to the drawer, for which he could maintain assumpsit, and, as such, was subject to garnishment by his creditor. *Stones River Nat. Bank v. Lerman Milling Co.*, 9 Ala. App. 322, 63 So. 776, certiorari denied in *Ex parte Stones River Nat. Bank*, 185 Ala. 673, 64 So. 1019.

§ 81. Authority and Acts in Making Collection.

§ 82. — Banks in General.

Where draft with bill of lading attached is indorsed to bank for collection, it is entitled to receive remittance and give full acquittance to those paying draft. *Bank v. Merchants' Nat. Bank* (Ala. App.), 77 So. 167.

§ 83. — Agents and Correspondents.

Where the drawer of a draft deposited it for collection in a bank located remotely from the place of payment, he thereby authorized such bank to employ another reputable bank located near the place of payment to collect it, and such collecting bank became the agent of the drawer, and the receiving bank was not liable unless the money came actually into its hands. *Stones River Nat. Bank v. Lerman Milling Co.*, 9 Ala. App. 322, 63 So. 776, cited in notes in 52 L. R. A., N. S., 611, 621, 640, and Ann. Cas. 1915D, 12, 21, certiorari denied in *Ex parte Stones River Nat. Bank*, 185 Ala. 673, 64 So. 1019.

§ 85. Rights and Liabilities as to Proceeds.

§ 86. — In General.

Conversion.—The act of an insolvent bank collecting note through forwarding bank and, without remitting, commingling the proceeds with its general fund held a conversion. *Lummus Cotton Gin Co. v. Walker*, 195 Ala. 552, 70 So. 754.

§ 87. — Insolvency of Collecting Bank.

Constructive Trust—Following Trust

Fund.—Money collected by a bank for the holder of a note through his forwarding bank and not paid to the forwarding bank by reason of intervening insolvency could not be charged with a specific trust for the holder's benefit on the ground that it was to be found somewhere in the funds of the insolvent bank. *Lummus Cotton Gin Co. v. Walker*, 195 Ala. 552, 70 So. 754.

§ 89. Failure to Collect.

Where draft with bill of lading attached, indorsed to plaintiff bank for collection, was by it forwarded to defendant bank, law implies a promise by defendant to collect draft and remit proceeds, or return draft and bill of lading if payment is refused. *Bank v. Merchants' Nat. Bank* (Ala. App.), 77 So. 167.

§ 90. Actions for Negligence or Default.

Nature and Form of Remedy.—Where a draft with a bill of lading attached was indorsed by the drawer to a bank for collection, the legal title to the chose and a special property in the goods represented by the bill of lading passed to the bank; but the drawer of the draft had such an equity that he might in his own name recover as for money had and received against a correspondent of the bank which collected the draft. *Bank v. Merchants' Nat. Bank* (Ala. App.), 77 So. 167.

The seller of goods, having drawn a draft for the purchase price and attached thereto a bill of lading, indorsed the draft for collection to plaintiff bank, and plaintiff transmitted the draft with bill of lading attached to defendant bank, its correspondent, with instructions not to deliver the bill of lading until the draft was paid. However the bill of lading was delivered, and plaintiff bank sued defendant to recover the amount of the draft. Held, that as the law implied a promise on the part of defendant to collect the draft and remit the proceeds or return it and the bill of lading, payment having been refused, plaintiff might maintain an action for the proceeds, despite the equitable interest of the seller, and Code 1907, § 2489, declaring that actions on notes or other contracts for the payment of money must be prosecuted

in the name of the party really interested, whether he has the legal title or not. *Bank v. Merchants' Nat. Bank* (Ala. App.), 77 So. 167.

(E) LOANS AND DISCOUNTS.

§ 93. Requisites and Validity of Loan or Discount.

Loans by Cashier to Himself.—Loans made by the cashier of a bank to himself, and not submitted for approval to the board of directors nor the finance committee of the bank, were forbidden by Acts 1911, p. 71, § 20, providing that no bank shall lend any money to any salaried officer, agent, or employee without the loan being submitted to and approved by the board of directors or finance committee. *Bank v. American Nat. Bank* (Ala.), 75 So. 310.

§ 95. Interest or Rate of Discount, and Usury.

See post, USURY.

Where money is advanced by a bank, and the transaction is in substance a loan, though in form a discount of securities, and the amount taken out for the use of the money is in excess of the legal rate of interest, the transaction is usurious under Code 1907, § 4624. Where, however, the transaction is not in substance a loan, but is a bargain and sale of securities, and the obligation of the person liable on such securities is not made more burdensome, the transaction is not usurious, though the amount of the discount is in excess of the legal rate of interest. *Hudson v. Repton State Bank* (Ala. App.), 75 So. 695.

§ 95½. Rights and Liabilities as to Paper Discounted.

Set-Off — Waiver. — Where defendant advanced money to a purchaser of standing timber, on an agreement that the purchaser would cut and deliver it, that he should be allowed a certain amount per M., which on each shipment should be credited on his demand note and a draft given for the balance, and with full knowledge of the facts gave the purchaser a draft to be discounted with plaintiff bank to secure money with which to pay off laborers, and accepted

the logs called for in the bill of lading, delivered to the bank with the draft, and logs substituted for the numbered logs mentioned in the bill of lading, it thereby waived its right to set off a demand against the bank in excess of the draft on the ground that the purchaser's note had been matured by demand for payment. *Farmers' Bank, etc., Co. v. Shut*, 192 Ala. 53, 68 So. 363.

(F) EXCHANGE, MONEY, SECURITIES, AND INVESTMENTS.

§ 97½. Issue and Payment of Drafts.

Right to Countermand Payment.—The giving of a draft, not being an assignment to the payee of the funds in the drawee's hands, the drawer may countermand payment, and by notice obligate the drawee to refuse payment. *Western Union Tel. Co. v. Louissell*, 11 Ala. App. 563, 66 So. 839, appeal denied in *Ex parte Western Union Tel. Co.*, 191 Ala. 665, 67 So. 1019.

Notice Not to Pay.—Where a bank receives a telegram stopping payment of a draft, it must obey without inquiring whether any mistake had been made in transmitting. *Western Union Tel. Co. v. Louissell*, 11 Ala. App. 563, 66 So. 839.

A notice to the bank not to pay a draft drawn in favor of "James F. Manison" is not, as a matter of law, notice not to pay a draft in favor of "James J. Manson," such as obligates the drawee to refuse payment of the draft. *Western Union Tel. Co. v. Louissell*, 11 Ala. App. 563, 66 So. 839.

(H) ACTIONS.

§ 119. Evidence.

Admissibility.—Where bank cashier, to aid his relatives in securing loan, had them make a note which he indorsed as cashier and negotiated and on its maturity gave his personal note to plaintiff for a loan and deposited the original note as collateral, indorsing it to plaintiff, who sued the bank, evidence on behalf of the bank that the transactions regarding the note were not carried on its books as an asset should have been admitted. *Choctaw Bank v. Gewin* (Ala. App.), 78 So. 96.

IV. NATIONAL BANKS.**§ 122. Nature and Status.**

Agents of General Government.—*Tarrant v. Bessemer Nat. Bank*, 7 Ala. App. 283, 61 So. 47. See the title **BANKS AND BANKING**, § 122, vol. 2, p. 269.

§ 125½. Liability of Stockholders for Debts of Bank.

Code 1907, § 3744, authorizing a judgment creditor of a corporation to enforce payment by a stockholder of his unpaid subscription, is not available to a judgment creditor of a national bank, as its enforcement would impair the remedy given the bank by Rev. St. U. S., § 5141 (U. S. Comp. St. 1913, § 9678, giving the bank the right to sell the stock of a delinquent shareholder for the satisfaction of the amount due thereon. *McQuiddy v. King*, 191 Ala. 205, 67 So. 1015.

V. LOAN, TRUST, AND INVESTMENT COMPANIES.**§ 135. Forfeiture of Franchise and Dissolution.**

Trust Companies—Annulment of Charter.—Under Acts 1911, p. 88, § 49, authorizing the superintendent of banks to sue to annul and vacate the charter of any bank or for liquidation, and Code 1907, § 3528, making trust companies amenable to the general banking laws, so far as applicable to trust companies, the superintendent of banks has the exclusive authority to proceed against trust

companies, whether or not they are doing or are authorized to do a banking business in connection therewith. *Montgomery Bank, etc., Co. v. State* (Ala.), 78 So. 825.

Same—Dissolution.—Under Code 1907, § 3512, making corporations subject to dissolution on the ground of the suspension of business by reason of lack of funds to carry on the business, the state superintendent of banks may proceed in chancery for the liquidation of a trust company, whose charter authority and franchise survive, notwithstanding its abandonment of its banking business, where it has disqualified itself from the lawful pursuit of its trust business by the reduction of its nominal capital stock below the minimum requirement prescribed by § 3529. *Montgomery Bank, etc., Co. v. State* (Ala.), 78 So. 825.

§ 136. Insolvency and Receivers.

Provisional Receivership of Trust Company.—Under Code 1907, § 3512, though the evidence did not show that remaining assets of the trust company were in danger of further waste, dissipation, or depletion, yet where its corporate dissolution seemed to be forecast with reasonable certainty unless its debts were provided for, and sufficient funds provided for its safe and lawful resumption of business, a provisional receivership is contemplated and authorized. *Montgomery Bank, etc., Co. v. State* (Ala.), 78 So. 825.

BASTARDS.

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§ 43. — Intimacy and Illicit Intercourse.

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§ 51. — Instructions.

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Cross References.

See the title BASTARDS, vol. 2, p. 273, and references there given.

I. ILLEGITIMACY IN GENERAL.

§ 2. Evidence.

§ 3. — Presumptions of Legitimacy.

Child Born in Lawful Wedlock. — A child born in lawful wedlock is presumed legitimate until contrary is properly shown by party who denies its legitimacy, and upon whom burden then rests to sustain his denial. *Sims v. Birden*, 197 Ala. 690, 73 So. 379, 744.

III. PROCEEDINGS UNDER BASTARDY LAWS.

§ 12½. Statutory Provisions.

Encroachment upon Judiciary—Consti-

tutionality.—Code 1907, § 2846, amended by Acts 1915, p. 722, providing that no presumption in favor of the correctness of trial courts' judgment shall be indulged in, held invalid as an invasion of the constitutional functions of the judiciary. *Samples v. State* (Ala. App.), 74 So. 758.

§ 21½. Persons Liable.

Defendant under 16.—In bastardy proceedings, plea that defendant was under 16 years at time of commission of offense was not legal answer, but, state having taken issue upon plea, and it appearing that defendant was under 16 at time child was begotten, defendant was

entitled to verdict. *Cogburn v. State* (Ala. App.), 76 So. 473.

§ 22. Jurisdiction.

Probate Court—Statutory Proceedings.—A proceeding in bastardy is not criminal, and court did not err in overruling defendant's motion to suspend proceedings and remit him to the probate court, as provided by Act 1915, pp. 577-589, with reference to criminal prosecution, on ground that he was under 16. *Cogburn v. State* (Ala. App.), 76 So. 473.

§ 25. Preliminary Proceedings.

§ 27. — Complaint or Affidavit.

Complaint Sufficient.—Under Code 1907, § 6364, a complaint that prosecutrix was pregnant with or delivered of, a bastard child, of which accused was the father, is sufficient. *Smith v. State*, 13 Ala. App. 411, 69 So. 406.

§ 29. — Warrant or Other Process.

Who May Issue—Statutes.—Under Code 1907, § 6364, providing for warrant in bastardy proceedings by justice of county where woman is pregnant and Local Acts 1915, p. 231, § 1, conferring on judges of Birmingham municipal court all power of justices of peace, judge of such municipal court had jurisdiction to issue such warrant. *Grace v. State* (Ala. App.), 77 So. 978.

§ 33. Pleading and Indictment.

§ 36. — Issues, Proof, and Variance.

Immaterial Variance.—Commencement of prosecution for bastardy being, under Code 1907, §§ 6364, 6370, permissible any time between pregnancy and 12 months after the child is born, variance between the complaint alleging the birth of the child before the commencement of the prosecution and proof of its being born after such commencement, but before the filing of the complaint, is immaterial. *Brantley v. State*, 11 Ala. App. 144, 65 So. 678.

§ 37. Evidence.

§ 39. — Admissibility in General.

Knowledge of Prosecutrix of Her Pregnancy.—Under Code 1907, § 6364, testimony of prosecutrix that she had felt movement of fetus, and knew she was pregnant prior to time she swore out

warrant, held admissible. *Holston v. State* (Ala. App.), 75 So. 175.

That child's eyes resembled those of his maternal grandfather is inadmissible in bastardy trial. *Johnson v. State* (Ala. App.), 74 So. 972.

Offer to Marry—Offer to Compromise.—In a bastardy proceeding it is competent to prove that after the conception or the birth, defendant promised to marry prosecutrix, unless the promise is accompanied by a condition that the prosecution be abandoned, in which latter case it is an offer of compromise, and not admissible. *Brantley v. State*, 11 Ala. App. 144, 65 So. 678.

Condition of Defendant's Wife.—In a bastardy proceeding the condition of the defendant's wife during the time of the intercourse may be shown. *Smith v. State*, 13 Ala. App. 411, 69 So. 406.

Conversations Not in Defendant's Presence.—Conversation between defendant's father and prosecutrix in bastardy proceedings was inadmissible, although defendant was "standing in the door"; it not being shown what door was meant. *Johnson v. State* (Ala. App.), 74 So. 972.

Same — Cross-Examination.—Statement as to conversation, not shown to have been in defendant's presence, brought out on cross-examination of defendant's witness, did not admit proof of entire conversation. *Johnson v. State* (Ala. App.), 74 So. 972.

Prosecutrix asking to Be taken to Place for Confinement.—In a bastardy proceeding the fact, attempted to be shown by defendant, that prosecutrix asked a third person to take her to a place for the purpose of giving birth to the child, is immaterial, in the absence of any evidence tending to show such person was the father of the child. *Brantley v. State*, 11 Ala. App. 144, 65 So. 678.

§ 41. — Character and Conduct of Prosecutrix.

Good Character of Prosecutrix.—In a bastardy proceeding evidence as to the good character of the prosecutrix for virtue and chastity is improperly received. *Smith v. State*, 13 Ala. App. 411, 69 So. 406.

Intercourse of Prosecutrix with Other Men.—In a bastardy proceeding evidence showing intercourse between prosecutrix and other men about the time the child was conceived was admissible. *Samples v. State* (Ala. App.), 74 So. 758.

Defendant in showing intercourse of prosecutrix with others, must confine the evidence to a period within which the child could have been conceived. *Brantley v. State*, 11 Ala. App. 144, 65 So. 678, cited in note in L. R. A. 1916B, 969.

Evidence of acts of intercourse by the prosecutrix with other men is inadmissible in a bastardy proceeding, where such men could not have been the father. *Smith v. State*, 13 Ala. App. 411, 69 So. 406, cited in notes in L. R. A. 1916B, 968, 969.

§ 41½. — Character and Conduct of Defendant.

Defendant's Conduct before and after Intercourse.—In a bastardy proceeding defendant's conduct before the time of the intercourse may be shown as well as his conduct thereafter. *Smith v. State*, 13 Ala. App. 411, 69 So. 406.

Attempt of Defendant to Procure Abortion.—That defendant attempted to aid in procuring an abortion of the pregnant woman in a bastardy proceeding is admissible. *Smith v. State*, 13 Ala. App. 411, 69 So. 406.

It is relevant that after prosecutrix informed defendant of her pregnancy, he gave her a concoction and directed her to take it, saying it would produce abortion, whether it would being immaterial, the probative force of the evidence lying in the admission of guilt to be inferred from his conduct. *Brantley v. State*, 11 Ala. App. 144, 65 So. 678.

Flight of Defendant.—In a bastardy proceeding evidence of defendant's flight is admissible. *Smith v. State*, 13 Ala. App. 411, 69 So. 406.

§ 42. — Admissions and Declarations of Defendant.

Defendant's silence in the face of accusation in a bastardy proceeding is admissible as a confession or admission only where he is shown to have heard and understood it and remained silent. *Johnson v. State* (Ala. App.), 74 So. 972.

§ 43. — Intimacy and Illicit Intercourse.

Intercourse Prior to Pregnancy—Preventatives against Conception.—In a bastardy proceeding prosecutrix may testify to intercourse between her and defendant for several months prior and up to the time of her pregnancy, and of the use by him, up to that time, of preventatives against conception. *Brantley v. State*, 11 Ala. App. 144, 65 So. 678.

Defendant Being Suitor of Prosecutrix.—In a bastardy proceeding evidence showing any intimacy of relationship between prosecutrix and defendant is admissible, as of the fact of his being a suitor of hers. *Brantley v. State*, 11 Ala. App. 144, 65 So. 678.

Prosecutrix and Defendant Engaged.—That prosecutrix and defendant were engaged at the time of the intercourse is relevant in a bastardy proceeding. *Brantley v. State*, 11 Ala. App. 144, 65 So. 678.

§ 44. — Resemblance of Child to Defendant.

Prosecutrix May Exhibit Child to Jury.—In a bastardy proceeding prosecutrix may testify that defendant was the father of her child, and exhibit it to the jury. *Brantley v. State*, 11 Ala. App. 144, 65 So. 678, cited in note in L. R. A. 1917B, 1148.

§ 46. — Sufficiency.

"Reasonable Certainty."—In a bastardy case, the measure of proof is reasonable certainty, and not proof "beyond a reasonable doubt" as in criminal case. *Holston v. State* (Ala. App.), 75 So. 175.

§ 48. — Trial.

§ 49. — Conduct in General.

Evidence Mere Conclusion—Objection.—That the testimony of prosecutrix in bastardy case that defendant was "a suitor" of hers is a mere conclusion, and objectionable as such, does not put in error the court in overruling the objection to it; no ground of objection suggesting this point. *Brantley v. State*, 11 Ala. App. 144, 65 So. 678.

Evidence Indefinite.—In a bastardy proceeding the offer of defendant, for purpose of rebuttal, to prove that somebody went to a certain doctor at some

time to procure medicine to produce abortion held too indefinite as to time and persons. *Brantley v. State*, 11 Ala. App. 144, 65 So. 678.

Objection to Evidence.—In a bastardy case where letter was offered in evidence by state and read to jury, and afterwards objection was interposed, objection came too late, and there was no error in overruling it. *Holston v. State* (Ala. App.), 75 So. 175.

Remarks of Counsel.—In a bastardy prosecution, the solicitor could properly urge jury to discharge their duty, and not to "wink" at invasion of sanctity of the home. *Samples v. State* (Ala. App.), 74 So. 758.

Same — Comment on Testimony. — The solicitor had a right to comment in argument upon all testimony introduced on direct or cross examination. *Samples v. State* (Ala. App.), 74 So. 758.

§ 50. — Questions for Jury.

See post, "Verdict or Findings," § 52.

Flight of Defendant.—The weight to be given in evidence of defendant's flight is for the jury in a bastardy proceeding. *Smith v. State*, 13 Ala. App. 411, 69 So. 406.

Illegal Answer—Issue Joined by State.—See ante, "Persons Liable," § 21½.

§ 51. — Instructions.

Instruction Invading Province of Jury.—In a prosecution for bastardy, instructions held properly refused as invading the province of the jury. *Smith v. State*, 13 Ala. App. 411, 69 So. 406.

Charge Not Hypothecating Evidence.—In bastardy case, refusal of instruction, "The court charges the jury that if it is probable that defendant is innocent, you should acquit him," was not error, as it does not hypothecate the evidence. *Holston v. State* (Ala. App.), 75 So. 175.

Charge Assuming Facts True. — In a bastardy proceeding, a requested charge, assuming as true a fact of which there is not even evidence, is properly refused. *Brantley v. State*, 11 Ala. App. 144, 65 So. 678.

When Charge Is Abstract.—Evidence in a bastardy proceeding having, after admission, been excluded from the consideration of the jury, a requested charge

with reference thereto was abstract. *Brantley v. State*, 11 Ala. App. 144, 65 So. 678.

§ 52. — Verdict or Findings.

Issue Joined on Insufficient Plea — Right to Verdict.—In bastardy proceeding, plea that defendant was under 16 years at time of commission of offense was not legal answer, but, state having taken issue upon plea, and it appearing that defendant was under 16 at time child was begotten, defendant was entitled to verdict. *Cogburn v. State* (Ala. App.), 76 So. 473.

§ 60½. Sentence on Criminal Conviction.

Hard Labor for County.—On conviction of bastardy, court may, under Code 1907, § 6377, fixing sentence at 12 months, impose such sentence at hard labor for county. *Grace v. State* (Ala. App.), 77 So. 978.

§ 61. Review of Proceedings.

§ 62. — Appeal.

Admission of Evidence—Harmless Error.—Any error in bastardy proceedings in overruling objection to evidence was harmless; it having subsequently been ruled out and excluded from the consideration of the jury. *Brantley v. State*, 11 Ala. App. 144, 65 So. 678.

Error Assigned—Not Insisted on in Brief.—It being necessary in bastardy proceedings to assign error, an error assigned, not being insisted on in appellant's brief, is deemed waived. *Brantley v. State*, 11 Ala. App. 144, 65 So. 678.

Remarks of Counsel—Cured by Instruction.—Any error in overruling motion of defendant in bastardy to exclude from the consideration of the jury remarks of the state's counsel that defendant had done a certain thing was cured by a charge that there was no evidence to that effect, and that the jury must not consider the statement of said counsel relative thereto. *Brantley v. State*, 11 Ala. App. 144, 65 So. 678.

Judgment Discharging Defendant—No Error Assigned.—A judgment discharging defendant in bastardy will be affirmed, where no errors are assigned, on an appeal taken in the name of the state. *State v. Dodd*, 9 Ala. App. 65, 64 So. 169.

Admissible of Evidence — Failure to Object Below.—In a bastardy proceeding defendant who did not object below can not, on appeal, complain that the court received evidence of the prosecutrix's good character. *Smith v. State*, 13 Ala. App. 411, 69 So. 406.

General Objection Not Specifying Particular Testimony Inadmissible. — Assignments, generally complaining that defendant's wife was incompetent to testify against him in a bastardy proceeding, do not raise the point that she testified as to privileged communications. *Smith v. State*, 13 Ala. App. 411, 69 So. 406.

Reduction of Judgment.—The defendant can not complain of the reduction of the judgment. *Smith v. State*, 13 Ala. App. 411, 69 So. 406.

Evidence Sufficient—Verdict Not Disturbed.—In a bastardy case where there was evidence which authorized a conviction, the verdict will not be disturbed. *Samples v. State* (Ala. App.), 74 So. 758.

Discretion in Cross-Examination. — The court's rulings in allowing cross-examination in bastardy proceedings to extend to irrelevant matters will not be reviewed, being a matter of discretion. *Johnson v. State* (Ala. App.), 74 So. 972.

Bearing Arms.

See post, WEAPONS.

Beneficial Associations.

See the title BENEFICIAL ASSOCIATIONS, vol. 2, p. 291, and references there given.

Bequests.

See post, WILLS.

Best Evidence.

See post, CRIMINAL LAW; EVIDENCE.

BIGAMY.

- § 2. Defenses.
- § 6. Evidence.
- § 8. — Admissibility in General.
- § 9. — Previous Marriage.

Cross References.

See the title BIGAMY, vol. 2, p. 293, and references there given.

§ 2. Defenses.

Defendant under Statutory Age of Consent.—That accused at the time of his former marriage was under the statutory age of consent so as to make the marriage avoidable is no defense, in a prosecution for bigamy, for again marrying without having the first marriage judicially annulled. *Garner v. State*, 9 Ala. App. 60, 64 So. 183.

§ 6. Evidence.

§ 8. — Admissibility in General.

Testimony of Accused as to Knowledge of Wife's Death.—Where there was nothing to show that the accused, in a prosecution for bigamy, had any information or reason to believe that his first wife was dead at the time of his second

marriage, and it did not appear that he had made any inquiry, he could not testify as to whether he knew at the time of his second marriage whether his first wife was living or dead. *Garner v. State*, 9 Ala. App. 60, 64 So. 183.

§ 9. — Previous Marriage.

How Proved.—In a prosecution for bigamy marriage may be proved by cohabitation and the confessions of the party, and it is not necessary to produce the record or the testimony of a witness to it. *Phillips v. State*, 13 Ala. App. 325, 69 So. 356.

Same—Certified Copy of Marriage License.—In a prosecution for bigamy, a certified copy of the former marriage license was admissible in evidence. *Garner v. State*, 9 Ala. App. 60, 64 So. 183.

Bill of Discovery.

See post, DISCOVERY.

Bill of Exceptions.

See post, EXCEPTIONS, BILL OF.

Bill of Lading.

See post, CARRIERS.

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- § 306. — Execution and Delivery of Instrument.
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- § 313. — Extension of Time and Agreement Not to Sue.
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 - § 319 (3) Evidence Admissible under Plea or Answer in General.
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- § 320. Presumptions and Burden of Proof.
- § 321. — In General.
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- § 333. — Consideration.
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- § 338. — Good Faith and Payment of Value.
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- § 343. — In Actions on Contracts of Indorsement.
- § 344. Weight and Sufficiency of Evidence.
- § 346. — Execution, Delivery, and Identity of Instrument.
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 - § 363 (1) In General.
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 - § 363 (3) Consideration.
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- § 364. — Instructions.
- § 366. Judgment.

Cross References.

See the title **BILLS AND NOTES**, vol. 2, p. 309, and references there given.

In addition, see *ante*, **BANKS AND BANKING**; *post*, **CORPORATIONS**; **EVIDENCE**; **INTEREST**; **NOVATION**; **PRINCIPAL AND SURETY**; **USURY**.

As to evidence as to consideration and as to delivery upon condition, see *post*, **EVIDENCE**.

I. REQUISITES AND VALIDITY.

(B) FORM AND CONTENTS OF PROMISSORY NOTES AND DUE-BILLS.

§ 17½. Date.

Date in general is not essential to a bill or note; if there be no date it will be considered as dated at the time it was made. *Potter v. Tucker*, 11 Ala. App. 466, 66 So. 922.

§ 24. Instruments Payable after Death of Maker.

Instrument Held Valid. — *Dorsey v. Hudmon*, 179 Ala. 520, 60 So. 303. See the title **BILLS AND NOTES**, § 24, vol. 2, p. 314.

(C) EXECUTION AND DELIVERY.

§ 31. Partial Execution and Failure of Others to Sign.

See *post*, "Conditional Delivery," § 37.

§ 35. Delivery.

§ 36. — Necessity and Sufficiency in General.

Negotiable instruments Act (Code 1907, § 4973), providing that as between immediate parties and as to a remote party other than a holder in due course a delivery of a note to be effectual must be made either by or under the authority of the maker, and in such case the delivery may be shown to have been conditional

or for a special purpose only, refers only to a conditional or special delivery to the payee of which he is advised at the time and not to a delivery to an agent for transmission to the payee. *Ex parte Goldberg*, 191 Ala. 356, 67 So. 839, reversing *Goldberg v. Stone*, 10 Ala. App. 485, 65 So. 454.

§ 37. — Conditional Delivery.

Under Code 1907, § 4973, providing that every negotiable instrument must be delivered, etc., where a stockholder in a bank delivered a note which she signed payable to the bank conditionally on all other stockholders paying to the bank sums proportionate to their share value at par, and all the other stockholders did not contribute, as the condition of the delivery contemplated, the stockholder signing the note was not liable thereon, unless the holder was a holder in due course, since the conditional delivery of a note renders it ineffectual as a binding promise to pay until the event happens upon which the condition is based, unless the note is transferred to a bona fide holder in due course. *Bank v. Jordan* (Ala.), 75 So. 930.

(E) CONSIDERATION.

§ 55. Sufficiency.

§ 56. — In General.

§ 56 (1) In General.

Where plaintiff held a note and mort-

gage of a decedent which embraced property in the possession of defendant, a note given by defendant to take up deceased's note was supported by a valuable consideration, where deceased's note had not been paid, but, if it had been paid, there was no consideration. *Orr v. Stewart*, 13 Ala. App. 542, 69 So. 649.

Complainant agreed with a mortgagor to buy the land at foreclosure and to have the use of it for a year to reimburse him, and that the amount paid was not to exceed the amount due on the mortgage, \$117, and that if the amount bid by complainant exceeded that amount, he should be relieved from paying more, and acquired possession of the land for a year by paying the amount due, which was less than half of the sum bid at the sale and less than the rental value of \$150, and acknowledged the relation of tenant, and, after paying rent for a number of years, and while in possession, executed a note for rent to the landlord's guardian. Held, that complainant could not contend that the note was without consideration on the ground that he owned the legal title to the land, and it was immaterial that the mortgagor's interest was only a life estate, and that the note was made to the guardian of the mortgagor. *Anders v. Sandlin*, 191 Ala. 158, 67 So. 684.

§ 56 (3) Forbearance.

The extension of the time of the payment of a debt was a sufficient consideration for a note given to secure the debt. *Dillworth v. Holmes Furniture, etc., Co.* (Ala. App.), 73 So. 288.

§ 58. — Preexisting Indebtedness or Liability.

A note, given in settlement of accounts against the maker's deceased husband was not unenforceable for want of consideration, if the husband's estate was solvent, and if she was entitled to the whole thereof, as it was a benefit to her to secure the satisfaction of debts for the payment of which the estate was liable, and a detriment to the owner of the claims to discharge them. *Vaughn v. Bass*, 10 Ala. App. 388, 64 So. 543.

Detriment to Promise.—Where defendant, the general manager of a company and the owner of 30 per cent. of its capi-

tal stock, executed notes to secure a past-due debt of the company to plaintiff under an arrangement whereby the company was discharged and a new debt created binding on him alone, the detriment to the promisee from the extinguishment of his demand against the original debtor was a valuable consideration to support the note, in the absence of any showing that the company, though bankrupt, had been discharged from the debt, or that it was wholly without assets; since it is immaterial that the detriment is of a trifling character, unless it is utterly worthless. *Boatwright v. Scheuer, etc., Co.*, 11 Ala. App. 420, 66 So. 819.

(F) VALIDITY.

§ 71. Effect of Invalidity.

§ 72. — Partial Invalidity.

In view of Code 1907, § 4579, making rebates on contracts of insurance illegal, where part of consideration of notes was unlawful promise to accord maker such rebate as consideration for notes, was partial illegality which rendered them void. *Armstrong v. Walker* (Ala.), 76 So. 280.

§ 75. Right to Contest Validity.

Where mortgagor of cotton was induced by his vendor of the land to sign notes creating lien on cotton for rent under mistaken apprehension that he merely signed notes for purchase price of land, such defense would be available both to him and to mortgage of cotton. *Herzfeld v. Hayne* (Ala.), 76 So. 973.

II. CONSTRUCTION AND OPERATION.

§ 76. What Law Governs.

A note made and to be performed in Kentucky is governed by the law of that state. *Tatum v. Commercial Bank, etc., Co.*, 193 Ala. 120, 69 So. 508.

§ 77. Parties.

§ 79. — Principals and Sureties or Guarantors.

Surety.—Where complainant and defendant took a joint deed of realty and gave their joint notes, complainant was surety for the debt of the defendant, who was the principal obligor for his own

half of the debt. *Turner v. Turner*, 193 Ala. 424, 69 So. 503.

§ 91. Marginal Memoranda and Figures.

The effect of a written contract is to be gathered from the whole writing, and any memorandum therein, including that written on the back of a bill or note, contemporaneously with its execution, and intended to constitute a part of it, is a part of such instrument. *People's Bank v. Moore* (Ala.), 78 So. 789.

Figures in Body of Note Controls Those in Margin.—*Bell v. Birmingham*, 9 Ala. App. 212, 62 So. 971. See the title **BILLS AND NOTES**, § 91, vol. 2, p. 339.

§ 92. Collateral Agreements.

Where an account was assigned as security for present and future advances and separate notes given for advances, each referring to assignment and with copy thereof attached, each note and assignment would be construed together. *O'Barr v. Turner* (Ala. App.), 75 So. 271.

III. QUALIFICATION, RENEWAL, AND RESCISSION.

§ 96. Operation and Effect of Extension or Renewal.

Original Notes Secured by False Representation.—In an action on renewal notes, that the agent of an insurance company to which the original notes were payable falsely represented the amount of the capitalization of the company, and defendant relied upon this representation as an inducement to his purchase of stock and execution of the original notes, was a good defense. *Armstrong v. Walker* (Ala.), 76 So. 280.

Illegality of Original Notes.—Where original notes were affected with illegality, their renewal was subject to same invalidating consequences. *Armstrong v. Walker* (Ala.), 76 So. 280.

IV. NEGOTIABILITY AND TRANSFER.

(A) INSTRUMENTS NEGOTIABLE.

§ 100. Nature and Form of Instrument.

§ 102. — Promissory Notes.

A note for a sum certain, payable to the order of one named 90 days after date, is a "negotiable instrument" within

Code 1907, § 4958, declaring that a negotiable instrument must be in writing, signed by the maker, must contain a promise to pay a sum certain in money, payable on demand or at a fixed time, and be payable to the order of a named person or firm. *Sherrill v. Merchants', etc., Sav. Bank*, 195 Ala. 175, 70 So. 723.

§ 102½. — Particular Kinds or Forms of Orders, Certificates or Warrants.

A "certificate of deposit" by which a bank agrees to pay interest thereon is in effect a "negotiable promissory note" and "commercial paper." *Elmore County Bank v. Avant*, 189 Ala. 418, 66 So. 509.

Certificates of bank deposits are in effect negotiable promissory notes, promising payment upon their return or surrender properly indorsed. *Johnson v. Blackmon* (Ala.), 78 So. 891.

§ 103. — Instruments Payable from Particular Fund.

Instruments drawn upon, or payable out of, a particular fund, are not negotiable bills or notes, because they do not carry the general personal credit of the obligor, and payment is contingent upon the sufficiency of the fund referred to. *People's Bank v. Moore* (Ala.), 78 So. 789.

In bills of exchange, neither the indication of a particular fund out of which the drawee is to reimburse himself, nor any direction as to resulting debits or adjustments as between the drawer and drawee, are regarded as affecting negotiability, providing the order to pay is itself absolute. *People's Bank v. Moore* (Ala.), 78 So. 789.

§ 106. Certainty as to Amount Payable.

§ 106. — Attorneys' Fees and Costs.

Provisions Not Affecting Negotiability.—*Bledsoe v. City Nat. Bank*, 7 Ala. App. 195, 60 So. 942, cited in note in L. R. A. 1916B, 685; *Ex parte Bledsoe*, 180 Ala. 586, 61 So. 813. See the title **BILLS AND NOTES**, § 108, vol. 2, p. 345.

§ 109½. Statement of Consideration.

In the case of promissory notes, the mere statement of the consideration, or of the transaction out of which the promise to pay originated, does not affect ne-

gotiability, since it does not qualify the obligation to pay. *People's Bank v. Moore* (Ala.), 78 So. 789.

§ 110. Conditions and Restrictions in Instrument.

Notes Held Negotiable.—Ex parte Bledsoe, 180 Ala. 586, 61 So. 813; Bledsoe v. City Nat. Bank, 7 Ala. App. 195, 60 So. 942, cited in note in 1916B, 685. See the title **BILLS AND NOTES**, § 110, vol. 2, p. 345.

§ 111. Recitals and Provisions as to Collateral Securities.

Under Laws Sp. Sess. 1909, p. 126, the fact that an instrument retains title to property as security for its payment does not destroy its negotiability. *Citizens Nat. Bank v. Buckheit*, 14 Ala. App. 511, 71 So. 82.

(B) TRANSFER BY INDORSEMENT.

§ 117. Formal Requisites.

"Allonge."—Under Code 1907, § 4986, providing that the indorsement must be written on the instrument itself, or upon a paper attached thereto, where a note and mortgage were pinned together for temporary convenience, and there was room on the note for an indorsement, the indorsement of the mortgage was insufficient to negotiate the note, and operated merely as a common-law assignment, for although the statute sanctions the use of the "allonge" of the old law merchant, a strip of paper tacked or pasted on to the instrument so as to become a part of it, it was not intended to establish the loose practice of making regular indorsements of commercial paper by writing on the back of any other paper to which it may be temporarily attached, more especially when there is ample space for indorsement on the back of the instrument itself. *Clark v. Thompson*, 194 Ala. 504, 69 So. 925.

§ 119. Indorsement in Blank.

Where a note payable to the maker was indorsed by him in blank, and contained no other indorsement, it was payable to bearer, under the express provisions of Code 1907, § 4966, subd. 5. *Davis v. First Nat. Bank*, 192 Ala. 8, 68 So. 261.

(C) TRANSFER WITHOUT INDORSEMENT.

§ 124. Transfer by Delivery.

§ 125. — In General.

Doctrine Stated.—*Stewart v. Bibb County, etc., Co.*, 177 Ala. 503, 58 So. 273. See the title **BILLS AND NOTES**, § 209, vol. 2, pp. 374, 375.

Notes Payable to Order.—Under Code 1907, §§ 4985, 5007, as to transfer of negotiable instruments, notes payable to order can be negotiated only by the indorsement of the holder, completed by delivery. *Jones v. Bell* (Ala.), 77 So. 998.

Certificate of Deposit.—Stipulation in certificate of deposit for payment upon their return or surrender properly indorsed is for safety and convenience of bank, and makes the certificate representative of deposit, so that its mere delivery with the intention to pass title to deposit would so operate in equity. *Johnson v. Blackmon* (Ala.), 78 So. 891.

V. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.

(A) INDORSEMENT BEFORE DELIVERY TO OR TRANSFER BY PAYEE.

§ 131. Nature and Construction of Contract in General.

An indorsement on a promissory note can not be contradicted by any contradictory parol agreement, and the intention of the maker and payee is immaterial as far as indorser is concerned. *People's Bank v. Moore* (Ala.), 78 So. 789.

§ 133. Consideration.

Where collateral securing a note became unsatisfactory before maturity and defendant, a volunteer, indorsed it, and neither defendant nor the maker derived any benefit from indorsement and holder did not suffer any detriment, the indorsement was a nudum pactum. *Zadek v. Forcheimer* (Ala. App.), 77 So. 941.

§ 138. Nature of Liability on Indorsement.

§ 140. — As Surety.

One who indorsed notes to lend credit to maker to enable latter to raise money on notes was surety rather than indorser. *Schillinger v. Wickersham* (Ala.), 75 So. 11.

§ 140½. — As Guarantor.

Where collateral security of note became unsatisfactory before maturity, one indorsing it as additional security was an "irregular indorser," and assumed an obligation in the nature of a guaranty of the payment of a pre-existing debt. *Zadek v. Forcheimer* (Ala. App.), 77 So. 941.

§ 141. Time of Indorsement.

Where one writes his name on the back of the note as indorser, at its inception, and not after it is fully executed, it is an irregular indorsement. *Long v. Gwin*, 188 Ala. 196, 66 So. 88.

§ 142½. Order of Indorsement.

The payee of a note is usually the first indorser and is liable next after the maker or acceptor. *Long v. Gwin*, 188 Ala. 196, 66 So. 88.

§ 143. Indorsement on Condition.

Wrongful Delivery.—In an action on a note against one indorsing it before its delivery to the payee, defendant insisted that he indorsed the note under certain representations and agreements which had not been complied with by the payee and with the understanding that the note was to be held by one to whom it was delivered in escrow, and that it was delivered to the payee without the knowledge and consent of defendant or the person to whom it was delivered in escrow and in violation of the agreement without the payee having complied with certain conditions precedent, and also that the note was delivered in escrow merely to help get a trade through or confirm a trade, and that it was agreed that the note was not to be used or negotiated, possessed, or owned by the payee. Held that, if the facts were as claimed, the indorser was discharged from liability on the note. *Farley v. Baldwin* (Ala.), 77 So. 723.

§ 144. Diversion to Unauthorized Purpose.

Notice to Payee.—Where a note was indorsed on the express agreement that it should be used by the indorser's son in acquiring a half interest in a business, and the payee was cognizant of the arrangement, a breach of the agreement will defeat action on the note. *Haas v.*

Commerce Trust Co., 194 Ala. 672, 69 So. 894.

Collateral Condition Not Violated.

Where a father indorsed his son's notes to enable the son to purchase a half interest in an incorporated business, the fact that one share of the son's stock was transferred to a dummy to comply with the law of the state where the business was located, which required three stockholders, does not show a violation of the agreement discharging the father. *Haas v. Commerce Trust Co.*, 194 Ala. 672, 69 So. 894.

An arrangement with respect to the drawing account of defendant's son from his half interest in an incorporated business, to purchase which defendant had indorsed his notes, held not a violation of the agreement that he should acquire a half interest. *Haas v. Commerce Trust Co.*, 194 Ala. 672, 69 So. 894.

§ 147. Extent of Liability.

Qualified Indorsement.—Under Negotiable Instruments Law, § 3, an indorsement, on a promissory note absolute on its face and as to the maker, "The undersigned indorsers assume the contract shown by the face of this note. Payable from Pass Aux Heron U. S. Government contract"—is a qualified indorsement, and indorsers' liability is limited to the fund indicated and conditioned upon its sufficiency to pay the notes, whether in whole or in part. *People's Bank v. Moore* (Ala.), 78 So. 789.

§ 148. Discharge of Indorser.

Where plaintiff bank, when it acquired notes from the payee, knew that defendant was an accommodation maker, and in legal effect only a surety thereon, and held collateral security of the payee sufficient to pay the notes, and released such collateral, or negligently allowed it to be withdrawn or appropriated, without the consent or fault of the defendant surety, it thereby discharged the surety. *Tatum v. Commercial Bank, etc., Co.*, 193 Ala. 120, 69 So. 508.

A bank, holding notes indorsed to it by the payee, who was the principal debtor, which on the execution of the notes, and before it acquired them, knew that they had been made by defendant for the payee's accommodation, and which, after the notes were due and pay-

able by the principal debtor, failed to apply the payee's deposit, sufficient to pay the notes, to their payment, thereby discharged the accommodation maker. *Tatum v. Commercial Bank, etc., Co.*, 193 Ala. 120, 69 So. 508.

(B) INDORSEMENT FOR TRANSFER.

§ 162. Mode, Form, or Purpose of Indorsement.

§ 165. — Indorsement for Collection.

The indorsement of a note to plaintiff or to any bank for collection does not, where plaintiff had possession of the note, affect its title. *Haas v. Commerce Trust Co.*, 194 Ala. 672, 69 So. 894.

§ 165½. — Indorsement without Recourse.

The liability of the maker of a note is unaffected by the fact that it was transferred to sureties who did not pay it but merely indorsed it to a third person without recourse. *Britnell v. Smith*, 189 Ala. 440, 66 So. 569.

Where a note transferred to sureties was reissued by them by indorsement without recourse, they were relieved from any liability in favor of the indorsee or those claiming under him. *Britnell v. Smith*, 189 Ala. 440, 66 So. 569.

§ 168½. Order of Liability.

Maker of a note, to whom consideration moved, is primarily liable, while an indorser is secondarily liable. *Hudson Trust Co. v. Elliott*, 194 Ala. 441, 69 So. 631.

§ 169. Necessity to Charge Indorser of Proceeding against Maker.

Under Code 1907, § 4112, providing that, when execution issues against two or more persons, one of whom was surety on the contract before judgment, the sheriff must levy on any property of the principal first, on the application of the surety, an indorsee of a note, obtaining judgments thereon against the maker, primarily liable, and against an indorser, secondarily liable, must proceed to collect the judgment by execution, and equity will restrain the indorsee from proceeding to enforce the judgment against the indorser, where

the maker has sufficient property to satisfy the judgment, though §§ 5384-5399 afford protection to a surety against payment of debt of principal, for under § 5386 the remedy is merely cumulative, and does not exclude other remedies, conferred by statute or existing at common law. *Hudson Trust Co. v. Elliott*, 194 Ala. 441, 69 So. 631.

§ 170. Extent of Liability.

Where a note secured by mortgage provided that no other property of the maker except that covered by the mortgage should be subject to the debt, and indorsement thereof imposes no personal liability on the indorser, since he merely guarantees that the maker will pay the note according to its tenor, and therefore the solvency of the maker or indorser can not even reduce the damages in an action for deceit in the transfer of the note. *Moon v. Benton*, 13 Ala. App. 473, 68 So. 589.

(C) ASSIGNMENT OR SALE.

§ 179. Equities and Defenses against Assignee.

§ 180. — In General.

Nonnegotiable Instrument. — Rent notes, payable not in money, but in cotton, are nonnegotiable choses in action, and the assignee takes only the rights of the assignor subject to all the rights, equities, and defenses existing against them in the hands of the assignee. *Brooks v. Greil Bros. Co.*, 192 Ala. 235, 68 So. 874.

Assignee Must Exercise Prudence.—

The assignee of a nonnegotiable instrument is not excused from the exercise of such prudence and inquiry as the circumstances would suggest to a reasonably prudent man. *Brooks v. Greil Bros. Co.*, 192 Ala. 235, 68 So. 874.

No Notice of Latent Equities.—Where a nonnegotiable instrument is assigned for value to an assignee without notice of a latent equity in favor of a third person, such equity is lost, as the law does not require that such assignee take it subject to latent equities, of which he has no notice. *Brooks v. Greil Bros. Co.*, 192 Ala. 235, 68 So. 874.

(D) BONA FIDE PURCHASERS.**§ 189. Nature and Grounds of Protection.**

It is essential to a bona fide purchase of a negotiable instrument that the purchase be made before maturity, without notice of any defense existing against the note in the hands of the payee. *German-American Nat. Bank v. Lewis*, 9 Ala. App. 352, 63 So. 741.

§ 190. Character of Instrument.

Rent notes, payable not in money, but in cotton, are not governed by the law merchant, and an assignee can not claim the protection which the statute affords to bona fide purchasers of commercial papers in the due course of business. *Brooks v. Greil Bros. Co.*, 192 Ala. 235, 68 So. 874.

§ 191. Mode or Form of Transfer.

By direct provision of Code 1907, §§ 5007-5014, to be holder in due course of a note given by husband and wife for money loaned to the husband, and so free of the wife's defense that she was an accommodation maker and a surety only, the holder must have acquired such note by negotiation to him which, in case of a note payable to order, could be only by indorsement. *Clark v. Thompson*, 194 Ala. 504, 69 So. 925.

Conditional Indorsement — "Holder in Due Course."—Where a bank in writing agreed to take charge of the obligations payable to another bank, to employ proper diligence in collecting them, and to devote the proceeds to its own reimbursement for sums paid out by reason of having assumed the deposit account and liabilities of the other bank, also agreeing to pay over any excess, the unqualified indorsement of a note by the second to the first bank, though made previous to the taking over of the second bank's affairs by the first bank to afford collateral for a loan by a third bank did not constitute an unconditional purchase of the note for value, rendering the first bank a "holder in due course," as defined in Code 1907, § 5507, since, if the substance of the written agreement had been indorsed on the back of the note, the indorsement would have been restrictive or conditional by

§§ 4987, 4988, 4991, 4992. *Bank v. Jordan* (Ala.), 75 So. 930.

§ 192. Actual Notice.**§ 193. — In General.**

Correspondence relative to other notes before execution of the note in question is insufficient to constitute notice of infirmity therein, within Code 1907, § 5011, to purchaser thereof. *Neill v. Central Nat. Bank* (Ala.), 78 So. 73.

§ 194½. — Time of Notice.

See ante, "In General," § 193.

Subsequent Notice.—An indorsee acquiring a note in due course of trade and for value without notice of any infirmity or defects would not be affected by subsequent notice thereof to him or his agent. *Elmore County Bank v. Avant*, 189 Ala. 418, 66 So. 509.

§ 196. Constructive Notice, and Facts Putting on Inquiry.**§ 197. — Good Faith in General.**

Where plaintiff purchased the note sued on for value in due course, nothing short of bad faith would destroy its standing as a bona fide purchaser. *Sample v. Tennessee Valley Bank* (Ala.), 76 So. 936.

§ 199. — Relation to Instrument of Persons Dealing Therewith.

Where a member of a firm purchases a note due the firm, which is void because it was given in consideration of an agreement to dismiss a criminal prosecution and hold the accused harmless, he is not a bona fide purchaser for value without notice. *Hartsell v. Roberts*, 185 Ala. 201, 64 So. 90.

§ 199½. — Matters Apparent from Instrument.

See ante, "Character of Instrument," § 190.

§ 200½. — Operation and Effect.

Under Code 1907, § 5011, relating to notice of an infirmity in an instrument or defect in the title of the one negotiating it, held, that an indorsee without actual knowledge of defenses, but with knowledge of facts which if properly pursued would have led to actual knowledge thereof, was charged therewith.

Elmore County Bank v. Avant, 189 Ala. 418, 66 So. 509.

§ 201. Taking after Maturity.

§ 202. — Title and Rights Acquired.

Where the principal maker of a note paid it with his own money, it operated to discharge the indebtedness absolutely and to release the sureties so that a transferee after maturity took nothing thereby. *Hagin v. Shoaf*, 9 Ala. App. 300, 63 So. 764, certiorari denied in *Ex parte Shoaf*, 186 Ala. 394, 64 So. 615, cited in note in *L. R. A.* 1915E, 396.

§ 203. — Defenses as against Purchasers after Maturity.

A note indorsed to plaintiff after maturity is subject to all legal defenses in his hands. *Choctaw Bank v. Gewin* (Ala. App.), 78 So. 96.

§ 204. Consideration in General.

§ 204½. — Payment of Value.

Where plaintiff, in acquiring note, did not part with anything of value or change his position, he was not an innocent purchaser, and the note was subject to all defenses available against the original holder. *Wilson v. Weaver* (Ala. App.), 77 So. 238.

Real or Supposed Value.—If the holder of a note purchased in due course of business for value before maturity without notice of the matters set up by defendant, he could recover, regardless of whether he paid the real or supposed value for the note. *Hudson v. Repton State Bank* (Ala. App.), 75 So. 695.

Issuance of interest-bearing time certificate of deposit is sufficient consideration to make one a bona fide purchaser of notes. *Neill v. Central Nat. Bank* (Ala.), 78 So. 73.

An indorsee of a note who did not pay money for it, but issued a certificate of deposit carrying interest, which was immediately negotiated by the indorser, and ultimately paid by the indorsee, held in the same position as if it had paid value for the note. *Elmore County Bank v. Avant*, 189 Ala. 418, 66 So. 509.

The holder of negotiable paper as collateral security for a pre-existing debt, without more, is not a bona fide holder for value. *Miller v. Johnson*, 189 Ala. 354, 66 So. 486.

§ 206. — Usurious Consideration.

The transfer of a negotiable paper, valid in the hands of original holder, at a discount greater than legal interest, is not usurious, although the transferor may have indorsed it, and such discount does not deprive the transferee of the protection of bona fide purchaser. *Bernheimer v. Gray* (Ala.), 78 So. 840.

§ 207. — Crediting Proceeds.

Where a bank did not pay certificate of deposit given for notes, it did not part with value so as to constitute it bona fide holder. *Armstrong v. Walker* (Ala.), 76 So. 280.

A bank discounting a note and depositing the proceeds to the payee's credit is not a bona fide purchaser for value unless the funds are absorbed by antecedent indebtedness or entirely exhausted by withdrawal, it not being sufficient that a material portion thereof was checked out. *Citizens Nat. Bank v. Buckheit*, 14 Ala. App. 511, 71 So. 89; *German-American Nat. Bank v. Lewis*, 9 Ala. App. 352, 63 So. 741; *Tatum v. Commercial Bank, etc., Co.*, 185 Ala. 241, 64 So. 561.

Where a bank discounts a note for a holder not its debtor, placing the amount to the credit of the holder by way of deposit, the bank does not become a bona fide purchaser, but, on the payment of the amount of deposit before notice of infirmity, the bank becomes a bona fide purchaser. *Sherrill v. Merchants', etc., Sav. Bank*, 195 Ala. 175, 70 So. 723.

§ 209. Taking as Collateral Security for Pre-Existing Debt.

Under Code 1907, §§ 4982, 5007, subd. 3, and § 5012, a holder otherwise in due course is a bona fide holder of negotiable paper for value though he has taken it as collateral security for pre-existing debt. *Vogler v. Manson* (Ala.), 76 So. 117.

§ 212½. Title and Rights Acquired by Bona Fide Purchasers.

If a note sued on was commercial paper complete and regular on its face which plaintiff purchased in good faith in the regular course of business for value before maturity and without notice of any defect of title or defense set up by

defendant, plaintiff is entitled to recover. *Hudson v. Repton State Bank* (Ala. App.), 75 So. 695.

§ 213. Defenses as against Bona Fide Purchasers.

§ 214. — In General.

Commercial paper in the hands of a bona fide purchaser for value before maturity is not subject to the defense which would avail against the original payee, unless it is shown that the purchaser had notice of such defense. *Jones v. Bell* (Ala.), 77 So. 998.

§ 218. — Conditions or Collateral Agreements.

The maker of a note can not defend an action thereon on the strength of an oral agreement that it was to become payable only on certain conditions, unless the holder of the note had notice of that agreement. *Jefferson County Sav. Bank v. Compton*, 192 Ala. 16, 68 So. 261.

§ 219. — Want or Failure of Consideration in General.

When Not a Defense.—*Bledsoe v. City Nat. Bank*, 7 Ala. App. 195, 60 So. 942. See the title **BILLS AND NOTES**, § 219, vol. 2, p. 379.

§ 220. — Accommodation Paper.

Under the express provisions of Code of 1907, § 4984, the accommodation maker of a note is liable to a holder for value notwithstanding the holder knew him to be only an accommodation party. *Tatum v. Commercial Bank, etc., Co.*, 185 Ala. 241, 64 So. 561.

§ 221. — Fraud in Inception.

That the payee of notes induced the maker to execute them by undue influence and fraud would not defeat the collection of the notes in the hands of a bona fide purchaser. *Tatum v. Commercial Bank, etc., Co.*, 185 Ala. 241, 60 So. 561.

§ 222. — Illegality in General.

§ 222 (1) In General.

Statutory Declaration of Illegality.—A contract declared void by the statute will not be enforced in favor of an innocent purchaser, but a negotiable contract not declared void will be enforced in favor of an innocent purchaser. *Citi-*

zens Nat. Bank v. Buckheit, 14 Ala. App. 511, 71 So. 82, cited in note in *Ann. Cas.* 1917D, 699, certiorari denied in *Ex parte Buckheit*, 196 Ala. 700, 72 So. 1019.

Note for Services of Physician Acting in Violation of Statute.—Any contract made in violation of Code 1907, § 1644, providing that a physician shall not be entitled to compensation for services where his certificate has not been recorded, and § 7564, prescribing a penalty for practicing medicine without a license, is void ab initio; and hence it is a good defense to a note given for services of a physician that the physician is acting in violation of such sections, though the plaintiff was an innocent purchaser of the note before maturity. *Whitehead v. Coker* (Ala. App.), 76 So. 484.

§ 222 (2) Foreign Corporation Not Complying with State Laws.

Foreign Corporation without Permit to Do Business.—A note given in consideration of a sale of corporate stock by a foreign corporation, which had not procured a permit to do business as required by Code 1907, §§ 3651-3653, can not be enforced by an innocent holder since the statute makes all contracts, either by or to such corporation null and void. *Jones v. Martin* (Ala. App.), 74 So. 761.

When Negotiable Instruments Enforceable.—A note given to foreign corporation which had no known place of business or designated agent within state as required by Const. 1901, § 232, and Code 1907, §§ 3642-3646, can be enforced by innocent holder where contract on which note was given was not void ab initio. *Jones v. Martin* (Ala. App.), 74 So. 761.

A contract made by a foreign corporation which had not complied with Code 1907, §§ 3642-3646, requiring it to maintain an office and agent within the state, §§ 3647-3649, requiring it to pay a tax on its capital employed within the state, or §§ 3651-3653, requiring it to pay the privilege or license tax, if negotiable and in the hands of an innocent purchaser, will be enforced, and a replication alleging that plaintiff is a bona fide purchaser of notes is good against pleas alleging the failure of the payee, a foreign corporation to comply with the statutes. *Citi-*

zens Nat. Bank *v.* Buckheit, 14 Ala. App. 511, 71 So. 82.

Subsequent Illegal Transaction of Business.—Where notes given a foreign corporation in an intestate commerce transaction are sued on by a bona fide purchaser thereof, the fact that, subsequent to receiving the notes, the corporation illegally transacted business within the state in relation to the machine sold, does not destroy the right of the holder of the note. *Citizens Nat. Bank v. Buckheit*, 14 Ala. App. 511, 71 So. 82, certiorari denied *in Ex parte* Buckheit, 196 Ala. 700, 72 So. 1019.

§ 223. — Usury.

Demand of holder of note in due course is not subject to be abated as to legal interest by reason of the fact that transaction between original parties is tainted with usury. *Vogler v. Manson* (Ala.), 76 So. 117.

§ 224. — Alteration.

When Not a Defense.—*Bledsoe v. City Nat. Bank*, 7 Ala. App. 195, 60 So. 942. See the title **BILLS AND NOTES**, § 224, vol. 2, p. 383.

VI. PRESENTMENT, DEMAND, NOTICE, AND PROTEST.

§ 230. Necessity of Demand for Payment and Notice of Nonpayment.

§ 231. — In General.

Under Code 1907, § 5025, as to presentment of a note, if money for its payment awaits the holder at the time and place for payment, this is the equivalent of a tender. *Moore v. Altom*, 196 Ala. 158, 71 So. 681.

The maker of a note is not entitled to presentment or notice of dishonor. *Hall v. First Bank*, 196 Ala. 627, 72 So. 171; *Long v. Gwin*, 188 Ala. 196, 66 So. 88.

§ 233. — Condition Precedent to Liability of Indorser.

An indorser's contract is conditioned on due presentment for payment to the party primarily liable, the maker or acceptor, and notice of dishonor, and a failure to make such presentment or to give such notice will discharge him. *Long v. Gwin*, 188 Ala. 196, 66 So. 88.

§ 235. — Effect of Failure to Make Demand or Give Notice.

Where the holder of a note does not present his note for payment where payment is tendered, he does not thereby forfeit his money, but only the cost of collecting it elsewhere. *Moore v. Altom*, 196 Ala. 158, 71 So. 681.

§ 236. Sufficiency of Presentment for Payment and Demand.

§ 238. — Persons Who May Make.

Notary Public.—Under the direct provisions of Code 1907, § 5166, a notary public has authority to receive a check and demand payment thereof. *Hooper v. Herring*, 14 Ala. App. 455, 70 So. 308.

§ 241. — Time.

Limitations and Laches.—*Stewart v. Bibb County, etc., Co.*, 177 Ala. 503, 58 So. 273. See the title **BILLS AND NOTES**, § 241 (1), vol. 2, p. 389.

§ 242. — Form and Mode.

Acts 1909 (Sp. Sess.), p. 141, §§ 89-92, provide when a negotiable instrument is dishonored by nonpayment, notice must be given to the drawer and to each indorser, which notice may be given by or on behalf of the holder, or any person who may be compelled to pay the holder, and who, upon taking it up, would have a right to reimbursement from the parties to whom notice is given. That statute also authorizes notice of dishonor to be made by an agent. Section 118 provides that when any negotiable instrument has been dishonored it may be protested, but protest is not required save in case of foreign bills. A bank on which a check was drawn refused payment, and its cashier delivered the check to a notary for protest. The notary duly wrote out the protest. Held, that as he was authorized to do so and as the cashier could act for the payee, there was sufficient presentment for payment, the notary not being required to do a vain thing and again present the check for payment, after it had been once refused. *Hooper v. Herring*, 14 Ala. App. 455, 70 So. 308.

§ 244. Protest and Certificate Thereof.

§ 246. — Requisites and Sufficiency.

Protest may be made by a commercial notary at the instance of any person au-

thorized to receive payment. *Hooper v. Herring*, 14 Ala. App. 455, 70 So. 308.

VII. PAYMENT AND DISCHARGE.

§ 261. Persons by Whom Payment May Be Made and Effect.

Drawer of Dishonored Check.—Under Acts 1909 (Sp. Sess.), p. 153, § 171, the drawer of a check which was wrongfully dishonored by a bank is entitled to intervene and pay it to protect his honor. *Hooper v. Herring*, 14 Ala. App. 455, 70 So. 308.

§ 262. Persons to Whom Payment May Be Made.

To Another than Actual Holder—Payee.—After transfer of a note payment to the payee will not discharge the instrument. *Sherrill v. Merchants', etc., Sav. Bank*, 195 Ala. 175, 70 So. 723.

Evidence of payments by defendant to the payee of negotiable notes is not admissible in an action by the holder in due course; the latter being the only person with whom the maker could settle unless payee and intervening holders had accounted for such payments with the final holder. *Oneonta Trust, etc., Co. v. Box* (Ala. App.), 73 So. 759.

§ 263. Mode and Sufficiency of Payment.

§ 265. — New Bills or Notes.

The execution of a note held not a payment of an original note given to a corporation by a stockholder, and did not destroy the lien of the corporation, under Code 1907, § 3476. *Montgomery Bank, etc., Co. v. Jackson*, 190 Ala. 411, 67 So. 235.

§ 266. — Property or Services.

Where lessees of a mine, who gave the lessor notes to secure back royalties, transferred to a company which assumed the notes and defaulted, the lessor recovering judgment, including the amount of the notes, and the company had property which came to the lessor satisfying his judgment, he could not recover against the original lessees on the notes. *Brown v. Shorter*, 195 Ala. 692, 71 So. 103.

§ 270. Discharge.

§ 272. — Cancellation or Surrender of Instrument.

A note coming into the hands of its

maker in due course is extinguished ipso facto, but it is revived along with all its securities by a transfer by the maker. *Owings Lumber Co. v. Marlowe* (Ala.), 76 So. 926.

Where a note is given its maker as collateral for a debt to him, it is not thereby discharged. *Owings Lumber Co. v. Marlowe* (Ala.), 76 So. 926.

§ 273. — Payment or Satisfaction by Other Parties.

Where the transferee of lessees of a coal mine assumed payment of the lessees' notes to the lessor, and satisfied the debt, the lessor could not recover against the lessees on a note. *Brown v. Shorter*, 195 Ala. 692, 71 So. 103.

VIII. ACTIONS.

§ 275. Right of Action.

§ 277. — Title to Sustain Action.

Indorsees and Assignees.—Under Code 1907, § 4985, providing that notes payable to bearer shall be negotiable by delivery, where a note payable to bearer and indorsed by him was negotiated to plaintiff and his predecessor, by a delivery, plaintiff was the legal holder thereof and entitled to sue thereon, though it was not indorsed by plaintiff's predecessor. *Davis v. First Nat. Bank*, 192 Ala. 8, 68 So. 261.

In a suit on a note, the fact that the original payees assigned it by separate writing to the holders who retained the same partnership name as the transferors, does not prevent them from being "holders" of the note within Code 1907, § 5006, authorizing the holder of a negotiable instrument to sue thereon in his own name. *Davis v. Florey* (Ala. App.), 77 So. 413.

§ 282. Defenses.

§ 283. — In General.

As between the parties and all others not bona fide holders, a negotiable note occupies the same position in an action for its collection as one not negotiable; and is subject to the same defenses. *Stone v. Goldberg*, 6 Ala. App. 249, 60 So. 744.

"Holder in Due Course"—"Negotiate."
—Under Negotiable Instruments Act

(Code 1907, § 4985), declaring that an instrument is negotiated when it is transferred so as to constitute the transferee a holder, and § 5007, defining a "holder in due course" of a negotiable note so as to require that it shall have been negotiated to him without notice of any infirmity, and § 5013, declaring that in the hands of any holder who is not a holder in due course a negotiable instrument is subject to the same defenses as if nonnegotiable, and § 5138, defining a "holder" to mean a payee of a note in possession thereof, and § 5143, providing that in any case not provided for by the law the rule of the law merchant shall govern, a payee of a negotiable note taking the note for value in good faith in the regular course of business without notice may recover thereon against a surety signing in reliance on the false statement of the maker that the signature of another ostensible surety is genuine and on the violated condition that other named persons are to sign as cosureties before delivery to the payee; the definition of a "holder in due course" being construed as applicable to a holder provided he is a negotiatee, but not excluding all who are not holders by negotiation, though the word "negotiate" means only the transfer from one holder to another after the instrument has been issued. *Ex parte Goldberg*, 191 Ala. 356, 67 So. 839, reversing *Goldberg v. Stone*, 10 Ala. App. 495, 65 So. 454.

§ 284. — Particular Grounds.

§ 284 (1) In General.

Alteration of the contract is a defense to a suit on a nonnegotiable note. *Weinstein Bros. v. Citizens' Bank*, 13 Ala. App. 552, 69 So. 972.

Breach of warranty as to the transaction is a defense to a suit on a nonnegotiable note. *Weinstein Bros. v. Citizens' Bank*, 13 Ala. App. 552, 69 So. 972.

Maker Doing Business without Compliance with Laws.—That a maker of a note was a foreign corporation, doing business without compliance with the laws, was no defense in an action against an indorser. *People's Bank v. Moore* (Ala.), 78 So. 799.

§ 284 (3) Want or Failure of Consideration.

Failure of consideration is a complete defense to an action upon a note by the payee or any one claiming under him other than a bona fide purchaser. *Tatum v. Commercial Bank, etc., Co.*, 185 Ala. 241, 64 So. 561.

Nonnegotiable Note.—Lack or failure of consideration is a defense to a suit on a nonnegotiable note. *Weinstein Bros. v. Citizens' Bank*, 13 Ala. App. 552, 69 So. 972.

§ 289. Parties Defendant.

§ 291. — Joinder.

At common law the holder of a negotiable instrument may proceed concurrently in separate suits against the respective parties liable, until the debt is satisfied. *Schillinger v. Leary* (Ala.), 77 So. 846.

Under Alabama statute a joint action against the maker and the indorser of a promissory note can not be maintained, since the obligation of each is several, and the liability of each is dependent upon different conditions. *Schillinger v. Leary* (Ala.), 77 So. 846.

§ 292. Declaration, Complaint, or Petition.

§ 293. — Form and Requisites in General.

Complaints Held Sufficient.—The complaint in an action by the payee on a note, being in the form prescribed by Code 1907, § 5382, form No. 1, is sufficient. *Stone v. Goldberg*, 6 Ala. App. 249, 60 So. 744.

In an action on a note a complaint, alleging the execution of the note payable to order, its transfer for value by indorsement before maturity in the due course of business by payee to plaintiff's indorser, who took without knowledge of existing defect or defense, purchase of the note by plaintiff, and that it is now his property, was sufficient. *Clearman v. Cobbs*, 197 Ala. 546, 73 So. 83.

§ 295. — Description of Instrument.

In holder's action on note, plea containing blind reference to payee's breach of a contract with maker was demurrable for failing to set out the instru-

ment in haec verba or according to its legal effect. *Weinstein v. Citizens' Bank (Ala.)*, 75 So. 397.

A count on promissory notes is demurrable where it fails to state the year of the execution of the note. *Potter v. Tucker*, 11 Ala. App. 466, 66 So. 922.

§ 296. — Transfer and Ownership.

§ 296 (1) Necessity of Alleging Indorsement, Assignment, and Ownership.

Assignment.—In an assignee's action to collect notes, the complaint must allege an assignment to plaintiff. *Morris v. Scott (Ala.)*, 73 So. 395.

Indorsement.—See post, "Bona Fide Purchase," § 298 (3).

§ 296 (2) Sufficiency of Allegations as to Indorsement, Assignment, and Ownership.

Under Code 1907, § 4985, providing for transfer of negotiable instruments by indorsement, an averment that a note was indorsed to plaintiff imports a delivery of the instrument. *Sherrill v. Merchants', etc., Sav. Bank*, 195 Ala. 175, 70 So. 723.

Allegations of Ownership.—A declaration on a note by a transferee is sufficient if it simply avers that the note is the property of plaintiff, and hence a complaint alleging that the note sued on was duly indorsed by the payee and was plaintiff's property was not demurrable. *Sample v. Tennessee Valley Bank (Ala.)*, 76 So. 936.

A complaint claiming of defendant a specified amount on notes therein described and alleging that the notes were payable to B., but were the property of the estate of which plaintiff was administratrix, was sufficient. *Cairns v. Daniel (Ala. App.)*, 77 So. 56.

§ 296 (3) Bona Fide Purchase.

Necessity of Alleging — Transferee.—The transferee of notes need not aver in his complaint that he purchased for value without notice. *Citizens Nat. Bank v. Buckheit*, 14 Ala. App. 511, 71 So. 82.

Same—Indorsee.—When the indorsee of a note seeks protection as a bona fide purchaser against secret defenses set up by the maker, he must plead his bona

fides. *German-American Nat. Bank v. Lewis*, 9 Ala. App. 352, 63 So. 741.

Complaint Held Sufficient.—A complaint averring that a negotiable instrument was before maturity indorsed by the payee and sold to plaintiff for a valuable consideration imports that plaintiff was a holder in due course within Code 1907, §§ 5007, 5014, defining holder, and declaring that every holder shall be deemed a holder in due course. *Sherrill v. Merchants', etc., Sav. Bank*, 195 Ala. 175, 70 So. 723.

Bill Held Not Demurrable.—Bill alleging failure of defendant to perform assignment and delivery of a note as agreed, and sale thereof to other defendants, praying judgment against the original defendant if it be ascertained that such others are bona fide purchasers for value, is not demurrable as showing on its face that such others are bona fide purchasers. *Camody v. Webster*, 197 Ala. 290, 72 So. 622.

Necessity for Alleging Mode of Transfer.—Code 1907, § 2489, requires actions on promissory notes to be brought in the name of the person having the legal title. Section 4985 provides that an instrument is negotiated when it is transferred in such manner as to constitute the transferee the holder thereof, and that, if payable to order, it is negotiated by the indorsement of the holder, completed by delivery. Held, that in an action on a note payable to the order of a third person, a complaint alleging that it had been transferred to plaintiff for value, but not alleging the method or mode of the transfer, was insufficient. *Wilson v. Weaver (Ala. App.)*, 77 So. 238.

Necessity of Alleging Indorsement and Whether Note Payable to Order or Bearer—Bona Fide Purchaser—Holder of Legal Title.—Under Code 1907, §§ 4985-5004, respectively, declaring that an instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder, and, if payable to bearer, it is negotiated by delivery, while, if payable to order, it is negotiated by indorsement, completed by delivery, and that where the holder of an instrument, payable to his order, trans-

fers it without indorsement, the transferee receives only such title as the transferer had, one to whom a note, payable to order, was delivered without indorsement, does not receive the legal title, and can never become a bona fide holder, and hence a complaint which did not aver whether the note was payable to order or bearer, and did not aver written indorsement to plaintiff, is insufficient to show plaintiff to be a bona fide purchaser. *German-American Nat. Bank v. Lewis*, 9 Ala. App. 352, 63 So. 741.

§ 300. — Presentment, Demand, Protest, and Notice.

Notice of Dishonor.—Before an indorser can be liable for the payment of a note, notice of dishonor must be averred and proven as required by statute. *Hall v. First Bank*, 196 Ala. 627, 72 So. 171.

In a suit on notes dated at Georgia, plaintiff averred that the instruments were received by him before they were due, and without notice of any defect or defense; that under the law of Georgia indorsers of promissory notes not negotiable at a chartered bank are liable on their indorsement without notice of nonpayment; that the notes sued on were not negotiable at any designated place; that the residences of the makers were at the times of purchase and maturity unknown to plaintiff; and that the instruments were indorsed by defendant to lend his credit to the maker to enable the latter to raise money on the notes. Held, that the averment was an excuse under the law of Georgia for failure to aver giving notice of nonpayment of the notes to defendant, a mere surety, and that the count was not subject to the demurrer directed to the phase of the case that plaintiff did not aver the giving of notice of nonpayment to a surety. *Schillinger v. Wickersham* (Ala.), 75 So. 11.

§ 303. Plea, Answer, or Affidavit of Defense.

§ 304. — Form and Requisites in General.

In an action on note, where complaint does not disclose that plaintiff bank was even a purchaser of defendant's obligation on which the note was based, suffi-

ciency of pleas thereto must be determined without reference to principles available where complaint discloses that plaintiff was bona fide holder of negotiable instrument of which that sued on is a renewal. *Armstrong v. Walker* (Ala.), 76 So. 280.

Plea Not Demurrable.—Where a complaint, to recover the amount of a note, does not on its face declare on a negotiable note, the pleas are not subject to demurrer for failure to aver that plaintiff had notice of the defense set up when he acquired the note. *Jones v. Martin* (Ala. App.), 74 So. 761.

Pleas Held Demurrable.—A plea, alleging that the note sued on is not a commercial negotiable paper, but embodying a copy of the note which shows it to be negotiable, is demurrable. *Citizens Nat. Bank v. Buckheit*, 14 Ala. App. 511, 71 So. 82, certiorari denied in *Ex parte Buckheit*, 196 Ala. 700, 72 So. 1019.

In suit on a note, the plea "that the instrument * * * was executed as part of an agreement between the A. Manufacturing Company and the defendants, and that said instrument has been detached from said agreement without consent of defendants," was demurrable as failing to set out the substance of the contract detached from the note. *Weinstein Bros. v. Citizens' Bank*, 13 Ala. App. 552, 69 So. 972, cited in note in *Ann. Cas.* 1917E, 612.

§ 305. — Traverses or Denials and Admissions in General.

Denial.—A plea that notes in suit were not executed by defendant or by any one authorized to bind him in the premises when properly verified, being in Code form, is good as against demurrer. *Guin v. Grasselli Chemical Co.*, 197 Ala. 117, 72 So. 413.

§ 306. — Execution and Delivery of Instrument.

Averring Change of Date.—In an action on a note, a plea, averring that the date of the note has been changed since it was signed, is a plea of non est factum. *Sulzby v. Palmer*, 194 Ala. 524, 196 Ala. 645, 70 So. 1.

§ 307. — Want or Failure of Consideration.

A special plea that the negotiable note

sued on was "without consideration" was sufficient. *Cochran v. Burdick Bros.*, 7 Ala. App. 274, 61 So. 29, cited in note in 1917F, 581.

A plea, reading, "There was no consideration for the note sued on," is subject to any possible ground of demurrer. *Armstrong v. Walker* (Ala.), 76 So. 280.

A plea in suit on a nonnegotiable note that "there was no consideration for the execution of the note described in said complaint" was in good form. *Weinstein Bros. v. Citizens' Bank*, 13 Ala. App. 552, 69 So. 972, cited in note in L. R. A. 1917F, 581.

§ 308. — Mistake, Fraud, or Duress.

Pleas Held Demurrable.—*Mizell v. Farmers' Bank*, 180 Ala. 568, 61 So. 272. See the title BILLS AND NOTES, § 308, vol. 2, p. 425.

In an action on renewal note, plea which did not show that defendant had relied or acted upon alleged false statements made by agent of payee of original note was demurrable. *Armstrong v. Walker* (Ala.), 76 So. 280.

Plea setting up fraud inducing giving of note sued on is insufficient against count alleging plaintiff is "holder in due course" of said note, in view of definition of said term by Code 1907, § 5007. *White v. Central Nat. Bank* (Ala.), 78 So. 74.

§ 309. — Illegality.

Illegality of Consideration.—In an action on a renewal note, a plea, alleging that a portion of the consideration for the original note was a promise to give rebates on insurance contracts, in violation of Code 1907, § 4579, was a good defense to the complaint as framed. *Armstrong v. Walker* (Ala.), 76 So. 280.

Plea Not Showing Transaction of Business within State by Foreign Corporations.—A plea, alleging that the notes sued on were executed and delivered to the agent of a foreign corporation within the state and that the transaction occurred in the state, where, under a contract between the maker of the notes and the agent of the foreign corporation, the latter assembled and installed a machine, when construed against the pleader, does not show that the foreign corporation had transacted business within the state.

Citizens Nat. Bank v. Buckheit, 14 Ala. App. 511, 71 So. 82.

§ 311. — Good Faith and Payment of Value.

Necessity for Alleging Notice of Failure of Consideration.—*Cochran v. Burdick Bros.*, 7 Ala. App. 274, 61 So. 29, cited in note in L. R. A. 1917F, 581. See the title BILLS AND NOTES, § 311, vol. 2, p. 427.

In an indorsee's action on a note, pleas of want and failure of consideration and fraud in the inception of the note, though not showing that plaintiff had notice of the infirmity, presented a good defense. *Elmore County Bank v. Avant*, 189 Ala. 418, 66 So. 509.

Notice of Infirmity of Title.—Where plaintiff received a negotiable instrument before maturity, paying value, the maker, to defeat recovery, must plead and prove notice to plaintiff of an infirmity in the payee's right to negotiate the note. *Sherrill v. Merchants', etc., Sav. Bank*, 195 Ala. 175, 70 So. 723.

Pleading of Character.—The indorsee of a negotiable promissory note seeking protection as a bona fide purchaser against such secret defenses as lack of consideration, breach of warranty, alteration or failure of consideration, set up by the maker in the indorsee's suit against him, must plead his character as such, so that the complaint must show the instrument as negotiable. *Weinstein Bros. v. Citizens' Bank*, 13 Ala. App. 552, 69 So. 972.

§ 313. — Extension of Time and Agreement Not to Sue.

Agreement Not to Sue.—In an action to collect notes, pleas that plaintiff agreed not to foreclose, but did foreclose, is insufficient in not alleging that the mortgage foreclosed was the one secured by the notes and contemplated by the contract. *Morris v. Scott* (Ala.), 73 So. 395.

In an action to collect notes, a plea that plaintiff agreed not to foreclose without giving defendant a reasonable opportunity to sell, but did foreclose, is insufficient for not denying that defendant was given a reasonable opportunity to sell. *Morris v. Scott* (Ala.), 73 So. 395.

§ 314. — Payment and Discharge.

Consideration.—In an action on rental notes given by defendant to plaintiff, a plea, alleging that the notes were two of a series executed for rent of premises consisting of a storehouse, dwelling and grounds; that the storehouse and dwelling, while occupied by a subtenant, were destroyed by fire; that on the destruction thereof plaintiff voluntarily approached defendant, and proposed that if defendant would pay a half of the face of the notes he would release him from the remainder; and that defendant accepted the proposition and released the subtenant from payment of rent and abandoned to plaintiff the part of the premises which had been burned, and thereafter offered to pay according to agreement—fails, when most strongly construed against defendant, to allege a consideration for plaintiff's promise, and plaintiff may recover on the notes. *Crow v. Burtwell*, 13 Ala. App. 468, 69 So. 382.

§ 315. — Verification.

* In an action against an indorser of a note where name of payee was indorsed on note, and neither execution nor assignment was denied by sworn plea as required by Code 1907, § 5332, note was properly admitted in evidence without other proof that it had been executed or assigned to plaintiff. *O'Rear v. American Trust, etc., Bank*, 195 Ala. 277, 71 So. 105.

§ 316. Replication or Reply and Subsequent Pleadings.

Plea of Non Est Factum.—In action by holder of a note, replication, repeating allegations of complaint as to bona fide purchase, was no answer to plea of non est factum. *Weinstein v. Citizens' Bank* (Ala.), 75 So. 397.

Plea that Notes Not Negotiable.—In a suit to recover on promissory notes where the complaint alleged ownership in plaintiff, but not that notes were negotiable, defined by Code 1907, § 5131, as those payable to order or bearer, replication to plea of payment alleging that plaintiff was holder in due course, but not alleging negotiability, was demurrable, but should not have been stricken

from the files. *Oneonta Trust, etc., Co. v. Box* (Ala. App.), 73 So. 759.

Plea of Secret Equities.—Where an indorsee of a negotiable instrument seeks protection as a bona fide purchaser, that fact should be set up in a special replication to the maker's plea of secret equities and the replication must show the negotiability of the instrument, either by setting out the note in haec verba or by proper descriptive averments, unless it has already appeared in the declaration. *German-American Nat. Bank v. Lewis*, 9 Ala. App. 352, 63 So. 741.

Plea of Void Contract.—In an action on a note, where defendant pleaded that the contract was void, a replication that the note was commercial paper complete and regular on its face, and that plaintiff purchased it in good faith in the regular course of business for value before maturity and without notice of any defects of title or defenses, is not demurrable. *Hudson v. Repton State Bank* (Ala. App.), 75 So. 695.

Plea of Failure to Apply Deposit to Payment of Note.—In a bank's action on notes made by defendant for the accommodation of the payee and indorsed by the payee to it, wherein defendant pleaded that he had made the notes for W.'s accommodation, and that his liability was only that of a surety, and that by its failure to apply W.'s deposit to the payment of the notes he had been released, the fact that the deposits were special, and could not therefore be applied to payment of notes sued on, should have been set up in a replication to the plea. *Tatum v. Commercial Bank, etc., Co.*, 193 Ala. 120, 69 So. 508.

Plea of Failure of Consideration.—Where, in an action upon a note by a purchaser, the maker by plea set up the defense of failure of consideration, the purchaser should have by replication pleaded that he was a bona fide purchaser; Code 1907, § 5014, not changing this rule of pleading. *Tatum v. Commercial Bank, etc., Co.*, 185 Ala. 241, 64 So. 561.

Plea of Fraud and Failure and Want of Consideration.—Where complaint on note did not allege that it contained words of negotiability as defined by Code, §§ 4958, 4965, 4966, and the pleas set up

fraud, and failure and want of consideration, replication, alleging that plaintiff was innocent purchaser, was bad on demurrer. *Whatley v. Muscogee Bank*, 197 Ala. 402, 72 So. 1018.

§ 317. Amended and Supplemental Pleadings.

Amendments. — Under Negotiable Instrument Act, § 89, where complaint in action on note does not allege notice of dishonor to indorsers, an amendment may be allowed or the action dismissed as to such indorser. *Hall v. First Bank*, 196 Ala. 627, 72 So. 171.

In an action on note, amendment of the complaint to change the date of the loan from December 13th to December 9th, conformably to the evidence did not authorize defendant, as a matter of right, to file additionally a proffered plea of nonclaim, and its rejection within the discretion of the trial judge is not reviewable. *Lampkin v. Rose (Ala.)*, 73 So. 896.

§ 319. Issues, Proof, and Variance.

§ 319 (3) Evidence Admissible under Plea or Answer in General.

Payment. — Where defendants gave notes to plaintiff to secure back royalties due him by former lessees of his coal mine, the consideration of the notes being the acquisition by defendants of mining equipment and improvement left by the former lessees and the execution by plaintiff to defendants of a new lease of the mine, and defendants thereafter transferred their lease to a coal corporation, which assumed the payment of defendants' notes to the plaintiff, plaintiff assenting but retaining his rights against defendants under the original lease, and where such coal company failed in its undertaking and the plaintiff sued it, recovering a judgment, covering the royalty debt secured by defendants' notes, which was partially satisfied, in suit by plaintiff on one of defendants' notes to recover the remainder, under issues framed by special pleas, such as one charging that plaintiff took possession of other improvements than those sold under execution on his judgment, of sufficient value to satisfy the whole debt, defendants could prove the value of the

improvements made by them on the mining property, including only such as were not sold under execution by plaintiff and which came into his hands as assets of the coal company to which defendants transferred, since by the terms of the lease such improvements belonged to defendants or their assignee, though subject to plaintiff's lien for royalties. *Brown v. Shorter*, 195 Ala. 692, 71 So. 103.

§ 319 (5) Evidence Admissible under General Issue.

In an action on a note by a holder against maker, where complaint negatives every special defense available, such defenses are raised by general issue and special pleas would not be good. *Clearman v. Cobbs*, 197 Ala. 546, 73 So. 83.

Conditional Liability.—The maker of a note can not defend an action thereon on the strength of an oral agreement, making liability conditional without pleading such agreement. *Jefferson County Sav. Bank v. Compton*, 192 Ala. 16, 68 So. 261.

§ 319 (6) Matters That Must Be Proved.

Want of Consideration.—In an action on a note, defendant pleaded want of consideration, and plaintiff filed a special replication setting up that he was a bona fide purchaser in due course. Held, that as plaintiff did not put defendant's plea in issue by a general replication authorized by Code 1907, § 5336, plaintiff's replication, being in the nature of a plea in confession and avoidance, relieved defendant of the necessity of proving a want of consideration. *German-American Nat. Bank v. Lewis*, 9 Ala. App. 352, 63 So. 741.

Notice of Dishonor.—Before an indorser can be liable for the payment of a note, notice of dishonor must be averred and proven as required by statute. *Hall v. First Bank*, 196 Ala. 627, 72 So. 171.

Notice of Infirmary of Title.—Where plaintiff received a negotiable instrument before maturity, paying value, the maker, to defeat recovery, must plead and prove notice to plaintiff of an infirmity in the payee's right to negotiate the note. *Sherill v. Merchants', etc., Sav. Bank*, 195 Ala. 175, 70 So. 723.

§ 319 (7) Variance.

Assignment in Writing.—A payee's indorsement of a note being an assignment of his property therein, there is no variance between an allegation of an assignment in writing and proof of a regular indorsement. *Haas v. Commerce Trust Co.*, 194 Ala. 672, 69 So. 894.

Want of Consideration.—In an action on a note, where defendant alleged want of consideration, proof of a failure of consideration will not support a judgment for defendant. *German-American Nat. Bank v. Lewis*, 9 Ala. App. 352, 63 So. 741.

Allegation of "Note," Proof of Speciality—Variance—"Note" — "Specialty."—A complaint alleging a cause of action on "notes" therein described was not supported by written instruments whereby the maker promised to pay a specified amount on a certain date providing a building was completed and turned over to him by the payee within 30 days from date, since a "note" under commercial law is a written agreement by one person to pay another person therein absolutely and unconditionally a certain sum of money at a time specified therein, and the instrument in question, being a conditional promise to pay, was a "specialty." *Cairns v. Daniel* (Ala. App.), 77 So. 56.

§ 320. Presumptions and Burden of Proof.

§ 321. — In General.

Where the maker pleads secret equities, a general replication filed in accordance with Code 1907, § 5338, casts upon the maker the burden of establishing his special pleas. *German-American Nat. Bank v. Lewis*, 9 Ala. App. 352, 63 So. 741.

§ 323. — Consideration.

In an action on a note given in settlement of accounts against the maker's deceased husband, the burden was on the maker to show that the husband's estate was insolvent, or that she was not entitled to the whole thereof, and that therefore there was a total or partial want of consideration. *Vaughn v. Bass*, 10 Ala. App. 388, 64 So. 543.

§ 325. — Nature of Liability.

In an action against one as maker of a note, the note itself, bearing the defendant's signature on its back, prima facie showed that the defendant was liable only as indorser, and, unless this prima facie presumption was rebutted, the plaintiff could not recover, unless proper notice of dishonor was given. *Long v. Gwin*, 188 Ala. 196, 66 So. 88.

§ 326. — Transfer and Ownership in General.

Indorsement.—Under Negotiable Instrument Act, § 184, the maker of a note is primarily liable and will be presumed to have indorsed it to complete its negotiation to plaintiff. *Hall v. First Bank*, 196 Ala. 627, 72 So. 171.

§ 327. — Good Faith and Payment of Value.

§ 327 (1) Presumptions as to Bona Fides in General.

Under the direct provisions of Code 1907, §§ 5007, 5014, every holder of a note is deemed prima facie to be a holder in due course, which means that he is deemed to have taken it before maturity in good faith and for value without notice of any defect. *Bruce v. Citizens' Nat. Bank*, 185 Ala. 221, 64 So. 82. See *German-American Nat. Bank v. Lewis*, 9 Ala. App. 352, 63 So. 741.

§ 327 (2) Burden of Proof as to Bona Fides in General.

Negotiable Instruments Law — Effect of Defective Title.—The Negotiable Instruments Law (Code 1907, §§ 4958-5138) did not change the common-law rule as to pleading and proving the fact of a bona fide purchase, but was merely declaratory of the common law on the subject, § 5014 declaring that every holder is deemed prima facie a holder in due course, but when it is shown that the title of any person who negotiated the instrument is defective, the burden is on the holder to prove that he, or some person under whom he claims, acquired title as a holder in due course. *German-American Nat. Bank v. Lewis*, 9 Ala. App. 352, 63 So. 741.

Burden of Proving Value Paid without Notice — Unnecessary Allegations. —

Where the transferee of notes unnecessarily alleges in his complaint that he purchased for value without notice, he assumes the burden of proving those issues. *Citizens Nat. Bank v. Buckheit*, 14 Ala. App. 511, 71 So. 82, certiorari denied in *Ex parte Buckheit*, 196 Ala. 700, 72 So. 1019.

Burden of Showing Knowledge of Defenses. —

In an action on a note, where the indorsee claimed to be a bona fide purchaser, and thus not subject to equities between the maker and the payee, proof that he purchased the note in the ordinary course of business and paid value therefor before maturity is sufficient in the first instance to cast on the maker the burden of establishing that the purchase was made with the knowledge of the defenses relied upon. *German-American Nat. Bank v. Lewis*, 9 Ala. App. 352, 63 So. 741.

An indorsee suing upon a note, and proving that he purchased in due course of business before maturity and for value, thereby shifts to the defendant the burden of proving that when he acquired it he had knowledge of the infirmity relied upon as a defense or that he had notice of facts which if diligently followed up would have led to knowledge of such defense. *Elmore County Bank v. Avant*, 189 Ala. 418, 66 So. 509.

Same—Invalidity of Indorsement. — In an action on a note which plaintiff alleged he acquired in good faith and as an innocent purchaser, the burden was upon the defendant to show that when plaintiff secured the note he had notice of an indorsement without consideration or indorsement procured by fraud, or that the note was otherwise defective. *Hudson v. Repton State Bank* (Ala. App.), 75 So. 695.

§ 327 (3) Consideration for Indorsement or Transfer.

Where the evidence showed failure of consideration and fraud in the procurement of the note sued on, the burden devolved upon plaintiff to establish that it was a bona fide purchaser for value in due course. *Sample v. Tennessee Valley Bank* (Ala.), 76 So. 936.

Allegation of Consideration. — Plaintiff, suing on a note payable to a third person and alleging that it was transferred to him for value, was bound to prove this material allegation. *Wilson v. Weaver* (Ala. App.), 77 So. 238.

Fraud or No Consideration. — Fraud in putting a bill in circulation, or the want or failure of consideration, casts upon the indorsee the burden of proving payment of value. *Elmore County Bank v. Avant*, 189 Ala. 418, 66 So. 509.

§ 327 (4) Fraud in Inception or Transfer.

Where the evidence showed failure of consideration and fraud in the procurement of the note sued on, the burden devolved upon plaintiff to establish that it was a bona fide purchaser for value in due course. *Sample v. Tennessee Valley Bank* (Ala.), 76 So. 936.

§ 329. — Payment.

In an action on a note wherein the defense of payment was set up, the burden of proving the execution of the receipts evidencing such payment was on the defendant. *Davis v. Florey* (Ala. App.), 77 So. 413.

In action on note, burden of showing extent payments have reduced indebtedness held on defendant. *Wade v. Killen* (Ala.), 75 So. 970.

§ 330. Admissibility of Evidence.

§ 331. — In General.

In an action on a note, evidence tending to explain the presence of an indorsement by showing that it had been pledged as collateral security to such indorser is admissible. *Haas v. Commerce Trust Co.*, 194 Ala. 672, 69 So. 894.

Evidence that a bank, which in due course took a note as security, knew that the payee then was in trouble with an insurance company concerning the application of funds received from insurance notes, was irrelevant, where the insurance company made no claim to the notes sued on. *Jackson v. Georgia Fire Ins. Co.*, 189 Ala. 495, 66 So. 588.

In a suit on a note assigned by the payee under a separate writing, it was not error on motion to refuse to exclude such note from the evidence. *Davis v. Florey* (Ala. App.), 77 So. 413.

§ 332. — Execution, Delivery, and Identity of Instrument.

In General.—*Mizell v. Farmers' Bank*, 180 Ala. 568, 61 So. 272. See the title **BILLS AND NOTES**, § 332, vol. 2, p. 448.

§ 333. — Consideration.

Admissible for Defendant.—*Mizell v. Farmers' Bank*, 180 Ala. 568, 61 So. 272. See the title **BILLS AND NOTES**, § 333, vol. 2, p. 450.

In an action on a protested check, executed in part performance of an agreement under which defendant was to give his own check and notes in payment of notes of a corporation of which he was president, and whereby plaintiff, according to defendant's claim was to transfer and send the notes to defendant, but according to plaintiff's claim was to cancel or return them, a letter, dated subsequently to agreement, in which plaintiff's agent promises to send the defendant the old notes, was admissible as tending to corroborate defendant's testimony as to what the agreement was. *Gale-Hooper Co. v. Rice* (Ala. App.), 75 So. 963.

§ 334. — Nature of Liability, and Relations of Parties to Instrument and to Each Other.

Admissible for Plaintiff.—*Briel v. Exchange Nat. Bank*, 180 Ala. 576, 61 So. 277. See the title **BILLS AND NOTES**, § 334, vol. 2, p. 450.

Admissible for Defendant.—In an action on a note, defendants may show that they are not liable as makers but only as indorsers. *Hall v. First Bank*, 196 Ala. 627, 72 So. 171.

§ 338. — Good Faith and Payment of Value.

False Representations.—Where a corporation, promoting an additional issue of stock to place a plant in defendant's town, sent an agent to her town, who made representations as to the company in a speech at a town meeting at which plaintiff bank's president was present, it was proper to admit in evidence, in an action on a note for a share of stock, false representations and agency of several townsmen, in substance the same as the

speaker's, where they had sought defendant out and prevailed upon her to take a share of stock and to sign a note in the handwriting of the speaker, and the representations in the speech of the speaker were also admissible to show that the bank which had taken over the note and had given in exchange a certificate of deposit due after maturity of the note, had notice of false representations and lack of consideration, and all other collective collateral facts of the promotion of the issue were admissible. *Blount County Bank v. Harris* (Ala.), 77 So. 43.

§ 340. — Payment and Discharge.

A check given by a firm, of which defendant was a member, payable to and indorsed by R., and an entry on the books of the firm showing a charge against R. on an account between him and the firm, have, by themselves, no tendency to prove any payment on the individual note of defendant to R. *Reynolds v. Reynolds*, 10 Ala. App. 420, 65 So. 194, certiorari denied in *Ex parte Reynolds*, 187 Ala. 672, 65 So. 1034.

In suit on a note by the lessor of a mine against lessees who gave notes to secure back royalties and transferred to a company which assumed payment, the lessor suing such company upon default and partially satisfying judgment, including the amount of the notes, it was proper to show the value of a compressor in the mine, equitable title to which was in the company, in connection with evidence that the lessor took possession of it as an asset of the company with which he should be charged as a credit on his judgment. *Brown v. Shorter*, 195 Ala. 692, 71 So. 103.

§ 343. — In Actions on Contracts of Indorsement.

In an action to hold defendant on his indorsement on a note given by his son for the purchase price of a half interest in an incorporated business, evidence of the minutes of the corporation, showing the reorganization and adjustment of the business after the purchase, is admissible to show compliance with the agreement. *Haas v. Commerce Trust Co.*, 194 Ala. 672, 69 So. 894.

§ 344. Weight and Sufficiency of Evidence.

§ 346. — Execution, Delivery, and Identity of Instrument.

Evidence Held Sufficient.—*Wooten v. Federal Discount Co.*, 7 Ala. App. 351, 62 So. 263. See the title **BILLS AND NOTES**, § 346, vol. 2, p. 457.

§ 348. — Nature and Extent of Liability.

In General.—*Briel v. Exchange Nat. Bank*, 180 Ala. 576, 61 So. 277. See the title **BILLS AND NOTES**, § 348, vol. 2, p. 459.

§ 352. — Possession as Evidence of Ownership.

Possession of a note duly indorsed to plaintiff prima facie established his title. *Haas v. Commerce Trust Co.*, 194 Ala. 672, 69 So. 894.

Possession of an unindorsed certificate of deposit is only prima facie evidence of ownership. *Hicks v. Meadows*, 193 Ala. 246, 69 So. 432.

§ 352½. — Good Faith and Payment of Value.

In a suit on a note, evidence held insufficient to show that plaintiff was not a bona fide purchaser for value. *Bruce v. Citizens' Nat. Bank*, 185 Ala. 221, 64 So. 82.

In an action on a note, evidence held not to show that plaintiff was a purchaser for value before maturity. *Tatum v. Commercial Bank, etc., Co.*, 185 Ala. 241, 64 So. 561.

In an action on a note, where defendant set up want of consideration, and plaintiff claimed to be a bona fide purchaser in due course, evidence held insufficient to establish plaintiff's bona fide purchase. *German-American Nat. Bank v. Lewis*, 9 Ala. App. 352, 63 So. 741.

No Value Paid.—In an action on a note evidence held to show that no value was paid for note, but that it was simply indorsed to plaintiff by payee, in order that he might obtain the interest he claimed therein. *Wilson v. Weaver* (Ala. App.), 77 So. 238.

Evidence Not Supporting Influence of Bad Faith.—In an action on a note by

an indorsee, evidence that the note was purchased with a lot of other similar notes, the amount of which was unusual in plaintiff's business, would not have supported an inference of bad faith in purchasing the note. *Sample v. Tennessee Valley Bank* (Ala.), 76 So. 936.

That note, after negotiation to plaintiff, was seen in hands of lawyer, was not evidence that plaintiff was not holder in due course. *O'Rear v. American Trust, etc., Bank*, 195 Ala. 277, 71 So. 105.

§ 355. Amount of Recovery.

§ 360. — Attorney's Fees.

The liability of an indorser of a note for counsel fees provided for therein does not depend upon the negotiability of the note, but upon the indorser's liability to pay the note or any part thereof. *People's Bank v. Moore* (Ala.), 78 So. 789.

§ 361. Trial.

§ 363. — Questions for Jury.

§ 363 (1) In General.

Affirmative Charge Proper.—Where note sued on was in evidence without countervailing proof, plaintiff was entitled to affirmative charge. *Weinstein v. Citizens' Bank* (Ala.), 75 So. 397.

Where, in an action against the joint makers of a note, one defendant filed a plea of non est factum as to which plaintiff offered no proof, the court properly gave affirmative instructions for such defendant. *Jackson v. Georgia Fire Ins. Co.*, 189 Ala. 495, 66 So. 588.

Affirmative Charge Improper.—In an action by the indorsee of a note, where the case was tried upon the general issue only, the effect of the general issue being merely to deny the execution or assignment of the note in suit, as to which there was no dispute, it was error to give a general charge for defendant though irrelevant testimony was admitted which would have tended to support special defenses. *Stewart v. Keller*, 197 Ala. 575, 73 So. 89.

In an action on a note given for the purchase price of land, where, though the evidence would have supported a

contrary finding, it warranted a finding that the defendant was entitled under his contract to a tract of five acres, the boundaries of which were pointed out by the grantor, which was not included in the deed tendered, the affirmative charge for plaintiff should not have been given, as the conflict in the evidence was for the determination of the jury. *Francis v. Parker*, 9 Ala. App. 279, 63 So. 782.

§ 363 (2) Execution and Delivery.

Affirmative Charge Proper.—*Mizell v. Farmers' Bank*, 180 Ala. 568, 61 So. 272. See the title **BILLS AND NOTES**, § 363 (2), vol. 2, p. 463.

In What Capacity Defendant Signed.—In an action on a note, declared on against the maker, which on its face showed that defendant signed as indorser and not as maker, it was for the jury to say in what capacity he signed. *Long v. Gwin*, 188 Ala. 196, 66 So. 88.

§ 363 (3) Consideration.

Where in an action on notes the defendants' plea of want of consideration was sustained by the undisputed evidence, defendants' general affirmative charge should have been given. *United Brothers v. Huffman Auditing Co. (Ala.)*, 78 So. 864.

§ 363 (7) Payment and Discharge.

In action by a seller of land on a note of a third person given by the purchaser, whether the sale had been rescinded with agreement of seller to return note to purchaser held, under the evidence for the jury. *Norton v. Alexander (Ala.)*, 78 So. 852.

Payment to Agent.—In an action on a note, defendant insisting he had paid it to the payee bank before plaintiff acquired it, and that the payee was at the time the agent, with authority to collect the note, of another bank with

which the note had been pledged as collateral, such issue held for the jury. *Manson v. Sutterer (Ala.)*, 77 So. 375.

§ 364. — Instructions.

As to affirmative charge, see ante, "In General," § 363 (1); "Execution and Delivery," § 363 (2); "Consideration," § 363 (3).

Misleading Instructions.—A charge tending to mislead the jury to a conclusion that an express agreement was necessary for plaintiff's surrender of a decedent's note and claim against the estate to be consideration for defendants' execution of their note is properly refused. *Orr v. Stewart*, 13 Ala. App. 542, 69 So. 649.

Good Faith of Holder.—Charge, that if corporation agreed to deliver share of stock and failed to do so, and if plaintiff, suing as indorsee of defendant's note for stock, had knowledge of such breach, or had knowledge which, if followed up, would have resulted in such knowledge, your verdict should be for defendant, held not misleading under evidence. *Blount County Bank v. Harris (Ala.)*, 77 So. 43.

§ 366. Judgment.

Discharge from Liability.—An indorsee of a note obtained judgments against the maker, primarily liable, and an indorser, secondarily liable as surety, and sought to protect the maker and to collect the judgment from the indorser. The property of the maker subject to the lien of the judgment against it was not diminished, and the indorser, as judgment creditor, could, by sale thereof, satisfy the judgment. Held, that the action of the indorsee did not release the indorser of the note, and the lien against the maker was not forfeited. *Hudson Trust Co. v. Elliott*, 194 Ala. 441, 69 So. 631.

Bill to Remove Cloud.

See post, **QUIETING TITLE**.

Blasting.

See post, **EXPLOSIVES**.

Boards.

As to particular classes of boards, see the particular titles, such as MUNICIPAL CORPORATIONS; SCHOOLS AND SCHOOL DISTRICTS.

Bona Fide Purchaser.

See ante, **BILLS AND NOTES**; post, **VENDOR AND PURCHASER**.

BONDS.

II. Construction and Operation.

§ 28. General Rules of Construction.

V. Actions.

§ 65. Nature and Form of Remedy.

Cross References.

See the title **BONDS**, vol. 2, p. 471, and references there given.

As to supersedeas and appeal bonds, see ante, **APPEAL AND ERROR**.

II. CONSTRUCTION AND OPERATION.

§ 28. General Rules of Construction.

Construed to Effectuate Reasonable Intention.—*Loeb v. Montgomery*, 7 Ala. App. 325, 61 So. 642. See the title **BONDS**, § 28, vol. 2, p. 478.

Construed against Maker of Obligation.—*Loeb v. Montgomery*, 7 Ala. App. 325, 61 So. 642. See the title **BONDS**, § 28, vol. 2, p. 478.

Construed to Support rather than Defeat Instrument.—*Loeb v. Montgomery*, 7 Ala. App. 325, 61 So. 642. See the title **BONDS**, § 28, vol. 2, p. 478.

V. ACTIONS.

§ 65. Nature and Form of Remedy.

Bond Enforcible at Common Law and under Statute.—*Jaffe v. Fidelity, etc., Co.*, 7 Ala. App. 206, 60 So. 966. See the title **BONDS**, § 65, vol. 2, p. 485.

BOUNDARIES.

I. Description.

- § 1. Relative Importance of Conflicting Elements.
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II. Evidence, Ascertainment, and Establishment.

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- § 30. Removal of Landmarks.

Cross References.

See the title BOUNDARIES, vol. 2, p. 494, and references there given.
In addition, see post, EVIDENCE.

I. DESCRIPTION.

§ 1. Relative Importance of Conflicting Elements.

Control of Natural Objects and Monuments over Other Elements.—The rule that a statement of the quantity of land inserted in a deed by way of description must yield to natural or permanent objects called for in the conveyance applies to the description of an area excepted from an entire tract granted in comprehensive terms. *Williams v. Bryan*, 197 Ala. 675, 73 So. 372.

A deed of a tract of land, "except one and one-half acres off the southeast corner to a branch," excepts the corner to the branch, though it contains 3¾ acres. *Williams v. Bryan*, 197 Ala. 675, 73 So. 372.

§ 7. Waters and Watercourses.

§ 9. — Construction of Language of Description.

In ejectment, a petition addressed by B. to the Spanish Governor General in 1798, describing land upon which he was

subsequently established by order of the Governor General as "fronting on the north side by Bayou Jasmine and * * * bounded * * * on the south by said Bayou Jasmine," and a deed from B., under which plaintiff claimed, describing the land as "bounded fronting Bayou Jasmine" and being the same land acquired by the grantor by a concession from the Governor General, held to embrace no land lying south of Bayou Jasmine, especially in view of the location of such Bayou and other watercourses mentioned in such instruments with respect to each other. *McMillan v. Aikin*, 189 Ala. 330, 66 So. 624.

§ 11. Roads, Ways, and Public Grounds.

§ 12. — Public Ways.

The conveyance of a town lot bounded by a public street presumptively carries with it the fee to the center of the street as a part of the grant. South, etc., *R. Co. v. Davis*, 185 Ala. 193, 64 So. 606.

II. EVIDENCE, ASCERTAINMENT, AND ESTABLISHMENT.

§ 17½. Pleading.

Where the issues made by the pleadings involved a boundary, plaintiff, alleging title to a government subdivision, could not show title by adverse possession to any part of an adjacent government subdivision. *Oliver v. Oliver*, 187 Ala. 340, 65 So. 373.

Where, in an action to recover a strip of land as a part of the governmental subdivision of a section, the issue involved the proper location of the boundary line between that subdivision and the adjacent subdivision which belonged to defendant, defendant must disclaim and suggest a dispute as to the boundary as provided by Code 1907, § 3843. *Jeffreys v. Jeffreys*, 183 Ala. 617, 62 So. 797.

In ejectment, where defendant pleaded not guilty as to land west of a boundary line claimed by him, evidence as to whether defendant had asserted any claim to the land east of the line as claimed by plaintiff before moving a corner was properly admitted. *Smith v. Bachus*, 195 Ala. 8, 70 So. 261.

§ 18. Admissibility of Evidence.

§ 19. — In General.

§ 19 (1) In General.

Parol Evidence as to Location of Boundaries. — *Middlebrooks v. Sanders*, 180 Ala. 407, 61 So. 898. See the title BOUNDARIES, § 19 (1), vol. 2, p. 501.

In a suit to determine the location of a disputed boundary line, parol evidence that if a disputed boundary line was where plaintiff claimed it was, plaintiff had 49 74/100 acres in his 40-acre tract, and defendant only 31 16/100 acres in his 40-acre tract was admissible. *Ward v. Lane*, 189 Ala. 340, 66 So. 499.

Same — Defendant's Testimony. —

Where, in a suit to determine the location of a boundary line, defendant of his own knowledge knew where some of the undisputed lines and corners were and was present when K. made a survey of the line in controversy, the court properly permitted defendant to testify concerning that survey. *Ward v. Lane*, 189 Ala. 340, 66 So. 499.

Same—Conversation.—A conversation between the parties and others in their presence as to the dividing line between the parties, involved in the action, is admissible in evidence. *Shelton v. Larkin (Ala.)*, 74 So. 971.

As to Possession of Person under Whom Plaintiffs Claimed. — In an action involving a boundary dispute evidence as to the possession of the person under whom plaintiffs claimed at the time he delivered the land to his grantees and he pointed out its lines held admissible. *Smith v. Bachus*, 195 Ala. 8, 70 So. 261.

Statement of Fact of Definite Line of Surveyor or Opinion.—Where the action involved a dispute as to a boundary line, the question to a witness as to whether he knew where a survey made by certain surveyors ran with reference to the lands, and his answer that it ran right along with the original survey, the old section line, and that he could tell it by the old marked trees on the north end of the line, was properly admitted, since it was a statement of fact of a definite line of survey, and the question did not call for an opinion. *Smith v. Bachus*, 195 Ala. 8, 70 So. 261.

§ 19 (3) Testimony of Surveyors and Their Assistants.

Where the action involved a dispute as to the location of a line between two government sections, a surveyor who had testified as to the facts of a survey made by him and another surveyor, may, as an expert, express an opinion as to whether the line run by them, made a true line between the sections. *Smith v. Bachus*, 195 Ala. 8, 70 So. 261.

A duly qualified competent surveyor may give his opinion as to the true location of the line between properties or as to divisions of land according to government calls. *Pennington v. Mixon* (Ala.), 74 So. 238.

Cross-Examination of Chain Bearers.—

Where, in a suit to determine the location of a disputed boundary line, plaintiff, to discredit the B. survey, introduced one of the chain bearers, who testified the line made by B. ran through a timbered country, and that none of the trees near or on that line bore any evidence of a government survey, that B. walked down a line that bore government marks, but that his starting point was below that line, the court properly permitted defendant to ask him, on cross-examination, if B. at that time had his field notes. *Ward v. Lane*, 189 Ala. 340, 66 So. 499.

§ 20. — Documentary Evidence.

Deeds.—Issue in ejectment being as to the location of a boundary line between the parties, their respective deeds to the adjoining tracts were properly admitted. *Livingston v. Nelson* (Ala.), 76 So. 449.

§ 21. Weight and Sufficiency of Evidence.

In a suit to enjoin a trespass the evidence was held to show that the boundary between adjoining lots was as claimed by complainant. *Chambless v. Jones*, 196 Ala. 175, 71 So. 987.

§ 22. Trial of Issues.

§ 24. — Questions for Jury.

In an action involving a disputed boundary, all bounds and starting points were questions of fact to be determined by the testimony. *Smith v. Bachus*, 195 Ala. 8, 70 So. 261.

§ 25. — Instructions.

See post, "Presumption as to Correct-

ness and Regularity," § 29 (3).

In ejectment to recover the south half of the southwest quarter of a certain section, defendant filed a disclaimer and pleaded that the dispute arose over a disputed boundary as to the line separating sections 17 and 18 in the township; each party pleading what he claimed to be the true boundary line. Held, that an instruction that if the jury were satisfied that the owners of the land on both sides of the M. line had recognized it as the true division line, and had held up to such line for more than ten years adversely up to the time defendant bought his land, the jury should find the issues for plaintiff, was erroneous as beyond the issues. *Howard v. Brannan*, 188 Ala. 532, 66 So. 433.

§ 25½. — Verdict and Findings.

Where, in a suit to determine a disputed boundary line, a survey of the line had been made by one Thompson, and a map of that line was introduced in evidence, a verdict finding that the true line between the two subdivisions in question was "The Thompson Line," without more, was insufficient to support a judgment, and could not be lawfully supplemented by the trial court adding thereto the Thompson map. *Ward v. Lane*, 189 Ala. 340, 66 So. 499.

On an issue as to the location of a disputed boundary line in ejectment, the jury found for plaintiff the land sued for and established the "B. G. McClellan survey as the true line of the N. E. ¼ of N. W. ¼, section (10) ten, township (13) thirteen, range (10) ten east." Held, that such verdict by simply referring to a survey left the matter at large and did not specify the location of the true line so that it could be marked by an officer, and was therefore fatally defective. *Wade v. Gilmer*, 186 Ala. 524, 64 So. 611.

§ 25½a. Costs.

Code 1907, § 3843, authorizing an issue to determine disputed boundaries, and providing that the court shall render judgment accordingly and order the sheriff to mark the true line and apportion the costs equitably, refers to the costs of establishing and marking the true line, and not the costs of the suit; and

the court may tax the cost against plaintiff suing in ejectment, where judgment is rendered for defendant filing a disclaimer with a suggestion that the issue is a disputed boundary line. *Oliver v. Oliver*, 187 Ala. 340, 65 So. 373.

§ 26. Agreements between Parties.

A formal agreement between adjacent owners claiming under deeds conveying adjacent government subdivisions as to the boundary line can not of itself vest title in one of them beyond the true line to which each actually owns, though acquiescence in such a line will prima facie indicate its verity. *Oliver v. Oliver*, 187 Ala. 340, 65 So. 373.

§ 28. Recognition and Acquiescence.

Where a lot owner, after a survey, with the knowledge and consent of the adjoining owner, moved the boundary fence toward the adjoining lot, the acquiescence of the adjoining owner in the survey prima facie indicated its validity and raised a presumption of its correctness. *Chambless v. Jones*, 196 Ala. 175, 71 So. 987.

Where adjacent owners claimed under deeds conveying government subdivisions, a recognition of a false line as a boundary between them was without effect, unless a party claiming beyond the true line held hostile possession up to the false line until the bar of limitation was complete. *Oliver v. Oliver*, 187 Ala. 340, 65 So. 373.

§ 28½. Adjudication by Public Authorities.

§ 28½a. — Appointment and Proceedings of Commissioners or Processioners.

§ 28½a (1) In General.

Provision, in consent decree fixing disputed boundaries, that commissioners should determine whether defendant had used land beyond his boundary, and report the value of such use, held not an attempt by court of chancery to determine question of title, when its jurisdiction under Code 1907, § 3052, subd. 5, is to determine boundaries. *Billups v. Gilbert*, 195 Ala. 518, 70 So. 145.

§ 28½a (2) Review by Court.

The parties to a suit to establish an

uncertain boundary line, brought under Code 1907, § 3052, subd. 5, entered into a consent decree, fixing the boundary and providing for commissioners to lay it out. No provision was made in the decree for a report by the commissioners of the data or evidence upon which they relied or acted. Held, that in the absence of evidence of fraud, the report of the commissioners as to the true line could not be revised by the court, it not appearing to be the desire of the parties that such revision should be had. *Billups v. Gilbert*, 195 Ala. 518, 70 So. 145.

Parties to a suit to determine a disputed boundary line brought under Code 1907, § 3052, subd. 5, authorizing courts of chancery to establish and define uncertain or disputed boundary lines, entered into a consent decree establishing a line. The agreement, carried into the decree provided for commissioners to lay out the line, to report whether the defendant had been cultivating or using any lands on the other side of the agreed line, and to determine the value of the use. The commissioners found defendant had been using lands beyond his line, and fixed the value of the use. Held, that defendant can not complain of personal decree rendered against him for the value of the use, on the theory that the court of equity was exceeding its power by proceeding to determine disputed title, for the consent decree did not contemplate the determination of any such question, but merely to fix the value of the use of land outside of his boundary. *Billups v. Gilbert*, 195 Ala. 518, 70 So. 145.

§ 29. Official Surveys.

§ 29 (2) Conclusiveness in General.

Where, in ejectment, the sole issue was the location of a boundary line between two government sections, such line, when located, was conclusive and fixed, notwithstanding an encroachment by the parties on either side of the line may have ripened into title by adverse possession, since such fact could not change the location of the section line nor transfer the land so claimed from one section to the other. *Howard v. Brannan*, 188 Ala. 532, 66 So. 433.

§ 29 (3) Presumption as to Correctness and Regularity.

A line run by a county surveyor at the instance of one party without notice to the other as required by Code 1907, § 6023, is not presumed correct as against such other party. *May v. Willis* (Ala.), 76 So. 941.

Where a county surveyor did not reduce the survey to a plat, and did not sign any memorial officially, Code 1907, § 6023, making a survey "presumptive evi-

dence of the facts stated," did not apply, and an instruction, stating that presumption, was erroneous. *Ferguson v. Shipp* (Ala.), 73 So. 414.

§ 30. Removal of Landmarks.

Offense under Statute.—*Robinson v. State*, 7 Ala. App. 172, 62 So. 303. See the title BOUNDARIES, § 30, vol. 2, pp. 505, 506.

Evidence.—*Robinson v. State*, 7 Ala. App. 172, 62 So. 303. See the title BOUNDARIES, § 30, vol. 2, p. 506.

Breach of Marriage Promise.

See the title BREACH OF MARRIAGE PROMISE, vol. 2, p. 507, and references there given.

Breach of the Peace.

See the title BREACH OF THE PEACE, vol. 2, p. 508, and references there given.

BRIBERY.**§ 1½. Persons Liable.***Cross References.*

See the title BRIBERY, vol. 2, p. 510, and references there given.

§ 1½. Persons Liable.

Municipal Officer Accepting Bribe as Officer of State.—Under Code 1907, § 6401, as to acceptance of bribe by an executive officer, an indictment will not lie

against a town marshal, while acting for the municipality, for accepting a bribe as an executive officer of the state. *Oaks v. State* (Ala. App.), 75 So. 818.

BRIDGES.

I. Establishment, Construction and Maintenance.

§ 3. Constitutional and Statutory Provisions.

§ 9. Construction.

II. Regulations and Use for Travel.

§ 18. Liabilities for Injuries.

§ 20. — Care Required and Liabilities of Public Authorities in General.

Cross References.

See the title BRIDGES, vol. 2, p. 513, and references there given.

I. ESTABLISHMENT, CONSTRUCTION AND MAINTENANCE.

§ 3. Constitutional and Statutory Provisions.

Constitutionality of Statute.—Act Aug. 26, 1909 (Acts 1909 [Sp. Sess.] p. 303) § 2, in so far as it relates to special road and bridge taxes levied under Const. § 215, subd. "a" is in conflict with the last clause thereof, and as to such levies, void. *State v. Court*, 190 Ala. 631, 67 So. 394.

§ 9. Construction.

Ratification of Contracts—Records of Board of Commissioners.—The record of proceedings of county commissioners, showing only that certain claims named were "passed to payment or referred to proper committees," is insufficient to show that a claim named for work on a bridge was allowed, so as to show ratification of an unauthorized contract for the work; it not appearing that it was not one merely referred to committee. *Mo-*

bile County v. Maddox, 195 Ala. 336, 70 So. 259.

Same—by Probate Judge.—The probate judge, a member of the county board of commissioners, can not invest with validity an incomplete act of the board or an unauthorized act of its individual members, and his issuance of a warrant without authority from the board is no ratification of an unauthorized bridge contract. *Mobile County v. Maddox*, 195 Ala. 336, 70 So. 259.

II. REGULATIONS AND USE FOR TRAVEL.

§ 18. Liability for Injuries.

§ 20. — Care Required and Liabilities of Public Authorities in General.

Defects in Bridges.—In the absence of statute expressly creating it, there is no liability upon a county for injuries to persons caused by defects in its bridges. *Mobile County v. Maddox*, 195 Ala. 336, 70 So. 259.

Briefs.

See ante, APPEAL AND ERROR; post, CRIMINAL LAW.

BROKERS.

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- § 38½. — Default or Refusal of Party Procured by Broker.
 - § 38½ (1) In General.
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- § 39. Bad Faith, Fraud, or Misconduct of Broker.
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VI. Rights, Powers, and Liabilities as to Third Persons.

- § 52½. Representation of Principal in General.
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Cross References.

See the title BROKERS, vol. 2, p. 524, and references there given.
In addition, see post, PRINCIPAL AND AGENT.

I. REGULATION AND CONDUCT OF BUSINESS IN GENERAL.**§ 2. Who Are Brokers.**

Real Estate Broker.—*Handley v. Shaffer*, 177 Ala. 636, 59 So. 286. See the title BROKERS, § 1, vol. 2, p. 526.

II. EMPLOYMENT AND AUTHORITY.**§ 5. Evidence of Agency.**

Admissibility.—A written contract of purchase by seller with another was relevant evidence that plaintiffs were agents of seller although there was a written contract of agency. *Smith v. Sharp Real Estate Co. (Ala.)*, 77 So. 40.

§ 11. Delegation of Authority.

A broker may recover commissions upon procuring sales from a subagent, though the owner did not know that the purchaser was procured by the subagent. *Alford v. Creagh*, 7 Ala. App. 358, 62 So. 254.

III. DUTIES AND LIABILITIES TO PRINCIPAL.**§ 12. Nature of Broker's Obligation.**

Duty to Disclose Facts in His Knowledge.—*Handley v. Shaffer*, 177 Ala. 636, 59 So. 286. See the title BROKERS, § 12, vol. 2, p. 528.

Distinction between Undertaking to Effect Sale and One Merely to Find Purchaser.—*Handley v. Shaffer*, 177 Ala. 636, 59 So. 286. See the title BROKERS, § 12, vol. 2, p. 528.

§ 15. Individual Interest of Broker.

Broker Buying Property to Resell at Profit to Himself.—*Alford v. Creagh*, 7 Ala. App. 358, 62 So. 254. See the title BROKERS, § 15, vol. 2, p. 529.

§ 16. Acting for Parties Adversely Interested.

One contracting to sell land for another may act for purchaser in any way not inconsistent with his duty to his principal. *Smith v. Sharp Real Estate Co. (Ala.)*, 77 So. 40.

A broker employed by defendant to sell its cotton seed oil is not the agent of one purchasing through such broker. *Portsmouth Cotton Oil Refin. Corp. v. Madrid Cotton Oil Co.*, 195 Ala. 256, 71 So. 111.

§ 17. Fraud of Broker or His Agent.

Liability for Rent of Part Sold.—*Dean v. Roberts*, 182 Ala. 221, 62 So. 44. See the title BROKERS, § 17, vol. 2, p. 529.

Waiver by Principal.—The principal, if he sees fit to do so, with full knowledge of the facts, may waive the rule that his broker's acts in bad faith, as by purchasing the principal's property for himself, are void as to the principal, and his ratification may be presumed if he does not repudiate within a reasonable time after knowledge. *Clay v. Cummins (Ala.)*, 77 So. 328.

§ 18. Actions for Negligence or Wrongful Acts of Broker.

Liability for Rent Where Conveyance Taken in Brokers' Own Names.—*Dean v. Roberts*, 182 Ala. 221, 62 So. 44. See the title BROKERS, § 18, vol. 2, pp. 529, 530.

Burden of Proof.—Where an ignorant negro woman procured a real estate agent to sell her land, and he persuaded her to execute an option thereon to him for about one-half what the land was worth, the burden was upon him, in a suit by his principal to cancel a deed made pursuant to the option, to prove that the transaction was just, fair, and equitable in every respect; the fact that the broker had acquired an option not destroying the relation of principal and agent and its attendant confidential relations. *Cox v. Morton*, 193 Ala. 401, 69 So. 500.

IV. COMPENSATION AND LIEN.**§ 19. Right to Compensation in General.**

Sale Effected through Subagent.—*Alford v. Creagh*, 7 Ala. App. 358, 62 So. 254. See the title BROKERS, § 19, vol. 2, p. 530.

§ 20. Employment of Broker.

Implied Acceptance of Offer of Employment.—*Alford v. Creagh*, 7 Ala. App. 358, 62 So. 254. See the title BROKERS, § 20, vol. 2, p. 530.

Validity of Contract Where Compensation Contingent.—*Bush v. Russell*, 180 Ala. 590, 61 So. 373. See the title BROKERS, § 19, vol. 2, p. 530.

§ 20½. Ratification of Broker's Acts.

See post, "Contract or Transaction Negotiated Different from That Authorized," § 34.

§ 21. Necessity of License.

To Validity of Contract.—*Alford v. Creagh*, 7 Ala. App. 358, 62 So. 254. See the title BROKERS, § 21, vol. 2, p. 530.

§ 22. Necessity of Contract in Writing.

Contract of Employment Need Not Be in Writing.—*Alford v. Creagh*, 7 Ala. App. 358, 62 So. 254. See the title BROKERS, § 22, vol. 2, p. 530.

§ 23. Revocation of Authority.

Necessity for Notice of Revocation of Authority.—*Alexander v. Smith*, 180 Ala. 541, 61 So. 68, cited in note in 49 L. R. A., N. S., 998, 1010. See the title BROKERS, § 23, vol. 2, p. 531.

Revocation Pending Negotiations.—*Handley v. Shaffer*, 177 Ala. 636, 59 So. 286, cited in notes in 49 L. R. A., N. S., 987; 23 L. R. A. 1916B, 875; Ann. Cas. 1917B, 1197. See the title BROKERS, § 23, vol. 2, p. 531.

§ 26. Sufficiency of Services of Broker.

§ 27. — In General.

Elements of Sufficient Services.—*Alford v. Creagh*, 7 Ala. App. 358, 62 So. 254. See the title BROKERS, § 27, vol. 2, p. 531.

§ 28. — Performance of Contract of Employment.

Necessity of Actual Sale.—Under agreement to sell land, where commission is to be paid "when the deal is closed," commission is not due until sale is consummated according to its terms, or upon substituted terms, unless seller wrongfully refuses or fails to execute sale. *Smith v. Sharp Real Estate Co.* (Ala.), 77 So. 40.

* It is not necessary that there be an actual purchase of the property on which an option has been obtained before the broker who undertakes to obtain the option is entitled to his commission his contract not being for an absolute purchase or sale. *Bailey v. Padgett*, 195 Ala. 203, 70 So. 637.

Necessity of Purchaser Being Accepted by Principal.—*Handley v. Shaffer*, 177 Ala. 636, 59 So. 286. See the title BROKERS, § 28, vol. 2, p. 532.

Selling on Credit.—*Alexander v. Smith*, 180 Ala. 541, 61 So. 68. See the title BROKERS, § 28, vol. 2, p. 532.

§ 29. — Performance of Services within Time Specified.

A broker to sell real estate within a specified time may not recover compensation under the contract, where he did not procure a purchaser within the specified time. *Hughes v. Daniel*, 187 Ala. 41, 65 So. 518.

Only Acceptance by Principal Remaining to Be Effected.—*Handley v. Shaffer*, 177 Ala. 636, 59 So. 286. See the title BROKERS, § 29, vol. 2, p. 532.

Time for Completion of Loan after Furnishing Abstract.—A contract with a broker to pay commission for securing loan, "if within — days" after application for the loan was approved and the customer furnished an abstract, the broker should be ready to complete the loan, required that the broker be ready to complete the loan within a reasonable time after the abstract was furnished. *Allen v. Stradford* (Ala.), 78 So. 955.

Express Extension of Time.—Where a broker employed to sell failed to procure a purchaser within the time specified, and thereafter the owner gave him additional time, there could be no recovery on the contract giving the additional time, where the broker made no effort to bring about a sale thereunder. *Hughes v. Daniel*, 187 Ala. 41, 65 So. 518.

Implied Extension of Time.—*Alford v. Creagh*, 7 Ala. App. 358, 62 So. 254, cited in note in 49 L. R. A., N. S., 995. See the title BROKERS, § 29, vol. 2, p. 533.

Broker's Efforts Continued after Time Agreed upon.—Where a broker employed within a specified time continued after the time to try to effect a sale, though there was no express agreement therefor he must, to recover on a quantum meruit, show that he furnished a purchaser able, ready, and willing to pay in cash the price the owner had set, if the owner so demanded, or on such other terms as might be settled by agreement between the owner and the purchaser, and that the owner and the purchaser agreed on the terms of sale. *Hughes v. Daniel*, 187 Ala. 41, 65 So. 518.

Sale Made by Principal after Contract Time.—Where a broker did not procure a purchaser willing to enter into a contract with the owner, who subsequently obtained a decree confirming his title, and thereafter sold the property to a corporation formed by a prospective customer procured by the broker, the broker, to recover a commission, must show that the owner was guilty of fraud in deferring the sale, and the mere fact that he did not inform the broker of the decree confirming his title was immaterial on that issue. *Hughes v. Daniel*, 187 Ala. 41, 65 So. 518.

§ 30. — Bringing Parties Together.

Where plaintiff put defendant in communication with a prospective buyer, with the understanding that he should have a commission on any sale that might be effected, plaintiff became entitled to his promised commission only in the event of her accepting the purchaser on her own terms. *Bruce v. Drake*, 195 Ala. 236, 70 So. 273.

§ 30½. — Completion of Negotiations.

Where a broker employed to procure a purchaser procured a prospective purchaser who prepared a draft form of contract and delivered a check as earnest money, but no sale was made, because the prospective purchaser and the owner could not agree on terms, the broker could not recover commissions. *Hughes v. Daniel*, 187 Ala. 41, 65 So. 518.

Where the seller of land and the buyer, with whom plaintiff broker, seeking a commission, had placed her in touch, repudiated the agreement of purchase, and made a new agreement, with two condi-

tions: First, that neither party should be bound unless the seller could raise a loan of \$1,500 upon the land the buyer was to convey to her; and, second, unless the buyer had a marketable title to his land, which conditions were unperformed when the parties met to exchange conveyances, and the sale not consummated—plaintiff was not entitled to his commission from the seller, though the sale was consummated later on other terms. *Bruce v. Drake*, 195 Ala. 236, 70 So. 273.

§ 31. — Procuring Cause of Contract or Transaction.

Instructions Stating the Law Correctly.—*Handley v. Shaffer*, 177 Ala. 636, 59 So. 286. See the title BROKERS, § 31, vol. 2, p. 533.

Necessity of Broker Participating in Negotiations.—*Alexander v. Smith*, 180 Ala. 541, 61 So. 68. See the title BROKERS, § 31, vol. 2, p. 533.

Broker Need Not Be Sole Cause of Offer to Purchase.—*Handley v. Shaffer*, 177 Ala. 636, 59 So. 286. See the title BROKERS, § 31, vol. 2, p. 533.

Whether a broker has earned a commission by procuring a purchaser is a question of fact, and it is enough that the efforts of the broker acting upon the purchaser are the efficient cause of his offer; it being not necessary that such efforts be the whole cause. *Bailey v. Padgett*, 195 Ala. 203, 70 So. 637.

§ 32. — Ability and Willingness of Party Procured to Perform Contract.

A broker employed to sell land is entitled to his compensation if he brings to the seller a purchaser able, ready, and willing to purchase on the terms named. *Kellar v. Jones*, 196 Ala. 417, 72 So. 89.

An agent does not have to produce a purchaser "known" to the seller to be able, ready, and willing to execute the contract. *Smith v. Sharp Real Estate Co. (Ala.)*, 77 So. 40.

Acceptance by Principal Conclusive.—*Handley v. Shaffer*, 177 Ala. 636, 59 So. 286. See the title BROKERS, § 32, vol. 2, p. 534.

Acceptance by the principal of the purchaser is conclusive that he is able, ready, and willing to buy. *Bailey v. Padgett*, 195 Ala. 203, 70 So. 637.

§ 33. — Negotiations Direct with Principal.

§ 33 (1) In General.

Sale by Landowner without Fraudulent Intent.—*Alexander v. Smith*, 180 Ala. 541, 61 So. 68. See the title BROKERS, § 33 (1), vol. 2, p. 534.

Knowledge That Party Was Sent by Broker.—*Handley v. Shaffer*, 177 Ala. 636, 59 So. 286. See the title BROKERS, § 33, vol. 2, p. 534.

§ 33 (2) Sale in Which Broker Has Been Instrumental, or to One Introduced or Procured by Broker, or with Whom Broker Has Negotiated.

A broker employed to sell land is entitled to his compensation if he brings the parties together and a sale is afterwards effected by the seller himself. *Kellar v. Jones*, 196 Ala. 417, 72 So. 89.

A broker working under a special contract stipulating that, if the sale is made by the owner, the broker would receive a half commission, securing a prospective purchaser and upon the owner's acceptance of his services and a sale by the owner to such purchaser was entitled to the stipulated commission. *Kellar v. Jones*, 196 Ala. 417, 72 So. 89.

§ 34. — Contract or Transaction Negotiated Different from That Authorized.

Though an agreement providing for commissions to a broker in case of his effecting a sale of corporate stock, provided that he should secure enough cash for his payment, the owner having ratified a sale which did not result in sufficient cash, was liable for the commissions. *Barbour v. Cantrell*, 193 Ala. 154, 69 So. 67.

§ 34½. — Invalidity of Contract or Transaction Negotiated.

It is no defense to an action by a broker to recover compensation for effecting a sale of lands that the contract of sale was within the statute of frauds. *Bailey v. Padgett*, 195 Ala. 203, 70 So. 637.

§ 35. Failure to Complete Contract or Transaction Negotiated.

§ 36. — In General.

To entitle an agent or broker to com-

mission, he must procure a purchaser able and ready to comply with the terms and conditions of sale, and while the condition as to the ability of the purchaser is waived if the owner accepts the purchaser, knowing or with notice that he is not able or will not be able to comply with the terms of sale, where no contract is made between the owner and the prospective purchaser, there is no such waiver, though the owner accepts the purchaser, unless, at the time of the acceptance, he has notice of the purchaser's inability or unwillingness to comply with the terms of the purchase. *Rike v. McHugh*, 188 Ala. 237, 66 So. 452.

§ 37. — Defect in Principal's Title.

§ 37 (1) Nature and Effect of Defect in Title in General.

Where real estate brokers effected a contract for a sale of land and received a payment of earnest money under the contract which required a vendor to give good title, they are not entitled to retain that money, regardless of whether the vendor owes them a commission, where the parties abandoned the contract because of the vendor's inability to convey such title; for an agent can acquire no greater rights than his principal. *Messer Real Estate, etc., Co. v. Ruff*, 185 Ala. 236, 64 So. 51.

§ 37 (2) Refusal of Wife of Principal to Join in Conveyance.

That principal who employed broker to sell lands could not sell without voluntary assent of wife does not avoid his obligation to pay broker on performance. *Cofield v. McGraw* (Ala. App.), 77 So. 981.

§ 38. — Default or Refusal of Principal.

§ 38 (1) In General.

Failure through Principal's Fault.—*Handley v. Shaffer*, 177 Ala. 636, 59 So. 286. See the title BROKERS, § 38, vol. 2, p. 537.

Capricious Refusal to Accept Purchaser.—*Handley v. Shaffer*, 177 Ala. 636, 59 So. 286. See the title BROKERS, § 38, vol. 2, p. 537.

The right of a broker to compensation

for procuring a purchaser ready, able, and willing to buy, can not be defeated by a capricious refusal of the principal to accept such purchaser. *Bailey v. Padgett*, 195 Ala. 203, 70 So. 637.

Prior Conveyance by Principal. — Where defendant, who had a stock subscription and offered to pay plaintiff an agreed commission in case he effected a sale of stock, it was held that after plaintiff effected a sale of the stock, though defendant had conveyed his interest to a third person before the sale, plaintiff, being ignorant of that fact, was entitled to recover from defendant. *Barbour v. Cantrell*, 193 Ala. 154, 69 So. 67.

§ 38 (2) Provisions in Contract of Employment or Contract of Sale as Affecting Broker's Right to Commissions.

Under a contract to sell land, where the broker's commission depended on his closing sale within 15 days, where, although the broker secured a purchaser, sale was not completed within such time because of inability of the abstractor to complete abstracts, and the owner, learning who the prospective purchaser was, thereafter refused to sell to him, the broker was not entitled to commission, although for a time after the expiration of the time limit the parties continued uninterruptedly to negotiate as if the contract were still in force. *Espalla & Co. v. Warren*, 197 Ala. 601, 73 So. 23.

§ 38½. — Default or Refusal of Party Procured by Broker.

§ 38½ (1) In General.

A broker employed to effect a sale of land is entitled to his compensation when he procures a person able, ready, and willing to buy on the terms specified and the vendor accepts him, though the purchaser may afterwards decline. *Bailey v. Padgett*, 195 Ala. 203, 70 So. 637.

§ 38½ (2) Provisions in Contract of Employment or Contract of Sale as Affecting Broker's Right to Commissions.

Defendant sold certain land reserving a vendor's lien with a power of sale in case of default, in the exercise of which power he caused the land to be sold

and purchased it at the sale for the unpaid purchase money with costs and attorney's fees. For a part of the broker's commissions on the sale of the land he executed to the broker notes which provided that they were not to become obligations until the notes given by the vendee for the purchase money had been paid. Held, that defendant's repurchase of the land at the sale under the power of sale was not a payment of the deferred payment notes within the meaning of the agreement with the broker, since, though "payment" in a broad sense includes money or anything else of value which the creditor accepts in satisfaction of his debt, it means in its restricted sense full satisfaction paid by money and not by exchange or compromise or by an accord and satisfaction, and hence defendant was not liable on the notes given the broker. *Roach v. McDonald*, 187 Ala. 64, 65 So. 823.

§ 39. Bad Faith, Fraud, or Misconduct of Broker.

§ 39 (1) In General.

Duties with Respect to Advising Principal. — *Handley v. Shaffer*, 177 Ala. 636, 59 So. 286. See the title BROKERS, § 39 (1), vol. 2, p. 537.

Loss of Right to Commissions. — *Alford v. Creagh*, 7 Ala. App. 358, 62 So. 254. See the title BROKERS, § 39 (1), vol. 2, p. 537.

Fraudulent Conveyance to Brokers in Their Own Names. — *Dean v. Roberts*, 182 Ala. 221, 62 So. 44. See the title BROKERS, § 39 (1), vol. 2, p. 538.

Purchaser's Understanding as to Possibility of Reduction in Price. — *Alexander v. Smith*, 180 Ala. 541, 61 So. 68. See the title BROKERS, § 39 (1), vol. 2, p. 538.

§ 39 (2) Sale for Inadequate Price or Price Less than Might Have Been Procured.

Creating Impression That Price May Be Reduced. — *Alford v. Creagh*, 7 Ala. App. 358, 62 So. 254. See the title BROKERS, § 39 (2), vol. 2, p. 538.

§ 39 (4) Waiver of Fraud or Wrongful Act.

Where a realty broker was authorized to sell at a minimum price of \$32.50 an

acre, with the understanding that, if he sold for as much as \$35 an acre, he should get a commission of 5 per cent., and if he sold for not less than \$33.25, and not exceeding \$35 an acre, he should get all in excess of \$33.25 per acre, and such broker sold for \$37.50 per acre, having endeavored to get away from the original contract when sending his principal a telegram for permission to sell at \$32.50, the principal not having been deceived into making a new contract, or relinquishing his rights, as he approved the contract of sale, which disclosed the real transaction, on its receipt, safeguarding himself by an accompanying letter holding the broker to the original agreement as to compensation, the broker was entitled to a commission of 5 per cent. under the original agreement, and, his principal, not having been misled, and having expressly ratified the sale on condition the broker should be paid as provided by the original agreement, can not set up that the broker forfeited his right as intending to get from under the original agreement. *Clay v. Cummins (Ala.)*, 77 So. 328.

Where plaintiff negotiated a sale of defendant's property to the government, but the title was rejected, and it was agreed between the parties that the government should condemn the land and that the agreed price should be found as the value, which agreement was carried out and the amount paid to defendant, the transfer was not voidable at the option of the government, even though plaintiff used improper influence to induce the sale, since the judgment became final by the payment, and defendant therefore could not resist an action for plaintiff's compensation by a plea that he had used improper means to influence the government to enter the contract. *Russell v. Bush*, 196 Ala. 309, 71 So. 397.

§ 43. Reimbursement of Advances, Expenses, or Losses.

Brokers Fraudulently taking Title in Their Own Names. — *Dean v. Roberts*, 182 Ala. 221, 62 So. 44. See the title BROKERS, § 43, vol. 2, p. 539.

§ 45. Persons Liable.

Husband and Brother-in-Law.—*Alford*

v. Creagh, 7 Ala. App. 358, 62 So. 254. See the title BROKERS, § 45, vol. 2, p. 540.

Broker Employed by Only One Defendant.—*Handley v. Shaffer*, 177 Ala. 636, 59 So. 286. See the title BROKERS, § 45, vol. 2, p. 540.

V. ACTIONS FOR COMPENSATION.

§ 46. Nature and Form of Action.

A broker performing all the services required of him by the owner and whose services were accepted and a sale consummated by the owner, so that nothing remained to be done except to pay the compensation promised, was entitled to recover under the common counts. *Kellar v. Jones*, 196 Ala. 417, 72 So. 89.

§ 47. Defenses.

In an action by a real estate broker to recover compensation for procuring a purchaser at a fixed price, it was no defense to show that plaintiff intimated to the purchaser that the property might be secured for less, for, while a broker owes his principal absolute fidelity, yet an intimation, being an indirect suggestion capable of erroneous interpretation, is not sufficient to show infidelity as a matter of law. *Alexander v. Smith*, 180 Ala. 541, 61 So. 68.

§ 48. Pleading.

§ 48 (1) Declaration, Complaint, or Petition.

Necessity of Averring Performance.—*Handley v. Shaffer*, 177 Ala. 636, 59 So. 286. See the title BROKERS, § 48 (1), vol. 2, p. 341.

Showing Employment. — *Handley v. Shaffer*, 177 Ala. 636, 59 So. 286. See the title BROKERS, § 48 (1), vol. 2, p. 341.

Complaint Authorizing Recovery for Procuring Purchaser before Employment Began.—*Handley v. Shaffer*, 177 Ala. 636, 59 So. 286. See the title BROKERS, § 48 (1), vol. 2, p. 341.

§ 48 (2) Issues, Proof, and Variance.

Where defendant pleaded that plaintiff's commissions for the sale of roofing were not payable until the purchase price was paid, the court erred in refusing to permit defendant to prove such fact. *Long-Lewis Hdw. Co. v. Ewing*, 8 Ala. App. 657, 62 So. 341.

In a suit for a broker's commissions for procuring a purchase for land, it was not a good answer that plaintiff knowingly permitted the purchaser to negotiate with defendant without disclosing to defendant that the purchaser was procured through the broker's efforts, etc., where the pleas did not aver any facts imposing on the broker the duty to disclose to defendants the fact that the purchaser was the broker's customer, and where they did not aver defendant's ignorance of that fact. *Handley v. Shaffer*, 177 Ala. 636, 59 So. 286.

§ 48. Evidence.

§ 50. — Admissibility.

§ 50 (1) In General.

In an action for commissions for effecting a sale of corporate stock, plaintiff claimed that he sold the stock for defendant under an oral contract, while defendant averred that the contract was a written one made with a firm of which plaintiff was a member. Held, that evidence that plaintiff's alleged partner knew of defendant's transfer of the stock subscription prior to the sale, offered to show that plaintiff should recover his commissions from the then holder, was immaterial. *Barbour v. Cantrell*, 193 Ala. 154, 69 So. 67.

Time for Payment of Commissions.—*Long-Lewis Hdw. Co. v. Ewing*, 8 Ala. App. 657, 62 So. 341. See the title BROKERS, § 50 (1), vol. 2, p. 542.

Time Covered by Broker's Correspondence with Landowner.—*Alexander v. Smith*, 180 Ala. 541, 61 So. 68. See the title BROKERS, § 50, vol. 2, p. 542.

On Issue of Broker's Fraud in Representing Both Parties.—*Long-Lewis Hdw. Co. v. Ewing*, 8 Ala. App. 657, 62 So. 341. See the title BROKERS, § 50 (1), vol. 2, p. 543.

§ 50 (2½) Evidence of Ability and Willingness of Party Procured to Perform.

In an action for having furnished a buyer for land it was proper for agents to show that they had informed seller that the purchaser was able, ready, and willing to make required cash payment. *Smith v. Sharp Real Estate Co. (Ala.)*, 77 So. 40.

§ 50 (4½) Evidence of Bad Faith, Fraud, or Misconduct of Broker.

On the issue of a broker's fraud in representing both parties, defendant held entitled to show that he acted as agent for T. in other matters connected with the construction of certain houses for which he negotiated a sale of roofing from defendant to T., and for which he claimed commissions. *Long-Lewis Hdw. Co. v. Ewing*, 8 Ala. App. 657, 62 So. 341.

§ 51. — Weight and Sufficiency.

§ 51 (1) In General.

Whether Sale Made in Reasonable Time.—*Alford v. Creagh*, 7 Ala. App. 358, 62 So. 254. See the title BROKERS, § 51, vol. 2, p. 544.

Principal's Fraud.—The testimony of a broker, suing for a commission on a sale of land, and entitled to recover only on the theory that the owner was guilty of fraud in deferring a sale, that after the sale the owner promised to pay him a sum less than he claimed to be due, and that he accepted the promise, did not justify a finding that the owner was guilty of fraud. *Hughes v. Daniel*, 187 Ala. 41, 65 So. 518.

In a real estate broker's action for a commission, evidence held insufficient to show the seller's lack of good faith in the transactions wherein her contract to sell to the buyer introduced to her by plaintiff fell through and she later consummated a sale through another agent to the same buyer. *Bruce v. Drake*, 195 Ala. 236, 70 So. 273.

§ 51 (2) Ability or Willingness of Proposed Purchaser to Perform.

Slight evidence of the prospective purchaser's ability to pay for the land is all that is necessary in an action to recover commissions, the owner having refused to make the sale, and a mere demand by the purchaser having been held sufficient. *Bailey v. Padgett*, 195 Ala. 203, 70 So. 637.

§ 51 (3) Bad Faith, Fraud, or Misconduct of Broker.

Bad Faith of Broker's Subagent.—*Alford v. Creagh*, 7 Ala. App. 358, 62 So. 254. See the title BROKERS, § 51, vol. 2, p. 544.

§ 52. Trial.**§ 52 (1) Questions for Jury in General.**

In an action by an agent for furnishing buyer for land, evidence held to take to jury question whether plaintiff's principal, by his acts in refusing to make a deed, waived offer of performance by alleged buyer. *Smith v. Sharp Real Estate Co. (Ala.)*, 77 So. 40.

§ 52 (2) Questions for Jury as to Employment of Broker, Construction of Contract, or Ratification of Acts of Broker.

In an action against a married woman and her husband to recover commissions for producing a purchaser for her lands, evidence held sufficient to carry to the jury the question whether the woman authorized the sale. *Bailey v. Padgett*, 195 Ala. 203, 70 So. 637.

§ 52 (3) Questions for Jury as to Sufficiency of Services of Broker.

Whether a broker has earned a commission by procuring a purchaser is a question of fact. *Bailey v. Padgett*, 195 Ala. 203, 70 So. 637.

What Amounts to "Procurement" of Purchaser.—*Handley v. Shaffer*, 177 Ala. 636, 59 So. 286. See the title BROKERS, § 52 (3), vol. 2, p. 545.

§ 52 (3½) Questions for Jury as to Bad Faith, Fraud or Misconduct of Broker.

In an action by a real estate broker to recover compensation for procuring a purchaser at a fixed price, it was not proof of the broker's unfaithfulness as matter of law, to show that the purchaser understood the broker to intimate that the property might be secured at a less price. *Alexander v. Smith*, 180 Ala. 541, 61 So. 68.

§ 52 (4) Instructions in General.

Right to Recover under the Pleadings.—In a broker's action for a commission, brought upon the common counts, and upon a written contract stipulating a half commission upon a sale by the owner, the defendant's requested charges that unless the plaintiff procured from the purchaser a bona fide offer for the land he could not recover, though intended to apply to the count of the spe-

cial contract, were properly refused, where they would deny a recovery even upon the common counts. *Kellar v. Jones*, 196 Ala. 417, 73 So. 89.

Directing Jury's Attention to Acts of Defendant's Wife.—*Alexander v. Smith*, 180 Ala. 541, 61 So. 68. See the title BROKERS, § 52 (4), vol. 2, p. 545.

§ 52 (5) Instructions as to Sufficiency of Services of Broker.

In a broker's action for commissions, an instruction that if an agent communicated to the owner the name of a purchaser, and the owner accepted the purchaser without objection, that in law operated as a waiver of the requirement that the purchaser be ready, willing, and able to buy, though erroneous, was not reversible error, where there was uncontradicted evidence that the purchaser was ready and willing to purchase, and that the failure to carry out the contract arose from some other cause, especially where the court further charged that, unless the owner accepted the prospective purchaser without qualification, the evidence must reasonably satisfy the jury that the purchasers were able to make the required payments. *Rike v. McHugh*, 188 Ala. 237, 66 So. 452.

In a broker's action for commissions, where the evidence was uncontradicted that the prospective purchaser was able, ready, and willing to comply with the terms of sale, and that the failure to carry out the contract arose from some other cause, an instruction that unless the jury were reasonably satisfied, from all the evidence, that the purchaser was able to pay cash for the property on or before a specified date, to find for defendant, was misleading and properly refused. *Rike v. McHugh*, 188 Ala. 237, 66 So. 452.

VI. RIGHTS, POWERS, AND LIABILITIES AS TO THIRD PERSONS.**§ 52½. Representation of Principal in General.**

A "broker" is an agent employed to make bargains and contracts between other persons in the course of trade, and, while ordinarily authorized to buy or sell a particular thing in specified

quantities and at a limited price, secret instructions which conflict with his apparent powers have no effect on the rights of third persons, dealing with him in good faith. *Portsmouth Cotton Oil Refin. Corp. v. Madrid Cotton Oil Co.*, 195 Ala. 256, 71 So. 111.

A "broker" is an agent acting under a limited authority usually authorized to buy or sell a particular thing in specified quantities, and, though to bind his principal he must keep within the limits of the authority conferred upon him, yet secret instructions conflicting with the usual or apparent powers of a broker will no more affect the rights of third persons dealing with him in good faith in ignorance of his instructions than in the case of an ordinary agent. *Portsmouth Cotton Oil Refin. Corp. v. Madrid Cotton Oil Co. (Ala.)*, 77 So. 8.

§ 53½. Purchases, Sales, and Conveyances.

§ 53½a. — In General.

Under an agency agreement, whereby a seller of land agrees to deliver a deed "to the purchaser," it is necessary that the name of the buyer be disclosed within the time in which the deed is to be made, as a deed can not be effectively executed without the name of the grantee. *Smith v. Sharp Real Estate Co (Ala.)*, 77 So. 40.

When agent is employed to find purchaser for land, it is his duty to disclose name of purchaser to his principal, but where agent is commissioned to sell on stated terms, and makes written agreement of sale which is binding on purchaser, duty to disclose and duty to execute deed are concurrent. *Smith v. Sharp Real Estate Co. (Ala.)*, 77 So. 40.

An agency agreement by owner to deliver a deed to purchaser "now secured" is acceptance of the purchaser although his identity is not disclosed, but the initiative is on such buyer to tender a required payment and security before seller can be required to execute a deed. *Smith v. Sharp Real Estate Co. (Ala.)*, 77 So. 40.

§ 53½b. Deposits and Payments.

A real estate agent, employed by a principal to procure an exchange of his real estate for the real estate of another and a cash payment, has no implied authority to collect the payment, and a payment to him is not binding on the owner. *Edwards v. Kilgore*, 192 Ala. 343, 68 So. 888.

§ 53½c. Repudiation or Ratification of Broker's Acts.

Defendant authorized a broker to sell for it cotton oil. The broker notified defendant on October 24th of a sale to plaintiff, and defendant, though notifying the broker on November 4th that the oil had been otherwise disposed of, did not notify plaintiff of that fact or in any way question the contract until November 13th. At that time defendant refused to perform the contract on the ground that a tank for the oil had not arrived in time, and did not until November 16th, after being notified that plaintiff would hold it liable for loss on account of failure to deliver the oil, repudiate the contract on the ground of the broker's want of authority. Held, that defendant was estopped from denying the authority of the broker, not having denied it promptly and in the meantime in effect speculated on a decrease in the price of the oil. *Portsmouth Cotton Oil Refin. Corp. v. Madrid Cotton Oil Co. (Ala.)*, 77 So. 8.

§ 54. Estoppel by Broker's Acts.

See ante, "Repudiation or Ratification of Broker's Acts," § 53½c.

§ 55. Actions by or against Principals or Brokers.

Evidence.—Where, in action for defendant's breach of a contract made through a broker, defendant was estopped to deny authority of broker, evidence tending to discredit broker's authority was improperly received. *Portsmouth Cotton Oil Refin. Corp. v. Madrid Cotton Oil Co. (Ala.)*, 77 So. 8.

BUILDING AND LOAN ASSOCIATIONS.

§ 4. Stock.

§ 5. — Subscription and Issuance in General.

§ 26. Actions by and against Associations.

Cross References.

See the title BUILDING AND LOAN ASSOCIATIONS, vol. 2, p. 546, and references there given.

§ 4. Stock.

§ 5. — Subscription and Issuance in General.

Misrepresentations of Agent — Provision in Contract.—In an action based on fraud for premiums paid in a building and loan association, where plaintiff signed a contract stating his understanding that the company was not bound by any representations of its agent, he was bound by its terms, unless he was prevented from reading it by fraudulent representations of the seller or seller's agent. *Capital Security Co. v. Owen*, 196 Ala. 385, 72 So. 8.

Where one dealing with an agent to take applications for home purchasing investment contracts signed without reading an application reciting that the applicant relied solely on the terms of the contract and the options set forth on the back of the application and made a part thereof, and retained the contracts without reading them, and the agent made no effort to prevent a reading of the application and of the contracts, nor made misrepresentations as to the contents of the application, the applicant was not entitled to relief on the ground

of fraud based on statements by the agent as to the contents of the contracts. *Capital Security Co. v. Gilmer*, 190 Ala. 340, 67 So. 258; *Capital Security Co. v. Underwood*, 2 Ala. App. 662, 67 So. 706.

Same—Confidential Relation to Plaintiff.—Where plaintiff negligently signed without reading an application for home-purchasing investment contracts, and retained the contracts without reading same, she was not entitled to equitable relief for fraud based on statements of the agent as to the contents of the contracts where no confidential, fiduciary or special relation existed between them. *Capital Security Co. v. Davis*, 12 Ala. App. 498, 67 So. 705.

§ 26. Actions by and against Associations.

Plea of General Issue.—Where plaintiff sought rescission of agreements for the purchase of investment contracts and for the recovery of money paid thereon on the ground of fraud, the issues could be presented by a plea of the general issue. *Capital Security Co. v. Gilmer*, 190 Ala. 340, 67 So. 258; *Capital Security Co. v. Underwood*, 12 Ala. App. 662, 67 So. 706.

Building Contracts.

See post, CONTRACTS; MECHANICS' LIENS.

Building Restrictions.

See post, DEEDS; MUNICIPAL CORPORATIONS.

Bulk Sales Law.

See post, FRAUDULENT CONVEYANCES.

Burden of Proof.

See post, CRIMINAL LAW; EVIDENCE, and particular titles.

BURGLARY.

I. Offenses and Responsibility Therefor.

- § 1. Nature and Elements of Offense.
- § 2. — In General.
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- § 31. — Effect of Possession of Property Stolen.
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- § 33. — Questions for Jury.
- § 34. — Instructions.

Cross References.

See the title BURGLARY, vol. 2, p. 564, and references there given.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

- § 1. Nature and Elements of Offense.
- § 2. — In General.

Stealing Goods from Railroad Car. — Stealing of goods of any value from a railroad car is burglary, and the value of the goods is not an element of the offense. *Boyd v. State*, 12 Ala. App. 152, 67 So. 806.

- § 4. — Character of Building.

State Capitol—Each Room "Building" Under Statute.—Under Code 1907, § 6415, providing that any person, who, with in-

tent to steal or commit a felony, breaks and enters any building, etc., shall be guilty of burglary, each room or apartment of the State Capitol may be a "building" within the statute. *Adams v. State*, 13 Ala. App. 330, 69 So. 357.

- § 7. — Breaking and Entry.

Unlocking Door.—Breaking and entering are essential to burglary, though a "breaking" by unlocking, rather than by battering down a door, etc., is sufficient to constitute a "breaking." *Norman v. State*, 13 Ala. App. 337, 69 So. 362.

Forcible Removal of Bar Across Door. —The forcible removal of a bar across a

door used as a fastening is a breaking. *Ashmon v. State*, 9 Ala. App. 29, 63 So. 754.

§ 8. Defenses.

§ 8½. — In General.

Consent of Owner of Thing Stolen.—Any property which the applicant in an examination for a license to practice medicine under Code 1907, §§ 1626-1646, had in his examination papers after surrender to the supervisor, was not such that his consent would relieve defendant from liability for breaking into a building and stealing them. *Norman v. State*, 13 Ala. App. 337, 69 So. 362.

II. PROSECUTION AND PUNISHMENT.

§ 11. Indictment or Information.

§ 14. — Description of Building.

Necessary Averments.—Under Code 1907, § 6415, an indictment for burglary in having entered an office, described as a structure or inclosure, is bad unless it contains the averment that it was constructed or made specially for the keeping of goods or other valuable thing. *Adams v. State*, 13 Ala. App. 330, 69 So. 357.

Indictment Held Sufficient.—Under Code 1907, § 6415, an indictment for burglary, charging that defendant, with intent to steal, broke and entered the shop, store, warehouse, or other building of S., in which goods, merchandise, books or things of value were kept for sale or deposit, was proper. *Adams v. State*, 13 Ala. 330, 69 So. 357.

§ 16. — Ownership or Possession of Building.

Ownership Must Be Laid.—The ownership of the premises entered must be definitely laid in an indictment for burglary, on account of the rule requiring the negation of the defendant's right to break and enter. *Adams v. State*, 13 Ala. App. 330, 69 So. 357.

Ownership Laid in Occupant Except Servant.—The ownership of the premises in an indictment for burglary should be laid, not in the holder of legal title, but in the occupant or possessor when the offense was committed, unless the

occupant was a mere servant, when ownership should be laid in the master. *Adams v. State*, 13 Ala. App. 330, 69 So. 357.

Occupancy — Negation of Right to Break and Enter.—Where an indictment for burglary does not aver that occupancy of the premises was in another than the defendant, the conclusion should be necessary from the facts stated that the accused was not the occupant of the building entered, or there should be a positive negation of his right to break and enter. *Adams v. State*, 13 Ala. App. 330, 69 So. 357.

Failure to Aver Corporation or Partnership.—An indictment for breaking into a building of the "Hill Grocery Company," not averring it was a corporation or partnership, and averring felonious taking from "Hill Grocery Company, a body corporate," was insufficient as it is left to influence that the same company is described in both averments. *Noah v. State* (Ala. App.), 72 So. 611.

§ 17. — Description and Ownership of Property in Building or Stolen from Building.

Under Code 1907, § 6415, providing that a burglary may be committed in a store in which goods, wares, merchandise, or other valuable thing is kept, an indictment which describes the store as a place where goods, merchandise, "or" clothing, "or" things of value are kept is demurrable, as not describing the property mentioned as things of value, so as to enable the court to determine whether they were within the general terms of the statute. *Hawkins v. State*, 8 Ala. App. 234, 62 So. 974.

Description of Building and Not of Stolen Property.—Averment in indictment for burglary, under Code 1907, § 6415, that in the office burglarized there were kept for use or deposit goods or books, or things of value, held merely descriptive of the place broken into and entered, and not employed as a description of the things stolen or intended to be stolen. *Norman v. State*, 13 Ala. App. 337, 69 So. 362.

§ 19. — Issues, Proof, and Variance.

As to variance between indictment and

proof as ground for affirmative charge, see post, "Questions for Jury," § 33.

Variance — "Or" in Indictment. — An indictment for burglary in form given in Cr. Code 1907, p. 664, form 27, relating to "goods, merchandise, or clothing, things of value," and not containing the word "or" as in Code 1907, § 6415, will not sustain conviction because of variance, where only money was stolen, and there was not evidence that there was anything else in the building. *Ashmon v. State*, 9 Ala. App. 29, 63 So. 754.

§ 21. Admissibility of Evidence.

§ 22. — In General.

Immaterial Evidence.—In prosecution for burglary, testimony of police officer as to whether or not there was attempt being made to arrest some one for breaking into store was inadmissible as immaterial. *Malone v. State* (Ala. App.), 76 So. 469.

Action against Third Party for Goods.—Where, in prosecution for burglary, it was claimed that goods stolen from the store of A. were sold to W. and found in his store, evidence of an action between them for the goods, and the result thereof, was *res inter alios acta*, and inadmissible. *Cogbill v. State*, 8 Ala. App. 223, 62 So. 406.

§ 24. — Identity and Ownership of Property in Building or Stolen from Building.

Property Not Positively Identified. — A stamp book, which was like one taken from a burglarized store, and which was found in the woodshed of a codefendant to which a trail, followed by dogs, led, along which trail were found papers taken from the store, and which also led to a house where a witness testified the defendant and his codefendant left some stolen papers the night of the burglary, was admissible, even though the state's witness could not positively identify it, since the other facts and circumstances were sufficient to take to the jury the question whether it was the same book as the one stolen. *Allen v. State*, 8 Ala. App. 228, 62 So. 971.

§ 29. Weight and Sufficiency of Evidence.

§ 30. — In General.

§ 30 (½) In General.

Evidence held to sustain a conviction of burglary. *Cogbill v. State*, 8 Ala. App. 223, 62 So. 406; *Harris v. State*, 11 Ala. App. 314, 66 So. 876.

§ 30 (1) Proof of Corpus Delicti.

Testimony of the supervisor of a state examination that examination papers were stolen from the office of a certain named person in the State Capitol at some time between Thursday night and Saturday morning, defendant's possession of such stolen papers, etc., held sufficient circumstantial evidence to show the corpus delicti. *Norman v. State*, 13 Ala. App. 337, 69 So. 362.

§ 30 (1½) Breaking and Entry.

Defendant can not be convicted of burglary of a dwelling house unless it is shown that he broke into the house or had entered into a conspiracy for that purpose. *Coplon v. State* (Ala. App.), 73 So. 225.

In prosecution for burglary the evidence held sufficient to show a breaking and entry. *Ashmon v. State*, 9 Ala. App. 29, 63 So. 754.

§ 30 (3) Identity and Value of Stolen Property.

Direct or Circumstantial Evidence to Show Value.—That goods stolen from a railroad car, essential to constitute burglary, had some value, may be proved by direct or circumstantial evidence. *Boyd v. State*, 12 Ala. App. 152, 67 So. 806.

Sale of Goods to Show Value.—Where the charge was burglary of a railroad car, evidence that part of the goods stolen was sold to other parties a few hours after the burglary, was sufficient proof that the articles stolen were of value, as alleged in the indictment. *Boyd v. State*, 12 Ala. App. 152, 67 So. 806.

§ 31. — Effect of Possession of Property Stolen.

Evidence Sufficient to Prove Larceny.

—The mere fact of defendant's possession of the original state examination papers shown to be stolen property

was sufficient, in the absence of explanation, to afford a reasonable inference that he had stolen them. *Norman v. State*, 13 Ala. App. 337, 69 So. 362.

No Proof of a Larceny.—Possession by defendant of goods alleged to have been stolen from a store house will not support a conviction for burglary where there was no proof of a larceny or that the goods were in fact stolen. *Mullins v. State* (Ala. App.), 77 So. 963.

Sale of Article Recently Stolen.—Proof that accused sold a ham recently stolen from the smokehouse of the prosecuting witness makes out a prima facie case of burglary. *Hickey v. State*, 12 Ala. App. 143, 67 So. 732.

§ 33. Trial.

§ 33. — Questions for Jury.

Breaking.—In a prosecution for burglary evidence held to make the breaking a question for the jury. *Norman v. State*, 13 Ala. App. 337, 69 So. 362.

Identity of Stolen Articles.—It is a question for the jury whether the articles found in accused's possession shortly after the offense were those stolen and missing. *Ashmon v. State*, 9 Ala. App. 29, 63 So. 754.

Affirmative Charge — Evidence Sufficient to Go to Jury.—Evidence that building was locked, that during the night a window was broken, making an opening sufficient to enter, and meats were taken away, which were traced to a store where next day the accused was

selling such meat, and that he fled when officers appeared held sufficient to carry case to jury and warrant refusal of affirmative charge. *Noah v. State* (Ala. App.), 72 So. 611.

Same—Pecuniary Value Not Shown.—In a prosecution for burglary charging the taking of unfinished state examination papers from office in capitol, fact that they were not shown to have a market value held not to entitle defendant to affirmative charge. *Norman v. State*, 13 Ala. App. 337, 69 So. 362.

Same—Variance.—Where there is variance between allegations in indictment for burglary and proof, as to ownership of house alleged to have been broken into, court erred in refusing defendant affirmative charge. *Condry v. State* (Ala. App.), 76 So. 476.

§ 34. — Instructions.

As to variance between indictment and proof as ground for affirmative charge, see ante, "Questions for Jury," § 33.

Abstract Instruction.—Where in a prosecution for burglary, there was evidence that accused, on the night succeeding the burglary, had a watch taken from the house burglarized, the court properly refused to charge that no matter how strong the circumstances, if they could be reconciled with the theory that one other than defendant committed the crime, he should be acquitted. *Gunn v. State*, 7 Ala. App. 132, 61 So. 468.

Burial.

See post, CEMETERIES.

Buyer and Seller.

See post, SALES; VENDOR AND PURCHASER.

CANCELLATION OF INSTRUMENTS.

I. Right of Action and Defenses.

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- § 3. — Invalidity of Instrument.
- § 6. — Executed Contracts.
- § 8. Adequate Remedy at Law.
- § 9. — In General.
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- § 28. Form of Remedy.
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Cross References.

See the title CANCELLATION OF INSTRUMENTS, vol. 2, p. 584, and references there given.

As to cancellation of instruments for mental incapacity, see post, DEEDS; INSANE PERSONS; MORTGAGES.

I. RIGHT OF ACTION AND DEFENSES.

§ 1. Right to Cancellation.

§ 3. — Invalidity of Instrument.

Uncertainty of Instrument. — *Hawthorne v. Jenkins*, 182 Ala. 255, 62 So. 505. See the title CANCELLATION OF INSTRUMENTS, § 3, vol. 2, p. 587.

Instruments Not Appearing Void on Face.—*Smith v. Roney*, 182 Ala. 540, 62

So. 753. See the title CANCELLATION OF INSTRUMENTS, § 3, vol. 2, p. 587.

Grantor Non Compos Mentis.—If a deed were void on the ground that the grantor was non compos mentis when it was executed, a suit to cancel on that ground can not be maintained, since cancellation is unnecessary to the recovery of possession in an action at law. *Lewis v. Alston*, 184 Ala. 339, 63 So. 1008.

Fraud or Duress. — Where written

agreements superseding a prior parol contract between the parties were procured from one of them by fraud or duress, the aggrieved party may procure cancellation of instruments. *Cannon v. Birmingham Trust, etc., Co.*, 194 Ala. 469, 69 So. 934.

§ 6. — Executed Contracts.

Nonperformance of Condition Subsequent.—Where grantee's performance is imposed as a condition subsequent to retention and enjoyment of deed, equity will prevent irremediable mischief to grantor by rescission of executed deed. *Sewell v. Walkley (Ala.)*, 73 So. 422.

§ 8. Adequate Remedy at Law.

§ 9. — In General.

Complainant Not in Possession. — *Smith v. Roney*, 182 Ala. 540, 62 So. 753. See the title CANCELLATION OF INSTRUMENTS, § 9, vol. 2, p. 587.

Breach of Warranty and Deceit.—Bill to cancel and rescind a contract of sale for breach of warranty and for deceit will lie, in spite of remedy at law. *Consumers Coal, etc., Co. v. Yarbrough*, 194 Ala. 482, 69 So. 897.

§ 11. — Defense to Action on Instrument.

Mortgagee Making Mortgage for More than Proper Amount. — A mortgage given for services can not be canceled on the ground that the mortgagee, who filled in the amount of the mortgage, made it for more than he should, as that can be adjusted on foreclosure proceedings. *Blair v. Jones (Ala.)*, 78 So. 69.

§ 14. — Insolvency of Defendant.

Remedy at Law Neither Adequate Nor Complete.—*Peerless Coal Co. v. Lamar*, 180 Ala. 307, 60 So. 837. See the title CANCELLATION OF INSTRUMENTS, § 14, vol. 2, p. 590.

§ 17. Conditions Precedent.

§ 21. — Restoration of Former Status of Parties.

Not Offering to Repay Debt.—Where a mortgage given to secure a loan made by a foreign corporation was void and unenforceable because the corporation had not complied with the statutes re-

quiring certain formalities before such corporations can do business in the state, the mortgagor, who did not offer to repay the debt, is not entitled to the aid of equity to cancel the mortgage as a cloud on his title. *Douglass v. Standard Real Estate Loan Co.*, 189 Ala. 223, 66 So. 614.

§ 22. — Restoration of Consideration or Benefit.

§ 22 (1) In General.

Successors in Interest.—*Snead v. Scott*, 182 Ala. 97, 62 So. 36. See the title CANCELLATION OF INSTRUMENTS, § 22 (1), vol. 2, p. 595.

Restoration of the Status Quo. — An offer to restore the status quo on discovery of the fraud or within a reasonable time thereafter is a condition precedent to the right to sue for the cancellation, for fraud, of a deed given for a valuable consideration paid. *Kant v. Atlantic, etc., R. Co.*, 189 Ala. 48, 66 So. 598.

§ 22 (2) Consideration for Deed or Mortgage.

Mortgage Given to Pay Pre-Existing Indebtedness.—A mortgagor can maintain a suit in equity to cancel an invalid mortgage given to pay a pre-existing indebtedness without offering to pay such indebtedness. *Walker v. Baker (Ala.)*, 74 So. 368.

When Unnecessary to Return Consideration.—Where money paid complainant by the administrator of an estate in which she was interested at the time of execution of a deed to him in reliance on his misrepresentations that he had title by a deed from a former owner was received by complainant as an advancement representing the value of certain debts due the estate, she was under no obligation to return the money as a condition to rescinding her deed. *Hartley v. Frederick*, 191 Ala. 175, 67 So. 983.

Doing Equity.—A judgment creditor of a mortgagor may not maintain suit to cancel the mortgage, of record long before creation of his debt, as void under Code 1907, § 3653, because given to a foreign corporation having no permit to do business in the state, without doing

equity, by offering to refund the money loaned by the mortgagee. *Interstate Trust, etc., Co. v. National Stockyards Nat. Bank (Ala.)*, 76 So. 356.

II. PROCEEDINGS AND RELIEF.

§ 28. Form of Remedy.

Insolvency of Offending Party. — Courts of equity do not take jurisdiction of suit for rescission of contract merely to declare rescission, but only to administer some form of equitable relief or protection not available in other forums, or where, on account of insolvency of the offending party, a judgment at law might fail to compensate injured party or to place him in statu quo. *Stone v. Walker (Ala.)*, 77 So. 554.

§ 30. Parties.

Necessary Parties Defendant.—One of the grantees in a deed which the grantor was induced to execute by the fraudulent misrepresentations of the other grantee was a necessary party to a suit to annul the deed. *Hartley v. Frederick*, 191 Ala. 175, 67 So. 983.

Upon a bill to foreclose and cancel, the grantee in the conveyance sought to be cancelled was a necessary party respondent as complainants' rights could not be satisfactorily and completely determined without such party. *Mitchell v. Cudd*, 196 Ala. 162, 71 So. 660.

Action by Heirs — Nonjoinder of Widow.—In a suit by children of an intestate to set aside conveyances and transfers by the intestate to other children on the ground of fraud, and for a sale and division of the property transferred, and an accounting by the beneficiaries of the conveyances and transfers, the widow of the intestate was a necessary party, unless every right she had in the property involved had been effectively surrendered; and hence, where it did not appear from the bill that her dower and homestead had been assigned to her, or that she had accepted other property in lieu thereof, or waived or relinquished these rights, it was demurrable for nonjoinder of the widow. *McAllister v. McAllister*, 189 Ala. 220, 66 So. 462.

§ 31. Pleading.

§ 32. — Bill, Complaint, or Petition.

§ 32 (1) In General.

Showing Privity.—*Peerless Coal Co. v. Lamar*, 180 Ala. 307, 60 So. 837. See the title CANCELLATION OF INSTRUMENTS, § 32 (1), vol. 2, p. 603.

Alleging Residence of Parties by Inference.—*Bell v. Burkhalter*, 176 Ala. 62, 57 So. 460. See the title CANCELLATION OF INSTRUMENTS, § 32 (1), vol. 2, p. 602.

Notes Payable to Other than Defendant.—A bill seeking the cancellation of notes as procured by fraud, which alleged that they were payable to one other than the defendant, is insufficient in not showing that the defendant had possession of the notes, there being a presumption that they were in the possession of the payee. *Ahlrichs v. Parker*, 187 Ala. 227, 65 So. 815.

Averring Facts Constituting Fraud. —

A bill alleging that complainant was the sole heir at law of D., who died owning a house and lot devised to her by defendant's father, as well as personal property, that defendant became administrator of the estate, that a deed from complainant to defendant to all of the property of every description owned by D. was induced by defendant's representations that it was for the purpose only of transferring the house and lot, and that such house and lot had been deeded to defendant by his father, and did not belong to D., and that such house and lot had not, in fact, been conveyed to defendant, and further alleging a lifelong and intimate family association between complainant and defendant, that she was reared in the same house with him, and loved and trusted him, that when she executed the deed she was 56 years old, in ill health, and weak in both judgment and will power, that she was naturally impressionable and sentimental, and that defendant was 52 years old, vigorous mentally and physically, and a successful man of affairs, alleged every element of fraud and deceit to entitle complainant to have the deed set aside. *Hartley v. Frederick*, 191 Ala. 175, 67 So. 983.

Averring Facts Not Constituting Fraud.

—A bill which alleges that after complainant's husband had deserted her his brother-in law, the cashier of a bank, told complainant that her husband's accounts were short at the bank, that they must be paid, and that if she would execute certain assignments and releases to him he would see that they were paid, and she, being ignorant of her liability, and relying on representations of her husband's brother-in-law, executed the papers, does not charge such fraud or undue influence as invalidates the transfers. *Adams v. Davidson*, 192 Ala. 200, 68 So. 267.

Alternative Averment.—A bill for the cancellation of a conveyance to complainant and the rescission of a contract for the purchase of land, which, after alleging that defendants fraudulently misrepresented that the land sold extended to a public road, averred that defendants, prior to the conveyance, for the purpose of informing complainant as to their title, furnished an abstract with a plat of the land, and that the plat showed that the land to be conveyed extended up to and along the public road, or so very near thereto that by reason of the furnishing of the plat complainant was led to believe that the land to be conveyed extended to the public road. Held, that the bill made out no case for equitable relief; the alternative averment showing that complainant might have discovered the false representation. *Union Cemetery Co. v. Jackson*, 188 Ala. 699, 65 So. 986.

Deed Recorded but Not Delivered.

—A bill to cancel a deed as a cloud upon plaintiff's title, which averred that, while the conveyance had been recorded, no delivery had been made, should, where the facts showing reclamation and custody of the deed after registration are equivocal, clearly charge that the grantor neither intended nor, in fact, delivered the conveyance, but the bill is sufficient as against general demurrer where it averred that no person, except the grantor, had any interest in the land, and that no one acquired any rights under the deed. *Skipper v. Holloway*, 191 Ala. 190, 67 So. 991.

Possession of Assignee.—The assignee of a mortgage going into possession after the law day, and remaining for over ten years, before the mortgagor's heirs took any steps to redeem, on their bill to cancel the mortgage, was not required to define the boundaries and description of the land actually possessed by him. *Stockdale v. Cooper*, 193 Ala. 258, 69 So. 110.

§ 32 (4) Offer to Restore Consideration or Benefits.**To Account for or Be Charged With.**

—In suit to set aside deed for fraud, offer in bill to account for the consideration or be charged therewith as might be equitable held sufficient to entitle complainant to rescind. *Hartly v. Frederick*, 191 Ala. 175, 67 So. 983.

Failure to Restore Consideration or Show Sufficient Excuse.

—Plaintiff's bill in equity, seeking relief against the fraudulent sale to it of a mining lease, and a temporary injunction against the foreclosure of the mortgage securing its purchase-price notes, alleged that plaintiff purchased the lease of a coal mine from defendant, which was incumbered by a previous deed of trust securing bonds, defendant stipulating in the lease to cause all liens to be satisfied; that in payment plaintiff executed notes maturing within 13 months secured by a mortgage; that pending negotiations between plaintiff and defendant the bonded debt was readjusted by new notes, which defendant falsely represented to plaintiff as maturing within 18 months; that plaintiff was unwilling to allow his notes to defendant to mature before the bonded debt, and thus risk a foreclosure of that lien, but relying upon defendant's representations and a promise to extend plaintiff's notes so as to meet the maturity of the bonded debt, if defendant's representations in that respect should prove untrue, closed the transaction with defendant; that plaintiff would not have purchased, except for such representations and promise; that defendant further misrepresented the quality of the coal, and plaintiff in purchasing relied upon that misrepresentation also; that by reason of the poor quality of the coal

the mine was practically valueless; and that upon discovery of the true maturity of the bonded debt defendant refused plaintiff's demand for an extension of the notes as promised. The prayer was for (1) a temporary injunction restraining foreclosure of the mortgage, and a reference to ascertain the true value of the lease, with abatement of purchase price to conform; (2) a rescission in toto if upon reference the property was found practically valueless; (3) reformation of the maturity of the mortgage and notes so as to meet the maturity of the bonded debt, such extension to run until all liens against the property were removed. The answer contained a demurrer for want of equity in the bill and sworn denials, but admitted the statements as to quality as expressions of opinion. Held, that the bill was defective as a bill for rescission, since it failed to offer restitution of the property, or to show sufficient reason for such failure. *Consumers Coal, etc., Co. v. Yarbrough*, 194 Ala. 482, 69 So. 897.

Necessity for Offering to Pay Interest.—*Wilks v. Wilks*, 176 Ala. 151, 57 So. 776. See the title CANCELLATION OF INSTRUMENTS, § 32 (4), vol. 2. p. 605.

Insufficiency of Offer.—A bill by a mortgagor and his wife to cancel a mortgage on his homestead, on the ground that the wife's acknowledgment was not in accordance with statute, is defective where there is no offer to return the proceeds of the mortgage. *Mathews v. Carroll Mercantile Co.*, 195 Ala. 501, 70 So. 143.

§ 32 (6) Fraud in General.

Alleging Fraud in General Terms.—Where a wife sued to cancel written instruments superseding an oral antenuptial agreement between herself and husband on the ground that such instruments were procured by fraud, the facts out of which such fraud were supposed to have arisen should have been pleaded. *Cannon v. Birmingham Trust, etc., Co.*, 194 Ala. 469, 69 So. 934.

Insufficient Allegation of Fraud.—A bill for cancellation of a note and mortgage on the ground that their execution

and delivery was induced by material misrepresentation that the Excise Commission had consented to a transfer of a retail liquor license, when in fact, no such consent had been given was demurrable, 'if it did not allege that the license was not in fact properly and legally transferred to complainant by such Excise Commission. *Greil Bros. Co. v. McLain*, 197 Ala. 136, 72 So. 410.

A husband's bill to cancel deed to his wife for fraud in its procurement alleging that she agreed to return to live with him, if he would make the deed and quit drinking, and that, after returning, she left him within a month and never intended to live with him except long enough to secure the land, was defective in not negating just cause for her leaving him after her return under his agreement to make the deed and stop drinking. *Olson v. Olson* (Ala.), 75 So. 313.

§ 32 (7) Incapacity, Duress, and Undue Influence.

Grantee's Knowledge of Grantor's Insanity.—Under Code 1907, § 3347, providing that when any person shall, in good faith and for a valuable consideration, purchase real estate from an insane person without notice of his insanity, the conveyance is not void, but that the insane person may recover the difference between the market value of the land and the price paid, and § 3348, providing that except as provided in the preceeding section, contracts of insane persons are void, a bill seeking cancellation of insane person's conveyance held insufficient because not alleging grantee's knowledge of grantor's insanity. *Hale v. Hale* (Ala.), 75 So. 150.

§ 33½. — Cross-Bill, Cross-Complaint, or Counterclaim for Cancellation.

Cross-Bill Setting up Equitable Lien.—On bill to set aside a conveyance, a cross-bill, setting up an equitable lien for loans to pay incumbrances and make improvements, held proper. *Lewis v. Davis* (Ala.), 73 So. 419.

§ 33½. — Demurrer.

Bill Showing Transfer of Note.—While a prayer for the unconditional cancella-

tion or restoration of a note, shown to have been transferred by defendant to a purchaser, might render a bill demurrable in part, a prayer for the return of a note, the execution of which was induced by fraud, or, in default thereof, a decree for the amount of the note, held not to render the bill demurrable, though the bill showed that the note had been transferred by defendant. *Southern States Fire Ins. Co. v. Kelley*, 186 Ala. 259, 65 So. 328.

§ 36. — Issues, Proof, and Variance.

Where Proof Not Pertinent. — In action to cancel mortgage given to secure payment for legal services and payment of certain amount to a divorced wife, it is not pertinent to the proceeding that the wife has not received the amount due her. *Blair v. Jones* (Ala.), 78 So. 69.

§ 42. Relief Awarded.

§ 45. — Alternative, Additional, or Incidental Equitable Relief.

Bill Embodying Another Instrument under Which Defendant Could Hold. — Complainant wife, suing defendant trust company for cancellation of instrument and recovery of funds held thereunder, embodying in her bill another instrument under which defendant could hold, upon cancellation of the first instrument could not recover the property. *Cannon v. Birmingham Trust, etc., Co.*, 194 Ala. 469, 69 So. 934.

When Accounting May Be Asked. — On bill for rescission of contract, accounting may be asked and granted, even though the bill fail as to rescission. *Smith & Sons v. Securities Co.* (Ala.), 73 So. 892.

§ 47. — Relief to Defendant.

Improvements on Land. — *Dean v. Roberts*, 182 Ala. 221, 62 So. 44. See the title CANCELLATION OF INSTRUMENTS, § 47, vol. 2, p. 613.

Instruments Securing Attorney's Fee — Decree for Half Fee. — *Birmingham Lot Co. v. Taylor*, 182 Ala. 239, 62 So. 521. See the title CANCELLATION OF INSTRUMENTS, § 47, vol. 2, p. 613.

Cross-Bills Setting up Merely Defensive Matter. — Where complainant was denied relief on his bill to cancel certain conveyances, defendants who filed cross-bills setting up merely defensive matter, no independent equity being shown, was entitled to no affirmative relief. *Sellers v. Knight*, 185 Ala. 96, 64 So. 329.

§ 49. Costs.

Plaintiff Prevailing in Part. — Where defendants took and filed a voidable conveyance which constituted a cloud on complainant's title, necessitating the filing of a bill to set aside the conveyance, complainants, though they did not secure vacation of other conveyances as sought, are entitled to costs. *Chance v. Chapman*, 195 Ala. 513, 70 So. 676, cited in notes in L. R. A. 1916D, 383, 385.

Capital Stock.

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Care—Carelessness.

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CARRIERS.

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 - § 210 (2) Existence of Relation of Carrier and Passenger.
 - § 210 (3) Acts or Omissions of Carrier's Employees.
 - § 210 (5) Acts of Fellow Passengers or Other Persons.
 - § 210 (6) Starting or Moving Car While Passenger Is Boarding Same.

- § 210 (6½) Operation of Trains at Places Where Passengers Are Being Received or Discharged.
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- § 210 (13) Starting or Moving Car While Passenger Is Alighting.
- § 210 (16) Proximate Cause of Injury.
- § 210 (17) Exemplary Damages.
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 - § 211 (3) Acts of Carrier's Employees, Fellow Passengers, or Third Persons.
 - § 211 (3½) Setting Down Passengers in General.
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- (H) Palace Cars and Sleeping Cars.
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 - § 276. Actions for Breach of Contract.

Cross References.

See the title CARRIERS, vol. 2, p. 615, and references there given.

In addition, see post, COMMERCE; MASTER AND SERVANT; RAILROADS; SHIPPING; STREET RAILROADS; TELEGRAPHS AND TELEPHONES.

I. CONTROL AND REGULATION OF COMMON CARRIERS.

(A) IN GENERAL.

§ 1. Who are Common Carriers.

A liveryman is not a common carrier. *Georgia Life Ins. Co. v. Easter*, 189 Ala. 472, 66 So. 514, L. R. A. 1915C, 456.

§ 3. Charges.

Scope and Effect of Regulations in General.—Acts 1907, p. 80, fixing the maximum rate on intrastate freight, and amended by Acts 1907, p. 711, giving the Railroad Commission authority to change the rate, not mentioning or attempting to provide special or preferential rates, relates to regular or normal rates, and does not affect a voluntary special or preferential rate. *State v. Louisville, etc., R. Co.*, 197 Ala. 203, 72 So. 494.

Under Acts 1907, p. 80, fixing the maximum rate on intrastate freight as being the rate in force on January 1, 1907, a subsequent amendment on page 711 giving the Railroad Commission authority to change the rate, the maximum rate fixed by the first act would prevail until it was changed by the Railroad Commission under the authority of the subsequent act. *State v. Louisville, etc., R. Co.*, 197 Ala. 203, 72 So. 494.

Under Acts 1907 (Sp. Sess.) p. 40, § 14½, giving the Railroad Commission authority to permit preferential industrial rates, in the case of a non-emergency special industrial rate, there must be an affirmative approval of record by the Railroad Commission, as a condition precedent to the establishment of the rate, and the attorney general had authority in the name of the state to enjoin it. *State v. Louisville, etc., R. Co.*, 197 Ala. 203, 72 So. 494.

Acts 1907 (Sp. Sess.) p. 40, § 14½, giving the Railroad Commission authority to permit common carriers to establish special preferential industrial rates, does not authorize the Railroad Commission

to establish special rates or require their continuance, but only to approve special rates submitted by a carrier, who may withdraw them at will. *State v. Louisville, etc., R. Co.*, 197 Ala. 203, 72 So. 494.

Extra Charges When Passenger Has No Ticket.—An order of the Railroad Commission authorizing an extra charge where a passenger has no ticket held authorized by Laws 1907, p. 711, regardless of Code 1907, § 5563. *Kimbrell v. Louisville, etc., R. Co.*, 191 Ala. 392, 67 So. 586, cited in notes in Ann. Cas. 1917A, 975; Ann. Cas. 1917C, 58.

Construction of Tariff.—That a railway company may have given a similar tariff a different construction held not to require or justify the court in giving an unambiguous tariff a construction contrary to the language used. *Priebe v. Southern R. Co. (Ala.)*, 75 So. 409.

Applying Order to Railroad Not Specifically Named.—An order of the Railroad Commission relating to charges, indicating that it applies to all railroads, but naming several roads specifically, will be construed to apply to one not specifically named, as otherwise it might be void for discrimination. *Kimbrell v. Louisville, etc., R. Co.*, 191 Ala. 392, 67 So. 586.

Milling and Transit Privilege.—Under a railroad tariff giving milling and transit privilege on milled products re-shipped from J. over certain branch lines to certain stations, a shipper was not entitled to such privilege on products re-shipped from J. to a point not shown to be within the termination of the lines defined by terminals, or to be on any of the branch lines mentioned in the tariff. *Priebe v. Southern R. Co. (Ala.)*, 75 So. 409.

Shipper held not entitled, as a matter of right, to mill grain in transit and forward the milled product under the through rate in force from the point of origin to ultimate destination; "milling in

transit" being a special privilege allowable upon extra compensation under the direction of the Interstate Commerce Commission. *Priebe v. Southern R. Co.* (Ala.), 66 So. 573.

§ 4. Preferences and Discriminations.

Carrier, owning or leasing a line of road, may be compelled by the Public Service Commission to give equal facilities to all persons of the same class, and can not by contract with some customers exempt itself from treating all alike. *Alabama Cent. R. Co. v. Alabama Public Service Comm.* (Ala.), 76 So. 862.

If a common carrier, having a mere license to use rails of a logging company, has by its contract agreed not to give equal service to competitors of the logging company, it can not be compelled to do so, though the contract is void; the public service commission not being empowered to make a new contract for the parties. *Alabama Cent. R. Co. v. Alabama Public Service Comm.* (Ala.), 76 So. 862.

Conceding a contract between a common carrier and a logging company, by which the carrier was allowed to use the rails of a logging company for operating trains on condition that it should haul no pine logs for any other than the logging company, was void as to the condition, it afforded no basis for requiring the carrier to haul pine logs for another person, since, if the contract were void, the carrier had no rights whatever, and could not enter and use the rails, and, if it were valid, it could not be interfered with. *Alabama Cent. R. Co. v. Alabama Public Service Comm.* (Ala.), 76 So. 862.

§ 5. Proceedings to Enforce or to Prevent Enforcement of Regulations.

Enjoining Unlawful Rate. — Under Acts 1907 (Sup. Sess.) p. 40, § 14½, giving the Railroad Commission authority to permit special preferential industrial rates, a special rate not authorized by the commission is discriminatory and unlawful, and the attorney general had authority in the name of the state to enjoin such unlawful rate. *State v. Louisville, etc., R. Co.*, 197 Ala. 203, 72 So. 494.

(B) INTERSTATE AND INTERNATIONAL TRANSPORTATION.

§ 10. Charges in General.

Under the interstate commerce act the freight rate on an interstate shipment is the lawful rate existing at the time of the shipment, which rate the carrier is required to collect. *Central, etc., R. Co. v. Southern Ferro Concrete Co.*, 193 Ala. 108, 68 So. 981.

§ 10½. Schedule of Rates.

Interstate Commerce Regulations, § 36, provides that a carrier may apply to through rates to or from points to or from which no joint rate is published lawfully published bases, local or proportional in connection with other lawfully published tariffs. Held, that such regulation was applicable only to through fares to or from points to or from which no joint fare was published, and hence did not validate a ticket for interstate transportation over a prohibited route in accordance with filed tariffs, where there was in force at the time a duly published joint rate over a permitted through route, though the rate charged was the sum of the initial carrier's local rate and a joint rate, and prior to the sale of the ticket a joint circular had been issued but not filed, establishing the through route and joint rate for which the ticket was sold, and was therefore ineffective, as provided by Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 380 [U. S. Compt. St. 1901, p. 3156]) § 6, as amended by Act June 29, 1906, c. 3591, § 2, 34 Stat. 586 (U. S. Comp. St. Supp. 1911, p. 1289). *Seaboard, etc., R. Co. v. Patrick*, 10 Ala. App. 341, 65 So. 437.

Interstate Commerce Regulations, § 36, held not to validate a ticket for interstate transportation sold at a local plus a joint rate over a route prohibited by tariffs filed with the Interstate Commerce Commission, though, prior to the sale, a joint circular had been issued re-establishing such route, which circular had not been filed with the commission, as required by interstate commerce act, § 6, as amended. *Seaboard, etc., R. Co. v. Patrick*, 10 Ala. App. 341, 65 So. 437.

Construction of Tariff Filed with Interstate Commerce Commission.—The Kil-

by Car & Foundry Company shipped to its own order its cars over plaintiff's railroad and that of a connecting carrier. The cars were not sold as anticipated and were left on the tracks of connecting carrier for some time, when they were ordered returned. On return plaintiff paid connecting carrier demurrage or storage charges, and now seeks to recover the same from defendant. Connecting carrier's tariff of storage charges filed with interstate commerce commission provided that freight, except company material, received for delivery or held for forwarding directions, if stored in or on railroad premises, is subject to storage regulations, as follows: (a) For unloaded freight not removed within 48 hours; (b) carload freight placed on delivery tracks and subsequently unloaded is subject to demurrage rules while in cars and to storage rules after unloading; (c) for unloaded freight upon which free time allowed has expired while in cars; (d) for freight received if held more than 48 hours after receipt. Held, that the demurrage or storage charge advanced by plaintiff to connecting carrier could not be recovered from defendant, as the schedule filed was not applicable to demurrage or storage charges on cars standing on their own wheels on side tracks of connecting carrier. *Louisville, etc., R. Co. v. Kilby Car, etc., Co. (Ala.)*, 75 So. 394.

§ 11 ½. Judicial Proceedings to Enforce Regulations.

Waiver of Lien. — Liability for the fixed freight charges is not affected by the carrier's waiver or loss of its lien on the goods by delivery without collecting the lawful rate, and conference ruling No. 314 of the interstate commerce commission of May 1, 1911, governing a carrier's rights to collect freight undercharges, properly left it to the court's having jurisdiction to declare in each case whether the consignor or consignee is legally liable for the undercharges. *Central, etc., R. Co. v. Southern Ferro, etc., Co.*, 193 Ala. 108, 68 So. 981.

§ 12. Contracts in Violation of Regulations.

A complaint against a railroad, for

failure to deliver telegraphed ticket promptly, held not demurrable as showing that the agreement to telegraph the ticket was ultra vires and void or a form of undue discrimination, although not more than the regular fare was paid, since the expense and care necessary to telegraph the transportation was a mere incidental expense to be attributed to defendant's promotion of business and service. *Southern R. Co. v. Rowe (Ala.)*, 73 So. 634.

Estoppel to Exact Lawful Rate. —

Since under Interstate Commerce Act as amended by U. S. Comp. St. 1901, p. 3155, U. S. Comp. Supp. 1909, p. 1153, U. S. Comp. St. Supp. 1911, p. 1309, the lawful rate existing at the time is the only rate which a carrier may collect, it can not estop itself from exacting such rate. *Central, etc., R. Co. v. Birmingham Sand, etc., Co.*, 9 Ala. App. 419, 64 So. 202, cited in notes in 49 L. R. A., N. S., 93, 98, 100.

§ 12½. Damages for Violation of Regulations.

A consignee can not maintain an action against a carrier for damages from failure to have the lawful freight rate posted and kept open to public inspection as required by Interstate Commerce Act, notwithstanding Interstate Commerce Act, § 8, making a common carrier liable to a person injured by its failure to do any acts required to be done, and §§ 9 and 22, providing that the remedies given by the act are cumulative of existing remedies. *Central, etc., R. Co. v. Birmingham Sand, etc., Co.*, 9 Ala. App. 419, 64 So. 202.

II. CARRIAGE OF GOODS.

(B) BILLS OF LADING, SHIPPING RECEIPTS, AND SPECIAL CONTRACTS.

§ 18. What Law Governs.

Federal Laws. — The rights, liabilities, and remedies of parties under a contract for a through interstate shipment of live stock are governed alone by pertinent federal laws. *Nashville, etc., R. Co. v. Camper (Ala.)*, 78 So. 925.

If otherwise entitled to recover, the provisions of the Carmack Amendment should be accorded appropriate effect in

determining the liability of the carrier to the shipper in case of interstate shipments. *Nashville, etc., R. Co. v. Camper* (Ala.), 78 So. 925.

§ 18 ½. Duty to Give Bill of Lading or Receipt.

Failure to Deliver Receipt—Carmack Amendment. — An express company's failure to deliver a receipt to a shipper as required by the Carmack Amendment to the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 386, as amended by Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 [U. S. Comp. St. Supp. 1911, p. 1288]) imposes on the company the highest responsibility, and the law implies from the conduct of the parties an obligation on its part to deliver to the consignee at the address shown on the shipment within a reasonable time; proof of delivery to a connecting carrier not exempting from liability for damages from negligent delay. *Southern Exp. Co. v. Malone* (Ala. App.), 78 So. 408.

§ 19. Authority of Agents and Employees.

Issuance of Bill of Lading before Receipt of Goods.—An agent of a carrier has no authority to issue a bill of lading for goods before the same are received for shipment, and a carrier is not responsible for the unauthorized acts of an agent issuing a bill of lading before receiving the goods. *Louisville, etc., R. Co. v. National Park Bank*, 188 Ala. 109, 65 So. 1003.

Code 1907, § 6136, does not make a carrier liable for the act of an agent issuing a bill of lading before receiving the goods, unless the issue of bills of lading for goods received is within the scope of the agent's duties. *Louisville, etc., R. Co. v. National Park Bank*, 188 Ala. 109, 65 So. 1003.

Code 1907, § 6236, does not authorize an agent having power to issue bills of lading for property received to empower third persons not in the carrier's employ or in the prosecution of its business to issue at will bills of lading without receipt of the property to be shipped. *National Park Bank v. Louisville, etc., R. Co.* (Ala.), 74 So. 69.

Spurious Bills of Lading.—Code 1907,

§ 6136, making a carrier which issues a bill of lading without having received the property described therein liable to an innocent holder of the bill, imposes such liability only when the bill was issued by an agent having authority to issue genuine bills, or by some one under his direction or authority, so as to make it his own act, but does not make the carrier liable for spurious bills of lading issued by an agent who had only authority to supervise other agents authorized to issue bills of lading, or by unauthorized persons acting under that agent. *National Park Bank v. Louisville, etc., R. Co.* (Ala.), 74 So. 69.

The fact that cotton had been previously delivered by connecting carriers upon spurious bills of lading of defendant, does not show that the issuance of subsequent bills of lading was within the scope of the authority of defendant's agent. *National Park Bank v. Louisville, etc., R. Co.* (Ala.), 74 So. 69.

§ 21. Construction and Operation of Bill of Lading.

§ 22. — As a Receipt.

In General. — *Williams v. Louisville, etc., R. Co.*, 176 Ala. 638, 58 So. 315. See the title CARRIERS, § 22, vol. 2, p. 636.

§ 23. — As a Contract.

Contract to Safely Carry and Deliver — Failure of Shipper to Sign—Parol Evidence.—*Williams v. Louisville, etc., R. Co.*, 176 Ala. 638, 58 So. 315. See the title CARRIERS, § 23, vol. 2, p. 637.

§ 24. Negotiability and Transfer of Bill of Lading.

§ 27. — Rights and Liabilities of Transferee as to Persons Other than Carrier.

Title to Goods.—Where the consignor draws upon the consignee, and the draft with bill of lading attached is indorsed or transferred to one who discounts the draft, a special property in the goods passes to the transferee, subject to divestiture by acceptance and payment of the draft, but absolute if the consignee refuses to accept. *Hood v. Commercial Germania Trust, etc., Bank*, 12 Ala. App. 511, 67 So. 721, certiorari denied in *Ex parte Hood*, 191 Ala. 663, 67 So. 1017.

Where consignor deposited draft payable to himself and properly indorsed with bill of lading attached with bank, to which consignor was indebted and received credit, held, that consignment was not subject to attachment, as special property passed to bank. *Owensboro Banking Co. v. Buck* (Ala. App.), 77 So. 940.

Where cotton was not sold absolutely to debtor, who transferred bill of lading to bank, such property was not subject to bank's lien. *People's Bank, etc., Co. v. Walthall* (Ala.), 75 So. 570.

Trespass against consignee of goods and sheriff, levying and seizing in consignee's action against consignor, could be brought only by the party who had discounted consignor's draft with bill of lading attached, and become the owner at the time of trespass. *Hood v. Commercial Germania, etc., Bank*, 12 Ala. App. 511, 67 So. 721, certiorari denied in *Ex parte Hood*, 191 Ala. 663, 67 So. 1017.

Sheriff's levy and seizure of goods in suit against consignor by consignee, who had refused to accept them or pay the consignor's draft, held a trespass as against transferee of the draft and bill of lading. *Hood v. Commercial Germania, etc., Bank*, 12 Ala. App. 511, 67 So. 721, certiorari denied in *Ex parte Hood*, 191 Ala. 663, 67 So. 1017.

§ 35. Actions for Breach of Contract.

§ 35 (1) Pleading.

The complaint, in an action by a buyer of a bill of lading, against the carrier purporting to have issued it, for damages suffered as the proximate result of a conspiracy between the alleged shipper and the carrier's agent, which alleges that the bill was spurious, that the agent in entering into the conspiracy acted within the scope of his employment, but which does not charge that the things conspired to be done were within the scope of his employment, does not state a cause of action against the carrier, either at common law or under Code 1907, § 6136, making a carrier, issuing a bill of lading without having received the goods, liable to any person receiving the bill. *Louisville, etc., R. Co.*

v. National Park Bank, 188 Ala. 109, 65 So. 1003.

A complaint, by a purchaser of a spurious bill of lading against the carrier purporting to have issued it, which simply sets up a conspiracy between the alleged shipper and an agent of the carrier to do certain things, and the issuance of a bill of lading by the shipper and the purchase thereof by plaintiff as an innocent purchaser, can not be sustained on the theory of a system of business, in which issuance and sale of a spurious bill of lading constituted one item, and issuance of a genuine bill on the delivery of the goods on the forged bill another item, and the delivery or the procuring of the delivery of the goods on the forged bill another item, and all necessary to carry out the system causing loss. *Louisville, etc., R. Co. v. National Bank*, 188 Ala. 109, 65 So. 1003.

§ 35 (2) Evidence.

Admissibility — Ordinance to Show Reasonable Charge.—*Birmingham Transfer, etc., Co. v. Still* (Ala. App.), 61 So. 611. See the title CARRIERS, § 35 (2), vol. 2, p. 641.

Sufficiency of Evidence as to Nature of Service.—*Birmingham Transfer, etc., Co. v. Still* (Ala. App.), 61 So. 611. See the title CARRIERS, § 35 (2), vol. 2, p. 641.

§ 35 (3) Damages.

Exemplary Damages. — *Birmingham Transfer, etc., Co. v. Still* (Ala. App.), 61 So. 611. See the title CARRIERS, § 35 (3), vol. 2, p. 642.

(C) CUSTODY AND CONTROL OF GOODS.

§ 36 ½. Rights of Consignor and Consignee in General.

The consignee, having paid the consignor in full, took all the right, title, and interest of the consignor as against the carrier for loss of a bale paid for, but not delivered. *Southern R. Co. v. Brewster*, 194 Ala. 47, 69 So. 111.

Where consignee and buyer of bale of cotton settled with the consignor for a certain bale as if it had been delivered, neither the consignor nor his assignee

had any interest in the bale as against the carrier on which to base an action for its loss. *Southern R. Co. v. Brewster*, 194 Ala. 47, 69 So. 111.

§ 38. Actions by or against Carriers in Respect to Goods.

§ 38 (1) Title to Maintain Action in General.

Real Purchaser. — The seller, being both consignor and consignee, having indorsed bill of lading, the real purchaser having paid draft on ostensible purchaser, and received the goods, may sue the carrier for their injury. *Nashville, etc., Railway v. Abramson-Boone Produce Co.* (Ala.). 74 So. 350.

Action by Original Owner for Benefit of Assignee.—In view of the failure of the original owner of cotton, which was lost in shipment, to transfer the bill of lading in accordance with Code 1907, § 5158, so as to render the carrier liable under § 5546, the action is properly maintained in the name of the original owner for the benefit of his assignee. *Southern R. Co. v. Brewster*, 9 Ala. App. 597, 63 So. 790.

§ 38 (2) Right of Consignor to Sue Carrier.

See post, "Right of Consignee to Sue Carrier," § 38 (3).

A bill of lading is not an instrument for payment of money within Code 1907, § 2489, requiring suits upon such instruments to be in the name of the party really interested; hence the consignor may sue thereon though he was not the owner of the goods. *Southern R. Co. v. Brewster*, 9 Ala. App. 597, 63 So. 790.

Consignor Agent of Owner.—A consignor may sue for the loss of goods, though another be named in the bill of lading as consignee, it being presumed that the consignor has title; hence where the consignor was the agent of the owner, an action for loss of goods may be maintained in the name of the consignor for the use of the owner, this being simply a case of undisclosed principal, the bill of lading not having been indorsed over to the owner, and the railroad company not being liable to him under Code 1907, § 5546, as holder. *Southern R. Co. v. Brewster*, 9 Ala. App. 597, 63 So. 790.

ern R. Co. v. Brewster, 9 Ala. App. 597, 63 So. 790.

§ 38 (3) Right of Consignee to Sue Carrier.

Where goods consigned to different buyers from the same seller were loaded in one car and destroyed by fire, the buyers had rights of action against the carrier, and the seller could not sue. *Alabama, etc., R. Co. v. Altman & Co.*, 191 Ala. 429, 67 So. 589.

(D) TRANSPORTATION AND DELIVERY BY CARRIER.

§ 40. To Whom Delivery May Be Made.

Consignee's Agent — Ratification. — Carrier may perform duty to deliver by delivery to consignee's authorized agent, and consignee may ratify, with knowledge of facts, delivery for himself to another who had not been previously authorized to accept delivery. *Devon Mfg. Co. v. Southern Exp. Co.* (Ala.), 76 So. 39.

§ 42. Place of Delivery.

Destination.—After goods have reached destination, undertaking of carrier as such terminates, and any new obligation must arise out of new and different contract. *Henderson v. Atlantic, etc., R. Co.* (Ala.), 76 So. 309.

Change of Delivery Platforms.—Under Code 1907, § 5605, held, that change by carrier of place of delivery of freight from platform, which had been usual place of delivery for 20 years, to another accessible platform, was not in violation of contractual rights of consignee. *Boshell v. St. Louis, etc., R. Co.* (Ala.), 76 So. 282.

§ 44. Duties of Carrier in Making Delivery.

Express company rested under absolute obligation to deliver to consignee. *Devon Mfg. Co. v. Southern Exp. Co.* (Ala.), 76 So. 39.

§ 46. Acts Constituting Delivery.

There was a delivery as regards liability of a carrier for nondelivery; the consignee not only being informed, at time of shipment, that the point of destination was a nonagent station, and that

delivery would be made on a siding, but having accompanied the shipment, and been present when the car was placed on the side track, and assumed control of the goods, and removed part of them, failing then to remove the balance, subsequently burned in the car, merely from lack of conveyances. *Brennfleck v. Mobile, etc., R. Co.*, 184 Ala. 545, 63 So. 954.

§ 47. Failure or Refusal of Consignee to Receive Goods.

In action for conversion of freight by defendant railroad, which freight consignee refused to accept, evidence held sufficient for submission to jury of question whether consignee waived compliance by carrier with Code 1907, § 6139, as to time and notice of sale of such freight. *Boshell v. St. Louis, etc., R. Co. (Ala.)*, 76 So. 282.

§ 50. Liability for Misdelivery.

In General. — *Southern Exp. Co. v. Ruth & Son*, 5 Ala. App. 644; 183 Ala. 493, 59 So. 538. See the title CARRIERS, § 50, vol. 2, p. 651.

§ 51. Actions for Failure to Deliver or Misdelivery.

Pleading. — In action for damages against express company for failure to deliver, plea merely affirming ratification by consignee of act of delivery to another was allegation of conclusion of law without facts justifying it. *Devon Mfg. Co. v. Southern Exp. Co. (Ala.)*, 76 So. 39.

In suit against an express company for failure to deliver, since the obligation resting on the carrier to deliver to the consignee was absolute, and since a plea in one of its phases relied for exoneration upon delivery to an agent for the consignee, and in another phase on ratification by the consignee of delivery to a person other than himself, the plea, which did not aver sufficient facts from which to deduce the conclusion either that delivery was made to one authorized by the consignee to receive it, or that delivery was ratified by the consignee after being advised of the facts or acts involved in delivery to another, was de-

fective. *Devon Mfg. Co. v. Southern Exp. Co. (Ala.)*, 76 So. 39.

Evidence held to justify refusal of charge to find for carrier on cause of action predicated on failure to deliver. *Louisville, etc., R. Co. v. Cheatwood*, 14 Ala. App. 175, 68 So. 720.

Offset of Charges. — In an action for failure to deliver logs consigned to it, where plaintiff sought to recover upon the basis of their market value at the place of destination, the carrier can set off the freight charges. *Southern R. Co. v. Cooper*, 10 Ala. App. 576, 65 So. 676.

(E) DELAY IN TRANSPORTATION OR DELIVERY.

§ 51 ½. Diligence Required of Carrier.

Carrier is not an insurer against delay in transporting freight, and is only responsible for negligence. *Louisville, etc., R. Co. v. Cheatwood*, 14 Ala. App. 175, 68 So. 720.

§ 52. Liability of Carrier for Delay.

Notice to a carrier which may be implied from the shipment to plaintiff, residing in the cotton country, of a cotton gin at about the time the ginning season would begin, is not notice that plaintiff would engage in the ginning business, so as to entitle him to recover for loss of business offered during the time between when the gin should have been delivered and the time it actually was. *Illinois Cent. R. Co. v. Brothers*, 12 Ala. App. 351, 67 So. 628.

Right of Consignee to Refuse Shipment. — Where delay in the delivery of coal caused the consignee a loss equivalent practically to the value of the coal, the consignee may refuse to receive the shipment. *Central, etc., R. Co. v. Goodwater Mfg. Co.*, 14 Ala. App. 258, 69 So. 343.

§ 54. Actions for Delay.

§ 55. — Pleading.

Complaint Held Demurrable. — In an action against a carrier for delay in transportation of plaintiff's carnival outfit and troupe, an averment in the complaint that defendant knew the purpose for which plaintiff was moving such outfit was demurrable, as being too general,

since knowledge of the carrier of the general use to which property may be put will not always suffice to impose liability for loss of profits or of rental value. *Central, etc., R. Co. v. Weaver*, 194 Ala. 37, 69 So. 521.

Issues and Proof.—In an action *ex contractu* against a carrier for delay in the shipment of goods, where the complaint declared on an express contract, the bill of lading evidencing the contract should be put in evidence or accounted for and its terms established in order to warrant a recovery, and a mere receipt for the shipment is not admissible in evidence and will not support a recovery. *Southern R. Co. v. Langley*, 184 Ala. 524, 63 So. 545.

§ 56. — Evidence.

Burden of Proof.—A carrier, delaying transportation of freight, to escape liability, must prove freedom from negligence. *Louisville, etc., R. Co. v. Cheatwood*, 14 Ala. App. 175, 68 So. 720.

Admissibility.—In a shipper's action against an express company for damages from negligent delay, a copy of the rates of the company, on file with the Interstate Commerce Commission, was inadmissible, the shipper not suing for a total loss, but for damages caused by negligent delay, and the agreed value of the shipment shedding no material light on such inquiry. *Southern Exp. Co. v. Malone* (Ala. App.), 78 So. 408.

Weight and Sufficiency.—In shipper's action against express company for delay, evidence, and inferences therefrom, held sufficient to authorize finding company acted with reckless indifference in failing to deliver, and with such disregard of consequences as to amount to wantonness authorizing punitive damages. *Southern Exp. Co. v. Malone* (Ala. App.), 78 So. 408.

In an action against a railroad for delay in transporting a corpse, evidence held insufficient to show tender and delivery to defendant as terminal carrier for immediate transportation on the train that carried plaintiff shipper. *Southern R. Co. v. Renes*, 192 Ala. 620, 68 So. 987.

In an action against a carrier for de-

lay in the transportation of plaintiff's carnival outfit and troupe, estimates by plaintiff as to the profits he would have earned if the show had arrived in time were insufficient as a basis of damages; loss of profits which are purely speculative not being recoverable. *Central, etc., R. Co. v. Weaver*, 194 Ala. 37, 69 So. 521.

§ 57. — Damages.

§ 57 (1) Elements and Measure of Damages in General.

Diminution in Market Value. — The measure of damages for delay in delivering goods is ordinarily the diminution in the market value of the goods between the time when they ought to have been delivered and the time when they were delivered, whether the difference in value is the result of a decline in the market or of injury suffered by the goods in consequence of delayed delivery, together with interest from the date the goods should have been delivered, less freight, if unpaid. *Louisville, etc., R. Co. v. Cheatwood*, 14 Ala. App. 175, 68 So. 710, cited in note in *Ann. Cas.* 1917D, 167.

Rental Value—Lost Profits.—Measure of damages for delay in transportation of valuable machinery, lost profits not being recoverable because of the carrier not having notice, is the rental value. *Brothers v. Illinois Cent. R. Co.* (Ala. App.), 77 So. 423.

Value of Use During Delay.—Where a carrier has notice of facts apprising it that a shipper would sustain loss of the use of goods by delay in delivery, measure of damages is value of use during delay. *Louisville, etc., R. Co. v. Cheatwood*, 14 Ala. App. 175, 68 So. 720.

Value of Property and Interest Thereon.—Shipper suing for delay in delivery of goods may not recover value of use of property and also interest on value during delay. *Louisville, etc., R. Co. v. Cheatwood*, 14 Ala. App. 175, 68 So. 720.

Interest on Value of Shipment During Delay.—In recovering damages for delay, the shipper was not limited to interest on the value of the shipment during the period of the delay, the theory of the action being negligence on the part of

the express company, some counts alleging simply negligence, others charging wanton delay. *Southern Exp. Co. v. Malone* (Ala. App.), 78 So. 408.

Inconvenience and Expense.—A shipper, claiming damages for delay in delivery of household goods and wearing apparel, may not recover damages for inconvenience and expense caused by delay, except nominal damages, in the absence of evidence on the subject. *Louisville, etc., R. Co. v. Cheatwood*, 14 Ala. App. 175, 68 So. 720.

§ 57 (2) Special Damage Dependent on Knowledge of Circumstances.

A carrier's only liability is for damages caused by deterioration in the value of the goods themselves during the delay, unless it be shown that the carrier, at the time of the shipment, was notified of the peculiar facts and circumstances surrounding the shipment so that it could contemplate special damages flowing out of its delay. *Southern R. Co. v. Langley*, 184 Ala. 524, 63 So. 545, cited in note in *Ann. Cas.* 1917D, 167.

Loss of profits which plaintiff would have realized had the shipment been promptly delivered are special damages which are recoverable only when specially pleaded. *Southern R. Co. v. Langley*, 184 Ala. 524, 63 So. 545.

§ 57 (3) Excessive Damages.

In shipper's action against express company for negligent delay amounting to wantonness in shipping automobile magneto for repairs to maker, punitive damages of \$490 were excessive by \$240, and will be reduced, or case reversed, under Acts 1913, p. 610. *Southern Exp. Co. v. Malone* (Ala. App.), 78 So. 408.

§ 57 (4) Punitive Damages.

Express company's wanton delay in delivering shipment authorizes imposition of punitive damages in shipper's action against it for delay. *Southern Exp. Co. v. Malone* (Ala. App.), 78 So. 408.

(F) LOSS OF OR INJURY TO GOODS.

§ 60. Nature of Liability as Common Carrier.

At Common Law.—*Louisville, etc., R.*

Co. v. Brewer, 183 Ala. 172, 62 So. 698. See the title CARRIERS, § 60, vol. 2, p. 659.

By common law a carrier is an insurer and is responsible for all losses except those resulting from the act of God, or the public enemy, or the fault of the shipper. *Atlantic, etc., Railway v. Enterprise Cotton Oil Co.* (Ala.), 74 So. 232.

Where there was no special contract regarding carrier's liability for shipment of crude oil, the common-law rule of liability will govern. *Atlantic, etc., Railway v. Enterprise Cotton Oil Co.* (Ala.), 74 So. 232.

§ 61 ½. Character and Value of Goods.

A carrier, though ignorant of the contents of the drawers of a dresser in a shipment of household goods, is liable for their loss, absent fraud, or imposition by the shipper in concealing their contents. *Louisville & N. R. Co. v. Risenstein*, 14 Ala. App. 205, 69 So. 243.

Where a shipper falsely represents the contents of a package to a carrier to obtain a reduced freight rate, in an action against the carrier for injuries to the goods, the verdict must be for defendant. *Central, etc., R. Co. v. Broda*, 190 Ala. 266, 67 So. 437.

§ 65. Termination of Liability.

A carrier is not liable after the completion of its contract and complete delivery to and acceptance by the consignee. *Veitch v. Illinois Cent. R. Co.*, 74 Ala. App. 146, 68 So. 575.

§ 73. Actions for Loss or Injury.

§ 74. — Nature and Form.

An action for damages upon a complaint alleging a carrier's failure to deliver one bale of cotton, marked No. 777, to a named consignee was an action in special assumpsit on a bill of lading. *Southern R. Co. v. Brewster*, 194 Ala. 47, 69 So. 111.

§ 77. — Pleading.

Complaint Held Sufficient.—In an action against a railroad company for the loss of goods, where the complaint was in accordance with statutory form No. 15, prescribed for suits on bills of lading, proof of a special contract with the carrier, limiting its liability, is sufficient to

support recovery. *Southern R. Co. v. Brewster*, 9 Ala. App. 597, 63 So. 790.

Plea Held Demurrable.—A plea that loss of crude oil shipped by plaintiff was due to plaintiff's negligence in not closing a valve held demurrable because not negating carrier's negligence. *Atlantic, etc., Railway v. Enterprise Cotton Oil Co. (Ala.)*, 74 So. 232.

§ 78. — Presumptions and Burden of Proof.

Burden of Proof.—The burden rests upon a carrier to plead and establish that the loss to goods came within the exceptions to the common law rule of liability. *Atlantic, etc., Railway v. Enterprise Cotton Oil Co. (Ala.)*, 74 So. 232.

§ 79. — Admissibility of Evidence.

In action against carrier for damages, paper offered to show payment of freight held improperly admitted because not shown to be the act of the delivering carrier or any authorized agent. *Nashville, etc., Railway v. Cash*, 195 Ala. 307, 70 So. 269.

§ 80. — Sufficiency of Evidence.

Where a sister sued a carrier for damages in allowing a coffin containing the body of her brother to remain on the platform in the rain, evidence that she had agreed with her brother, who paid express charges, to pay a part thereof, showed no loss in property or estate, authorizing any recovery other than for mental anguish. *Deavors v. Southern Exp. Co. (Ala.)*, 76 So. 288.

The L. Railroad undertook to transport a car load of freight from the warehouse of E. to the warehouse of S. on the side tracks of the S. Co., and in the performance thereof took charge of the car and delivered it to the S. Co., and it placed it on the side track at S. warehouse, the two warehouses within the switching limits of the railroad yards. The order to transport the car was given to and accepted by the L. Railroad at 3 p. m., and the car was not delivered at the warehouse of S. until 11:30 a. m. three days later. There was evidence that the goods had not been damaged, and that no rain had fallen on the car until about 57 hours after the

order to transfer was given and accepted. Held sufficient to go to the jury on the question of actionable negligence in delaying to transport the car. *Veitch v. Illinois Cent. R. Co.*, 14 Ala. App. 146, 68 So. 575.

§ 81. — Damages.

Mental Anguish.—Brother or sister may, in proper case, recover damages as for mental pain and anguish against a common carrier resulting from negligence or breach of contract in carrying or delivery of a corpse. *Deavors v. Southern Exp. Co. (Ala.)*, 76 So. 288.

§ 83. — Instructions.

Refusal of instructions for failure to negative contributory fault of the carrier and to set out carrier's liability as insurer held proper. *Atlantic, etc., Railway v. Enterprise Cotton Oil Co. (Ala.)*, 74 So. 232.

In action for loss of crude oil, where court instructed jury that the carrier was not liable if loss occurred through shipper's fault as alleged in special pleas, the charge as a whole held not erroneous. *Atlantic, etc., Railway v. Enterprise Cotton Oil Co. (Ala.)*, 74 So. 232.

(G) CARRIER AS WAREHOUSE-MAN.

§ 84. Change in Nature of Liability of Carrier in General.

At Common Law.—*Louisville, etc., R. Co. v. Brewer*, 183 Ala. 172, 62 So. 698. See the title CARRIERS, § 84, vol. 2, p. 671.

§ 87. Duties of Carrier as Warehouseman.

Delivery to Independent Warehouseman.—*Louisville, etc., R. Co. v. Brewer*, 183 Ala. 172, 62 So. 698. See the title CARRIERS, § 87, vol. 2, p. 673.

(H) LIMITATION OF LIABILITY.

§ 90 1/2. What Law Governs.

Code 1907, § 4297, making void stipulations forfeiting rights for failure to give notice, is not applicable to interstate shipments. *Nashville, etc., R. Co. v. Camper (Ala.)*, 78 So. 925.

§ 91. Liabilities Subject to Limitation.

§ 92. — In General.

The federal Interstate Commerce Act.

§ 20, does not prevent a carrier from exempting itself from liability for loss of goods by fire, not attributable to its negligence. *Central, etc., R. Co. v. Patterson*, 12 Ala. App. 369, 68 So. 513.

§ 94. Mode or Form of Limitation.

§ 95. — In General.

A carrier in interstate commerce may limit its liability for goods injured by its negligence by contract fixing the agreed value of goods between it and the shipper, in the form prescribed by rule 6 of the Interstate Commerce Commission, but not by mere stipulation in the bill of lading. *Central, etc., R. Co. v. Broda*, 190 Ala. 266, 67 So. 437.

§ 101. Limitation of Amount of Liability.

§ 101 (1) In General.

Validity.—A carrier of goods may limit value of goods and damages recoverable for their loss or destruction, not caused by its own negligence, by a reasonable contract of shipment. *Louisville, etc., R. Co. v. Jones*, 192 Ala. 532, 68 So. 871; *S. C.*, 12 Ala. App. 347, 67 So. 621.

On reasonableness of the valuation placed by a contract of shipment on the goods depends validity of the stipulation, in consideration of the lower rate, limiting liability to such value. *Louisville, etc., R. Co. v. Risenstein*, 14 Ala. App. 205, 69 So. 243.

A stipulation in a bill of lading, establishing the measure of damages for loss of goods by a carrier differently from that fixed by statute, is valid and enforceable, and it is improper to allow a recovery for a greater sum than the amount fixed. *Southern R. Co. v. Brewster*, 9 Ala. App. 597, 63 So. 790.

Construction of Contract Limiting Liability.—Where the action was against a railroad for injuries to goods in transit under contract in the form prescribed by rule 6 of the Interstate Commerce Commission limiting their value as to shipper and carrier to \$100 in case of injury, the contention of the defendant is unsound that if part only of the goods are injured the plaintiff's recovery is limited to a proportional part of \$100; such contracts limiting liability being construed strictly against a carrier, and failure of

proof as to the relation of the amount of the value of the injured goods, to that of the total shipment, is immaterial. *Central, etc., R. Co. v. Broda*, 190 Ala. 266, 67 So. 437.

Interstate Shipments. — Act Cong. March 4, 1915, amending the Hepburn Act, which prescribes rules of recovery in case of interstate shipments, does not affect rights of actions accruing under the former statute. *Southern R. Co. v. Bynum*, 194 Ala. 190, 69 So. 820.

§ 101 (3) Loss Caused by Negligence or Wrongful Act of Carrier.

In the absence of statute, a common carrier of goods can not limit its liability for loss or destruction by its own negligence of goods carried, when such limitation is much below the real worth of the property. *Louisville, etc., R. Co. v. Jones*, 12 Ala. App. 347, 67 So. 621.

Statutory Regulation of Rights—Effect.—The fact that the state now regulates the rate which railroads may charge for the carriage of freight, one being in force when the liability of the carriage for injury or destruction of the goods by its negligence is limited by a special contract, and another when no such limitation is agreed, and both being approved by the state Railroad Commission, is not a statutory validation of a contract between the shipper and carrier, fixing the maximum value of goods to be recovered of the carrier in case of their loss through its negligence at a sum greatly below their real worth. *Louisville, etc., R. Co. v. Jones*, 12 Ala. App. 347, 67 So. 621.

In Consideration of Reduced Freight Rate.—While a carrier may not contract, for immunity from liability for loss or injury from its own or its servant's negligence, it may, in consideration of a reduced freight rate, agree on the value of things shipped as a measure of damages in case of loss, whether resulting from negligence or not, providing the amount is not unreasonable. *Alabama Great Southern R. Co. v. Knox*, 184 Ala. 485, 63 So. 538, 49 L. R. A., N. S., 411, cited in note in L. R. A. 1916A, 1274.

§ 102. Requirement of Notice of Loss.

Validity.—A special contract that a

claim for damages must be presented to the carrier within 10 days was void. *Illinois Cent. R. Co. v. Avery & Son*, 190 Ala. 241, 67 So. 414.

Stipulations in interstate bills of lading requiring notice of claim of damages and extinction of right to recover if notice stipulated is not given are valid and effective, and if notice of claim required is not given carrier is not liable in any form of action. *Nashville, etc., R. Co. v. Camper (Ala.)*, 78 So. 925.

Manner of Presenting Claim.—*Southern Exp. Co. v. Ruth & Son*, 5 Ala. App. 644; 183 Ala. 493, 59 So. 538. See the title CARRIERS, § 102, vol. 2, p. 681.

Action for Wrong Delivery—Effect of § 4297, Code 1907.—*Southern Exp. Co. v. Ruth & Son*, 5 Ala. App. 644; 183 Ala. 493, 59 So. 538. See the title CARRIERS, § 102, vol. 2, p. 681.

§ 103. Limitation of Liability as Ground of Defense.

§ 104. — Pleading.

Sufficiency of Plea.—In an action against a carrier for damages to an automobile during transportation, a plea alleged that the contract contained a clause providing that defendant should not be liable for any damages not caused by its negligence, and that the damages complained of were not caused by its negligence. Held, that the plea was one of confession and avoidance, and the burden of pleading and proving the matter of avoidance was on defendant, and hence the plea should have accounted affirmatively for the damage to the automobile by alleging the exculpatory facts, instead of merely denying that the damage was caused by defendant's negligence. *Nashville, etc., Railway v. Cash*, 195 Ala. 307, 70 So. 269.

In an action against a carrier for damages to an automobile during transportation, a plea alleged that the contract providing that defendant should not be liable unless a claim for damage was made in writing to the carrier at the point of delivery or origin, within four months after delivery of the property, and that such claim was not presented within four months, and that the damage to the automobile was peculiarly within

plaintiff's knowledge and unknown to defendant. Held, that a demurrer, on the ground that it did not aver that the contract contained a stipulation requiring plaintiff to give information of the happening of any event peculiarly within his knowledge, was erroneously sustained. *Nashville, etc., Railway v. Cash*, 195 Ala. 307, 70 So. 269.

(I) CONNECTING CARRIERS.

§ 107 ½. Who Are Connecting Carriers.

Where a car of freight was delivered by the initial carrier to a connecting carrier, to be placed on the consignee's side track, and before unloading the connecting carrier was directed by the consignee to deliver the car to a buyer, and for that purpose delivered the car to the terminal carrier, for delivery to the buyer on its side tracks. the three carriers were, under their joint traffic arrangements, "connecting carriers," within Code 1907, § 5548, permitting all such carriers to be jointly sued for loss of or injury to goods, and that judgment may be given against those shown to be liable. *Veitch v. Illinois Cent. R. Co.*, 14 Ala. App. 146, 68 So. 575.

§ 109. Special Contracts for Through Transportation.

The mere fact that a through passage is sold over connecting railroad lines does not show such a relation between them as to render the terminal line *prima facie* liable for any breach of contract or duty on the part of the receiving line. *Southern R. Co. v. Renes*, 192 Ala. 620, 68 So. 987.

§ 110. Delivery to Succeeding Carrier.

The peculiar responsibility of a common carrier for goods shipped does not devolve on a connecting carrier to the relief of the receiving carrier until such carrier has delivered the goods to it with directions for shipment, place of destination, and to whom consigned since until this is done the relation of common carrier is not established between the shipper and the connecting carrier. *Southern R. Co. v. Renes*, 192 Ala. 620, 68 So. 987.

Delivery to Connecting Carrier—Construction of Contract.—Where a contract

for the shipment of cotton provided that the contract was executed and all liability thereunder terminated on delivery of it to a steamship, or on the steamship pier at the port, the railroad did not contract for the shipment of the cotton to the foreign port, but only to deliver it to the connecting carrier as the shipper's agent in time for its shipment by a specified sailing of the steamship. *Louisville, etc., R. Co. v. Williams (Ala.)*, 73 So. 548.

Same—Delivery on Pier. — Railroad contracting to carry cotton to port, and to deliver to ocean carrier, was not liable for ocean carrier's failure to transport, where road delivered it on pier where steamship was loading in ample time for loading. *Louisville, etc., R. Co. v. Williams (Ala.)*, 73 So. 548.

Same — Notice of Arrival. — Railroad which contracted to deliver cotton to ocean carrier for shipment to foreign port could not complete delivery without notice to carrier of arrival of cotton and readiness for transfer to ship in time to give opportunity to take cotton aboard for intended sailing. *Louisville, etc., Co. v. Williams (Ala.)*, 73 So. 548.

§ 112. Loss of or Injury to Goods.

§ 112 (1) Liability in General.

It is beyond the scope of a carrier's business to adjust controversies between consignees of property shipped over another carrier, and the holders of bills of lading purporting to be those of other carrier. *National Park Bank v. Louisville, etc., R. Co. (Ala.)*, 74 So. 69.

The Carmack Amendment does not abrogate liability of connecting carrier for injury to goods in interstate shipment. *Nashville, etc., Railway v. Abramson-Boone Produce Co. (Ala.)*, 74 So. 350.

§ 112 (3) Liability of Initial Carrier.

Under bills of lading stipulating for interstate transportation, initial carrier had responsibility of entire transportation, in view of Carmack Amendment to Interstate Commerce Act, § 20. *Henderson v. Atlantic, etc., R. Co. (Ala.)*, 76 So. 309.

While under Code 1907, § 5546, the initial carrier is liable for damages from negligence of the delivering carrier, he

is not liable for negligence of a carrier to whom the shipment has been delivered under a new contract between the shipper and such latter carrier after the shipment has been carried to its original destination. *International Agr. Corp. v. Southern R. Co.*, 188 Ala. 354, 66 So. 14.

Liability after Termination of Connecting Carrier's Liability.—*Louisville, etc., R. Co. v. Brewer*, 183 Ala. 172, 62 So. 698. See the title CARRIERS, § 112 (3), vol. 2, p. 686.

§ 112 (4) Liability of Intermediate or Last Carrier.

In the absence of a special contract or of a relation of partnership or agency between the initial and connecting carrier, a connecting carrier is liable only for loss or damage occurring on its own line. *National Park Bank v. Louisville, etc., R. Co. (Ala.)*, 74 So. 69.

The Carmack Amendment does not abrogate or impair the separate liability of terminal or delivering carriers for losses occurring on their own lines, as fixed by state statutes or decisions. *Louisville, etc., R. Co. v. Lynne*, 196 Ala. 21, 71 So. 338.

§ 113. Carrier as Forwarder or Warehouseman.

Effect on Liability of Initial Carrier.—*Louisville, etc., R. Co. v. Brewer*, 183 Ala. 172, 62 So. 698. See the title CARRIERS, § 113, vol. 2, p. 687.

§ 114½. Actions against Connecting Carriers.

§ 114 ½a. — Parties.

Code 1907, § 5548, authorizing joint actions against carriers and a recovery against one or more, is remedial, and must be liberally construed to advance the remedy it seeks to afford. *Veitch v. Illinois Cent. R. Co.*, 14 Ala. App. 146, 68 So. 575.

§ 116. — Evidence.

§ 116 (1) Presumptions and Burden of Proof.

Presumption of Loss or Injury by Terminal Carrier.—Where goods are delivered to the initial carrier in good condition and are delivered by the terminal carrier in a damaged condition, the pre-

sumption is that they were injured on the line of the terminal carrier, and it has the burden of proving that the damage was not done on its line, or, if done, that it occurred without its fault or through the failure of the shipper to perform his contract. *Louisville, etc., R. Co. v. Cheatwood*, 14 Ala. App. 175, 68 So. 720.

By showing defendant railroad's delivery to plaintiff of a part of the original shipment, a presumption arises of its receipt by defendant in the same condition as when delivered to the initial carrier, which imposes upon defendant the burden of showing that missing goods were not lost while in its custody. *Louisville, etc., R. Co. v. Lynne*, 196 Ala. 21, 71 So. 338.

Same—Delay in Shipment.—The presumption, in the absence of opposing evidence, that damages or loss to goods shipped over connecting lines of railroad occurred on the line of the terminal carrier, based on the idea that a condition in its nature continuous has, in fact, continued, had no application to delay in a shipment of a dead body over connecting lines, where there was no showing that such body was actually delivered to the terminal carrier in time for a properly speedy shipment. *Southern R. Co. v. Renes*, 192 Ala. 620, 69 So. 987.

Burden of Proof—Timely Notice.—Where a railroad contracted to carry cotton to a port and deliver it to an ocean carrier for shipment to a foreign port, the burden was on the railroad, as against the shipper, to show that it gave notice to the ocean carrier of the arrival of the cotton at the pier in time for the ocean carrier to have taken the cotton aboard ship for the intended sailing. *Louisville, etc., R. Co. v. Williams (Ala.)*, 73 So. 548.

Same—That Goods Lost While in Defendant's Custody.—In an action against the terminal carrier for loss of goods, the burden is on plaintiff to show that his goods were lost or delivered while in defendant's custody. *Louisville, etc., R. Co. v. Lynne*, 196 Ala. 21, 71 So. 338.

Same—In Action for Delay.—In an action against the terminal carrier for failure to carry a corpse on the train on which plaintiff rode, the burden was on

him to show a tender by the initial carrier to defendant in reasonable time. *Southern R. Co. v. Renes*, 192 Ala. 620, 68 So. 987.

A receipt of goods by defendant as the delivering carrier casts on it the burden to show that delay in transmission was not due to its fault. *Central, etc., R. Co. v. Goodwater Mfg. Co.*, 14 Ala. App. 258, 69 So. 343.

§ 116 (3) Sufficiency of Evidence.

In action against railroad for delay in transporting corpse, based on contract of connecting road to ship body through on train with plaintiff, proof of breach of special contract held not made by any presumption from showing that body was removed from the connecting road's train, placed on truck, and defendant's train shortly left the station. *Southern R. Co. v. Renes*, 192 Ala. 620, 68 So. 987.

In suit against terminal carrier for loss of goods, testimony of checking clerk that at point of delivery to defendant the car was found short the goods complained of held insufficient to overcome a presumption that the missing goods came into the defendant's possession, where the clerk did not see the car opened. *Louisville, etc., R. Co. v. Lynne*, 196 Ala. 21, 71 So. 338.

§ 117. — Trial.

One suing carriers on a joint contract must recover against all or none, unless Code 1907, § 5548, authorizing joint actions against carriers and judgment against any shown to be liable, is applicable. *Veitch v. Illinois Cent. R. Co.*, 14 App. 146, 68 So. 575.

(J) CHARGES AND LIENS.

§ 117 1/2. Rights of Carrier in General.

It is duty of carrier to inform consignee of correct freight rate according to schedules on file with Interstate Commerce Commission or State Railroad Commission and on payment or tender of amount due to deliver freight. *Emerson v. Central, etc., R. Co.*, 196 Ala. 285, 72 So. 120.

§ 118. Rates of Freight.

Carrier and shipper are bound by law-

ful freight rates notwithstanding mistake, inadvertence, honest agreement, or good faith. *Emerson v. Central, etc., R. Co.*, 196 Ala. 285, 72 So. 120.

Where agent of interstate carrier, accepting goods under bill of lading requiring payment of freight by the owner or consignee, inadvertently charged a lower rate than that on file with the Interstate Commerce Commission, the carrier could recover the amount of the deficit. *Western Railway v. Collins (Ala.)*, 78 So. 833.

Estoppel to Demand Lawful Rate. — Since the freight rate of an interstate shipment can be only that duly filed with the Interstate Commerce Commission under the Interstate Commerce Act Feb. 4, 1887, the carrier can not, by accepting the lower rate, nor by any other act, estop itself from demanding the lawful rate. *Western Railway v. Collins (Ala.)*, 78 So. 833.

Effect of Failure to Post Schedule. — A carrier may recover the difference between the rate charged on an interstate shipment and the higher published rate, filed with and approved by the Interstate Commerce Commission, though the schedules have not been posted as required by Act March 2, 1889, § 6. *Northern Alabama R. Co. v. Wilson Mercantile Co.*, 9 Ala. App. 269, 63 So. 34, cited in notes in 49 L. R. A., N. S., 93, 98, 100.

Notice of Lawful Rates. — The General rule is that consignor, consignee, and carrier are charged with notice of lawful freight rates. *Emerson v. Central, etc., R. Co.*, 196 Ala. 285, 72 So. 120.

Classification as to Rates. — A tank wagon necessary to use with a traction engine and shipped with the engine should be shipped under the same classification as to freight rates as the engine, and it is immaterial that each could be used without the other. *Louisville, etc., R. Co. v. Newell (Ala.)*, 77 So. 553.

That all parties to a shipment considered a tank wagon as part of a traction engine, and so treated it, may be considered in determining the proper classification of the tank in regard to freight rates although such would not control if the classification was clearly unlawful. *Louis-*

ville, etc., R. Co. v. Newell (Ala.), 77 So. 553.

§ 121. Rights of Connecting Carriers.

Through Rate—Overcharge by Terminal Carrier. — Where there were two rates applicable to shipments, between certain points, one a joint or through rate over one route, the other made up by adding the respective rates of the several roads involved in another route, the initial carrier was at liberty to contract with reference to the former rate, though it shipped over the latter route, and, when the terminal carrier accepted the shipment it was chargeable with notice of the rate agreed upon, and could not charge the shipper a greater compensation than the contract provided for. *Oden-Elliott Lumber Co. v. Louisville, etc., R. Co. (Ala. App.)*, 77 So. 240.

§ 122. Persons Liable for Charges.

Either Consignor or Consignee. — A carrier may look either to the consignor, with whom the contract of shipment is made, or to the consignee, for the freight. *Central, etc., R. Co. v. Birmingham Sand, etc.*, 9 Ala. App. 419, 64 So. 202, cited in notes in Ann. Cas. 1917C, 864, 865; L. R. A. 1917A, 666.

Consignor — Implied Agreement to Pay. — A consignor impliedly contracts to pay the freight where the bill of lading contains no express stipulation binding him to pay. *Cincinnati, etc., R. Co. v. Vredenburg Sawmill Co.*, 13 Ala. App. 442, 69 So. 228, cited in notes in 1917A, 665, 667.

Same—Undisclosed Principal. — A shipper who takes a bill of lading in his own name as consignor, and who does not at the time disclose his agency nor put the carrier on notice that he is acting as agent of another in making the shipment, and not dealing with the goods on his own account, impliedly contracts to pay the freight, and the carrier, having no knowledge to the contrary, may deal with the consignor as owner of the shipment, and the consignor can not escape liability for freight by informing the carrier after the refusal of the consignee to accept the shipment that he acted as agent in making the shipment. *Cincin-*

nati, etc., *R. Co. v. Vredenburg Sawmill Co.*, 13 Ala. App. 442, 69 So. 228.

Same—Payment of Part by Consignee.—Where interstate carrier accepted goods on "order notify" bill of lading at a rate lower than that scheduled with the Interstate Commerce Commission, and collected the freight from the consignee, it could not thereafter recover from the consignor the deficit between the rate charged and the lawful rate. *Western Railway v. Collins* (Ala.), 78 So. 833.

The consignee's liability for freight is not affected by the carrier having waived or lost its lien on the goods by delivery without first collecting the freight. *Central, etc., R. Co. v. Birmingham Sand, etc., Co.*, 9 Ala. App. 419, 64 So. 202; *Western Railway v. Collins* (Ala.), 78 So. 833.

The consignee's acceptance and removal of goods sold to it f. o. b. its station, knowing that the carrier was giving up a lien for freight undercharges, did not obligate it to pay the freight charges beyond the amount stated. *Central, etc., R. Co. v. Southern Ferro Concrete Co.*, 193 Ala. 108, 68 So. 981, cited in note in 1917C, 866.

Commission merchant to whom oranges were consigned to sell and to pay the freight held liable to the carrier for an undercharge, notwithstanding the merchant had already sent the proceeds to the owner. *Cornelius & Co. v. Central, etc., R. Co.*, 13 Ala. App. 533, 69 So. 331, cited in notes in Ann. Cas. 1917C, 864, 865, 866.

§ 123. Actions for Charges.

Admissibility of Evidence.—In action for undercharge of freight, published classification and rates on file with Railroad Commission are admissible. *Emerson v. Central, etc., R. Co.*, 196 Ala. 285, 72 So. 120.

Submission of Issues to Jury.—Where, in an action by a carrier against a shipper for freight, the uncontradicted evidence showed that the carrier endeavored to deliver the car to the consignee, who positively rejected and refused to receive the shipment, there was no completed delivery of the shipment, for to constitute a completed delivery there

must be a delivery by the carrier and acceptance by the consignee, and it was error to submit to the jury the question of delivery to the consignee. *Cincinnati, etc., R. Co. v. Vredenburg Sawmill Co.*, 13 Ala. App. 442, 69 So. 228.

Affirmative Charge for Carrier.—Under Code 1907, §§ 5521-5523, 5527, 5531, 5532, 5550, 5553-5555, 7671, 7674, carrier held entitled to affirmative charge in action against consignee for difference between freight paid and published rate. *Emerson v. Central, etc., R. Co.*, 196 Ala. 285, 72 So. 120.

III. CARRIAGE OF LIVE STOCK.

§ 128. Duty to Receive for Transportation.

A railroad can decline to accept a shipment of live stock by showing that its stockyard, where it is required to rest cattle in transit by federal statute, is infected with a contagious disease, of which it had no knowledge in time to remedy the condition. *Nashville, etc., Railway v. Farrell*, 14 Ala. App. 380, 70 So. 986.

§ 128 ½. Special Contracts for Transportation.

It was no acceptance of a railroad's offer to ship live stock from a designated town, so that it would not be under duty by federal statute to unload and water them in transit, to ship the stock from another town on a through bill of lading, containing no stipulation against unloading, issued by another carrier as initial carrier. *Nashville, etc., Railway v. Farrell*, 14 Ala. App. 380, 70 So. 986.

§ 129. Duties in Respect to Transportation.

§ 131. — Food, Water, and Rest.

Placing Stock in Infected Yard.—A carrier of live stock, which placed the shipment in its infected yard for resting during transit, as required by federal statute, so that the stock as damaged, was liable though the yard was the only means available to avoid violating the statute. *Nashville, etc., Railway v. Farrell*, 14 Ala. App. 380, 70 So. 986.

Same — Knowledge of Carrier that Yard Infected.—A railroad, which re-

ceived live stock for transportation with knowledge that its stockyard, where it was required by federal statute to rest and water stock in transit, was infected with a contagious disease, and put the stock off in such yard, where it became infected and was damaged, was liable. *Nashville, etc., Railway v. Farrell*, 14 Ala. App. 380, 70 So. 986.

Where the shipper of live stock from a point in Kentucky informed the agent of a connecting carrier at a point in Tennessee, on the day before the initial carrier delivered the shipment to the connecting carrier, that such connecting carrier's stockyard at Nashville, was infected, the information was sufficient to put the connecting carrier on inquiry as to the condition of its yard, rendering it negligence on its part to unload the shipment in such yard for feeding and watering, as required by federal statute, without investigation. *Nashville, etc., Railway v. Farrell*, 14 Ala. App. 380, 70 So. 986.

§ 138. Limitation of Liability.

§ 138 (3) Power to Impose Conditions with Regard to Giving Notice of Loss.

Unreasonable Stipulation. — *Nashville, etc., Railway v. Hinds*, 9 Ala. App. 534, 60 So. 409, cited in note in *L. R. A.* 1916D, 342. See the title CARRIERS, § 138 (3), vol. 2, p. 698.

§ 138 (4) Power to Impose Duties on Shipper as to Care of Stock.

Stipulation as to Lack of Proper Bedding.—*Louisville, etc., R. Co. v. Shepherd*, 7 Ala. App. 496, 61 So. 14. See the title CARRIERS, § 138 (4), vol. 2, p. 698.

§ 138 (6) Operation and Effect of Limitation of Amount of Liability.

Where the bill of lading for a shipment of live stock prescribed the maximum recovery in case of loss or injury, the bill fixed the measure of damages, and not Code 1907, § 5514. *Illinois Cent. R. Co. v. Kilgore & Son*, 12 Ala. App. 358, 67 So. 707, certiorari denied in *Ex parte Kilgore & Son*, 191 Ala. 671, 67 So. 1002.

Interstate Shipment.—Under the Hepburn Act of 1906, amending the Interstate Commerce Act, recovery for injuries to an interstate shipment of live stock is limited to the values specified in the tariff rate, which was reduced on account of the reduction in value. *Southern R. Co. v. Bynum*, 194 Ala. 190, 69 So. 820.

§ 138 (7) Operation and Effect of Stipulations Requiring Shipper to Load, Unload, and Care for Stock.

Failure to Give Shipper Opportunity to Comply with Contract.—*Nashville, etc., Railway v. Hinds*, 9 Ala. App. 534, 60 So. 409. See the title CARRIERS, § 138 (7), vol. 2, p. 700.

§ 138 (8) Operation and Effect of Stipulation for Notice of Claim for Damages.

Failure to comply with requirement of bill of lading that notice in writing of claim for injury to live stock must be filed before it is removed from car or intermingled with other live stock is no bar to action against carrier for damages to interstate shipment. *Southern R. Co. v. Propst* (Ala. App.), 76 So. 470.

§ 138 (9) Waiver of Notice or of Defects Therein.

Denial of All Liability by Carrier. — *Louisville, etc., R. Co. v. Shepherd*, 7 Ala. App. 496, 61 So. 14. See the title CARRIERS, § 138 (9), vol. 2, p. 701.

§ 139. Connecting Carriers.

Liability of Initial Carrier. — Initial carrier was not liable for damages to cattle while being transported over local road after reaching destination, although there was a custom between consignee and connecting carrier allowing such extra transportation. *Henderson v. Atlantic, etc., R. Co.* (Ala.), 76 So. 309.

In action for damages to interstate shipment of cattle, held, where plaintiff failed to prove damage by defendant initial carrier or connecting carrier, verdict was properly directed for defendant, cattle having been shipped on another road after arrival at destination contracted for

in bill of lading. *Henderson v. Atlantic*, etc., R. Co. (Ala.), 76 So. 309.

§ 140. Actions against Carriers of Live Stock.

§ 143. — Defenses.

Though the interstate tariff rate limited recovery in case of injury or destruction of cattle to \$30 per head, the railroad company can not defeat an action for injuries to cattle on the ground that the injured animals were sold for more than \$30 per head. *Southern R. Co. v. Bynum*, 194 Ala. 190, 69 So. 820.

§ 144. — Pleading.

§ 144 (2) Plea.

A plea that the facts surrounding injuries to a shipment of cattle were peculiarly within the knowledge of the shipper held not to show the bill of lading requiring notice of claim to be valid under Code 1907, § 4297. *Illinois Cent. R. Co. v. Kilgore & Son*, 12 Ala. App. 358, 67 So. 707, certiorari denied in *Ex parte Kilgore & Son*, 191 Ala. 671, 67 So. 1002.

The provision in a bill of lading limiting the valuation and amount of recovery in the event of liability is available to the carrier without a special plea, where the bill of lading has been offered in evidence by plaintiff. *Ex parte Kilgore & Son*, 191 Ala. 671, 67 So. 1002.

Plea as to Undertaking by Shipper to Provide Bedding. — *Louisville, etc., R. Co. v. Shepherd*, 7 Ala. App. 496, 61 So. 14. See the title CARRIERS, § 144 (2), vol. 2, p. 704.

Failure to Allege that Carrier's Negligence Did Not Contribute to Injury. — *Louisville, etc., R. Co. v. Shepherd*, 7 Ala. App. 496, 61 So. 14. See the title CARRIERS, § 144 (2), vol. 2, p. 704.

Averment as to Failure to Give Notice. — *Louisville, etc., R. Co. v. Shepherd*, 7 Ala. App. 496, 61 So. 14. See the title CARRIERS, § 144 (2), vol. 2, p. 704.

§ 144 (3) Replication.

Replication Good as against Demurrer. — *Louisville, etc., R. Co. v. Shepherd*, 7 Ala. App. 496, 61 So. 14. See the title CARRIERS, § 144 (3), vol. 2, p. 705.

§ 145. — Evidence.

§ 145 (1) Presumptions and Burden of Proof.

§ 145 (1a) In General.

In an action by the shippers of live stock for damage from breach of express provision of the contract of carriage that the stock should not be unloaded at a certain point, it was incumbent on plaintiffs to prove that the contract contained the stipulation regarding unloading. *Nashville, etc., Railway v. Farrell*, 14 Ala. App. 580, 70 So. 986.

Showing Injuries Not to Have Occurred While in Possession of Carrier. — *Nashville, etc., Railway v. Hinds*, 9 Ala. App. 534, 60 So. 409. See the title CARRIERS, § 145 (1a), vol. 2, p. 706.

§ 145 (1b) Limitation of Liability.

Notice as Condition Precedent. — *Louisville, etc., R. Co. v. Shepherd*, 7 Ala. App. 496, 61 So. 14. See the title CARRIERS, § 145 (1b), vol. 2, p. 706.

§ 145 (2) Admissibility of Evidence in General.

In an action for injuries to a shipment of horses, an objection to a question, inquiring of the conductor whether any "exceptions" were noted on the bill of lading when the horses were turned over to him, was properly sustained, since not only was the bill of lading the best evidence, but an answer to the question, if affirmative, would have been incompetent, as hearsay, and, if negative, would have shown nothing as to the condition of the horses on delivery to the consignee or as to how they were injured. *Louisville, etc., R. Co. v. Moorer*, 195 Ala. 344, 70 So. 277.

Value of Animal Killed to Show Reasonableness of Limitation. — *Nashville, etc., Railway v. Hinds*, 9 Ala. App. 534, 60 So. 409. See the title CARRIERS, § 145 (2), vol. 2, p. 707.

Apparent Good Condition on Delivery to Connecting Carrier. — *Louisville, etc., R. Co. v. Shepherd*, 7 Ala. App. 496, 61 So. 14. See the title CARRIERS, § 145 (2), vol. 2, p. 707.

Market Value. — Where bill of lading provided that, on damage to live stock for which railway company was liable,

value at place and date of shipment should govern settlement, evidence of market value at place of destination is not admissible in action for such damages. *Southern R. Co. v. Propst* (Ala. App.), 76 So. 470.

§ 145 (3) Weight and Sufficiency of Evidence in General.

In an action against a railroad for damage to a shipment of live stock through having contracted disease when unloaded for resting in transit, as required by federal statute, in an infected stockyard, evidence held to show that the yard was infected shortly before the shipment was made. *Nashville, etc., Railway v. Farrell*, 14 Ala. App. 380, 70 So. 986.

§ 147. — Trial.

§ 147 (1) Questions for Jury in General.

In an action against a carrier of live stock for damage to a shipment, infected when unloaded at a stockyard for resting in transit, plaintiffs' case, under a count of the complaint declaring on defendants' negligence as a common carrier in violation of its legal duty, held for the jury. *Nashville, etc., Railway v. Farrell*, 14 Ala. App. 380, 70 So. 986.

§ 147 (6) Instructions.

§ 147 (8) — Care of Stock by Carrier.

Misleading and Argumentative Instruction.—*Nashville, etc., Railway v. Hinds*, 9 Ala. App. 534, 60 So. 409. See the title CARRIERS, § 147 (8), vol. 2, p. 710.

§ 147 (9) — Limitation of Liability.

Power to Waive Stipulation.—*Louisville, etc., R. Co. v. Shepherd*, 7 Ala. App. 496, 61 So. 14. See the title CARRIERS, § 147 (9), vol. 2, p. 711.

IV. CARRIAGE OF PASSENGERS.

(A) RELATION BETWEEN CARRIER AND PASSENGER.

§ 149. Who Are Carriers.

The distinction between a common carrier of passengers and a private carrier is that the common carrier must receive all who apply for passage so long as there is room and no legal excuse for refusing, while such duty does not rest on the private carrier. *Orr v. Boockholdt*, 10 Ala. App. 331, 65 So. 430.

§ 151. Who Are Passengers.

§ 152. — In General.

A passenger is one who is conveyed for hire, and the relation of carrier and passenger is usually dependent on a contract of carriage, which contract need not be between the carrier and the passenger, but may be between the carrier and a third person for the passenger. *Orr v. Boockholdt*, 10 Ala. App. 331, 65 So. 430.

Where a husband, whose wife had died, contracted with defendant for carriages and drivers to carry those in attendance at the funeral of the wife to a cemetery, persons who by the express or implied invitation of the husband occupied the carriages for the purpose were "passengers," and defendant owed to them the duty of using a reasonable care in the selection of skillful drivers. *Orr v. Boockholdt*, 10 Ala. App. 331, 65 So. 430.

A person purchasing a ticket and by mistake entering the wrong train is, until informed of his mistake, a passenger, entitled to protection as such. *Southern R. Co. v. Farquhar*, 192 Ala. 415, 68 So. 289.

Elevator Passenger.—Where an express delivery man or messenger having packages for delivery to the tenants in a public office building was required, as was the custom, to use the freight elevator when delivering such packages, the relation of carrier and passenger existed between the owner of the building and him. *O'Rourke v. Woodward* (Ala.), 77 So. 679.

Person Riding in Motor Car by Invitation.—Where plaintiff's intestate, killed through the negligence of defendant the owner and driver of a motor car in which deceased was riding, was invited by one of defendant's party to ride in the car, and defendant, knowing of his presence, did not object, defendant is liable for negligence, though he did not expressly invite deceased. *Galloway v. Perkins* (Ala.), 73 So. 956.

§ 153. — Payment of Fare.

A child about nine months old, who accompanies her mother, who is a passenger, is a passenger, though riding

free. *Southern R. Co. v. Herron*, 12 Ala. App. 415, 68 So. 551.

§ 158. — Conveyances and Places Not Proper for Passengers.

One riding on the steps or platform of an overcrowded street car is a "passenger," where he expects to and is able to pay the usual fare; the street car company customarily receiving and accepting fares from such passengers. *Mobile, etc., R. Co. v. Hughes*, 190 Ala. 216, 67 So. 278.

§ 159. — Pleading.

Complaint—Negating Status of Trespasser.—*Louisville, etc., R. Co. v. Glasgow*, 179 Ala. 251, 60 So. 103. See the title CARRIERS, § 158 (1), vol. 2, p. 715.

§ 159. — Evidence.

Sufficiency.—The evidence, in an action for death from being struck by street car at a flag station, held insufficient to show that plaintiff's intestate was at such station to offer himself as a passenger. *Alabama City, etc., R. Co. v. Bessiere*, 190 Ala. 59, 66 So. 805.

§ 160. Commencement and Termination of Relation.

§ 160 (1) In General.

In General.—*Louisville, etc., R. Co. v. Glasgow*, 179 Ala. 251, 60 So. 103, cited in notes in Ann. Cas. 1916A, 140, 876; 1917C, 1207. See the title CARRIERS, § 160 (1), vol. 2, p. 716.

In the absence of special circumstances, a carrier performs its whole duty by conveying the passenger to his destination, and need not care for the passenger while he makes preparation to further continue his journey. *Waldrop v. Nashville, etc., Railway*, 183 Ala. 226, 62 So. 769.

§ 160 (2) Going to or Awaiting Train.

In General.—*Louisville, etc., R. Co. v. Glasgow*, 179 Ala. 251, 60 So. 103, cited in note in L. R. A. 1915B, 829. See the title CARRIERS, § 160 (2), vol. 2, p. 716.

Plaintiff, who had purchased a ticket from defendant railroad and was waiting for the train in its station, was a passenger. *Nashville, etc., Railway v.*

Crosby, 194 Ala. 338, 70 So. 7, cited in note in Ann. Cas. 1917C, 1208.

Person Waiting in Station to Buy Ticket by Invitation.—*Louisville, etc., R. Co. v. Kay*, 8 Ala. App. 562, 62 So. 1014. See the title CARRIERS, § 160 (2), vol. 2, p. 717.

Going to Station Reasonable Time before Arrival of Train.—Where a person with a bona fide intention of taking passage by train goes to the carrier's station at a reasonable time before the arrival of the train, he is entitled to protection as a passenger from the moment he enters the carrier's premises; payment of fare not being a condition precedent to the establishment of the relation of carrier and passenger. *Central, etc., R. Co. v. Bell*, 187 Ala. 541, 65 So. 835, cited in note in Ann. Cas. 1917C, 1207.

One who within a reasonable time goes to a railroad station with the bona fide intention of taking a train becomes thereby entitled to protection as a passenger. *Widener v. Alabama, etc., R. Co.*, 194 Ala. 115, 69 So. 558, cited in note in Ann. Cas. 1917C, 1209.

Going to Station Unreasonable Time before Arrival of Train.—In a passenger's action for injuries in being ejected from defendant's waiting room, a plea that plaintiff went to the depot six hours before the arrival of any train, that such a time was not a reasonable one, that defendant owed plaintiff no duty as a passenger during such time, that the rules of the state railroad commission merely required the depot to be opened one hour before the arrival of trains, and that defendant's agent was not guilty of any wanton or intentional wrong proximately resulting in injury to the plaintiff, stated a good defense. *Widener v. Alabama, etc., R. Co.*, 194 Ala. 115, 69 So. 558.

A passenger, who came into defendant's waiting room six hours before the scheduled arrival of the train and was allowed to remain there by the agent, but was subsequently ordered out, had no cause of action for such ejection. *Widener v. Alabama, etc., R. Co.*, 194 Ala. 115, 69 So. 558.

If a railroad company opens its station far in advance of a reasonable time and

permits a prospective passenger to rest therein, such passenger is entitled to the protection only which the law extends to licensees without an express invitation. *Widener v. Alabama, etc., R. Co.*, 194 Ala. 115, 69 So. 558.

§ 160 (3) Reaching Destination and Leaving Train on Carrier's Premises.

In General.—*Southern R. Co. v. Burnett*, 6 Ala. App. 568, 60 So. 472, certiorari denied in *Ex parte Burnett*, 180 Ala. 540, 61 So. 920, cited in note in Ann. Cas. 1915C, 1225. See the title CARRIERS, § 160 (3), vol. 2, p. 717.

Where a passenger on a street car stepped off at her destination and started to cross the track behind the car, when her foot caught in a wire attached to the car, the relation of passenger and carrier had not terminated. *Birmingham R., etc., Co. v. O'Brien*, 185 Ala. 617, 64 So. 343, cited in note in Ann. Cas. 1915C, 1224.

Steam Railroads.—*Waldrop v. Nashville, etc., Railway*, 183 Ala. 226, 62 So. 769. See the title CARRIERS, § 160 (3), vol. 2, p. 717.

Street Railways.—*Waldrop v. Nashville, etc., Railway*, 183 Ala. 226, 62 So. 769, cited in notes in Ann. Cas. 1915C, 1224, 1225. See the title CARRIERS, § 160 (3), vol. 2, p. 717.

(B) FARES, TICKETS, AND SPECIAL CONTRACTS.

§ 162. Acts and Statements of Agents or Employees.

Where plaintiff purchased from defendant's agent mileage book having stamped thereon that it would not be good over certain line, defendant was not liable for refusal of such line to accept coupons, although defendant's agent represented that coupons were good over such line. *Alabama, etc., R. Co. v. Vermillion* (Ala. App.), 77 So. 67.

§ 162½. Nature and Effect of Ticket in General.

As between a passenger and the conductor, who can not know what passed between the passenger and ticket agent, the ticket held by the passenger is the sole evidence of the passenger's rights

under the contract of carriage. *Louisville, etc., R. Co. v. Maxwell*, 190 Ala. 47, 66 So. 669.

§ 162½a. Passes.

An employee of an independent contractor for the construction of a depot is an employee of the railroad company and a person to whom a pass might be issued under the statute. *Louisville, etc., R. Co. v. Dawson*, 11 Ala. App. 621, 66 So. 905.

§ 162½b. Special Contracts for Transportation.

Secret instructions or limitations upon the authority of a railroad's general agent do not exempt the railroad from the obligations of engagements made by him within his ostensible authority as to telegraph transportation to a person on a connecting railway line. *Southern R. Co. v. Rowe* (Ala.), 73 So. 634.

(C) PERFORMANCE OF CONTRACT OF TRANSPORTATION.

§ 163. Duties as to Transportation in General.

A passenger advised by trainmen to board the wrong train may recover for the damages thereby sustained. *Southern R. Co. v. Farquhar*, 192 Ala. 415, 68 So. 289.

A carrier's conductor, discovering that a passenger has boarded the wrong train, must inform him of the mistake and afford him a reasonable opportunity to get off, in view of all the facts. *Southern R. Co. v. Farquhar*, 192 Ala. 415, 68 So. 289.

§ 166. Receiving and Taking up Passengers.

See post, Carrying to and Stopping at Destination," § 169.

Where a passenger, making proper inquiry, is misled by acts or statements of the railroad or its agents into taking the wrong train, his remedy is to leave the train and seek other transportation and recover of the railroad damages sustained. *Southern R. Co. v. Pruett* (Ala.), 77 So. 49.

§ 166½. Accommodations during Transit.

Separate Coach Law—Construction—Intent.—Code 1907, §§ 5487, 5488, provid-

ing for separate accommodations upon trains for white and negro passengers, is to be construed so as to effectuate the reasonable intent of the legislature. *Spenny v. Mobile, etc., R. Co.*, 192 Ala. 483, 68 So. 870.

Same — Constitutionality.—Code 1907, §§ 5487, 5488, providing for separate accommodations upon trains for white and negro passengers, is not rendered unconstitutional under the equal protection clause of the federal constitution by a construction exempting from its operation a white sheriff traveling with a negro prisoner. *Spenny v. Mobile, etc., R. Co.*, 192 Ala. 483, 68 So. 870, cited in note in L. R. A. 1916E, 282.

Same—Application to White Sheriff with Negro Prisoner.—Code 1907, §§ 5487, 5488, provide for separate accommodations on trains for white and negro passengers. Section 7684 makes it a misdemeanor for a person to go into or ride upon a coach to which he does not belong. Held, that such statute does not apply where a white sheriff attempts to travel with a negro prisoner, and hence can not be assigned to separate coaches. *Spenny v. Mobile, etc., R. Co.*, 192 Ala. 483, 68 So. 870, cited in note in L. R. A. 1916E, 282.

Since Code 1907, §§ 5487, 5488, providing for separate accommodations upon trains for white and negro passengers, do not apply to a white sheriff traveling with a negro prisoner, the conductor may, in his discretion, assign them to any coach or compartment of the train. *Spenny v. Mobile, etc., R. Co.*, 192 Ala. 483, 68 So. 870, cited in note in L. R. A. 1916E, 282.

§ 167. Rules of Carrier.

Railroads may prescribe reasonable rules for the running of their trains, as that certain passenger trains only shall stop at certain stations. *Louisville, etc., R. Co. v. Maxwell*, 190 Ala. 47, 66 So. 669.

§ 168. Changes and Transfers to Connecting Lines.

In an action for failure to carry plaintiff to her destination, where in the absence of ordinance or contract she was not entitled as of right to a transfer, proof that it had been the custom or

usage of defendant to give transfers to passengers at that point if reasonable and not opposed to more positive law showed a rule of action as to which plaintiff might govern herself. *Birmingham R., etc., Co. v. Hatton*, 187 Ala. 573, 65 So. 934.

§ 169. Carrying to and Stopping at Destination.

Duties of Steam and Street Railways Compared.—*Birmingham R., etc., Co. v. Arnold*, 7 Ala. App. 521, 60 So. 988. See the title CARRIERS, § 169, vol. 2, p. 721.

Notice of Arrival at Station.—As a general rule it is not the duty of a common carrier to notify a passenger of the arrival of trains at stations other than the station at which the passenger is to alight. *Louisville, etc., R. Co. v. Myers*, 14 Ala. App. 310, 70 So. 186.

Though ordinarily a carrier need not give a passenger personal notice that his station has been reached, yet exceptional circumstances may impose such duty, in view of the age, sex, or physical infirmity of the passenger. *Southern R. Co. v. Herron*, 12 Ala. App. 415, 68 So. 551.

A carrier, failing to give notice to a passenger carrying a child, of her destination and time to alight, held liable for injuries to the child, carried beyond the destination and then returned to destination. *Southern R. Co. v. Herron*, 12 Ala. App. 415, 68 So. 551.

Failure to Properly Call Station.—Where the stations on defendant railroad's line were not called loud enough for plaintiff to understand the names, and, on the stopping of the train on which plaintiff was a passenger at the station next before her destination, the porter told her that it was her destination and helped her off with her baggage, it being dark, defendant was liable. *Louisville, etc., R. Co. v. Myers*, 14 Ala. App. 310, 70 So. 186.

Duty of Street Car to Stop upon Signal of Passengers.—*Birmingham R., etc., Co. v. Arnold*, 7 Ala. App. 521, 60 So. 988. See the title CARRIERS, § 169, vol. 2, p. 721.

A street car passenger, who was carried beyond two streets, at each of which she gave a signal to stop, can re-

cover for negligently failing to stop at either street. *Birmingham R., etc., Co. v. Hass*, 190 Ala. 273, 67 So. 504.

Railroads are not required to stop at all times and at all stations for passengers, but may operate through trains stopping at only large or important towns or stations. *Southern R. Co. v. Pruett (Ala.)*, 77 So. 49.

Passenger's Duty to Inquire as to Stops.—Passengers before boarding a train should inquire whether it stops at their desired destination. *Southern R. Co. v. Pruett (Ala.)*, 77 So. 49.

It is a passenger's duty, before taking passage, to inform himself as to what train will deliver him at his destination, so that, not doing so, and without misinformation from the carrier's agents boarding a train not stopping at his station, he has no remedy for being put off to await a train which does stop there. *Louisville, etc., R. Co. v. Maxwell*, 190 Ala. 47, 66 So. 669.

Duty of Passenger to Notify Conductor of Destination.—In the absence of a carrier's rule binding upon a ticket passenger, requiring him to notify the conductor of his destination before arrival, there is no primary obligation to give such notice, the ticket being conclusive notice of his destination; and the carrier can not escape liability for carrying him beyond because of the conductor's failure to ascertain his destination, even though the train passed it before the conductor entered the car where he was. *Louisville, etc., R. Co. v. Fuqua*, 187 Ala. 464, 65 So. 396, 52 L. R. A., N. S., 668, cited in note in *Ann. Cas.* 1916E, 1223.

Flagman Not Warranted in Assuming that Response of Another Indicated Plaintiff's Destination.—A carrier's flagman, whose duty it was to inquire the destination of passengers entering the train and advise the conductor of those going to a flag station, who asked a group of ladies, including plaintiff, where they were all going, to which one replied that she was going to a point near B., and to which plaintiff, going to M., a flag station, made no reply, held not warranted in assuming that the response indicated the plaintiff's destination. *Louisville, etc., R. Co. v. Fuqua*, 187 Ala.

464, 65 So. 396, 52 L. R. A., N. S., 668.

Passenger on Train Which Does Not Stop at Destination.—A passenger's right, evidenced by his contract, to be carried to a certain station, is not denied, where he, being on a train, which, under the company's rules, does not stop at such station, is put off by the conductor at the station nearest his destination to await the train which does stop there. *Louisville, etc., R. Co. v. Maxwell*, 190 Ala. 47, 66 So. 669.

§ 170. Discharging and Setting Down Passengers.

See ante, "Carrying to and Stopping at Destination," § 169.

In General.—*Louisville, etc., R. Co. v. Cornelius*, 183 Ala. 203, 62 So. 710. See the title CARRIERS, § 170, vol. 2, p. 723.

Announcing Stations.—A carrier's duty to give notice of the arrival of a train at a passenger's destination is performed if the name of station is so announced as to give him information of the fact a reasonable time before he is to get off; and the usual practice of giving notice by causing a general announcement to be made in the car where a passenger for the station is or ought to be, if followed with due care in every respect, is sufficient. *Central, etc., R. Co. v. Crane*, 189 Ala. 538, 66 So. 604, cited in notes in L. R. A. 1915C, 655; *Ann. Cas.* 1916B, 250, 251.

The blowing of a station signal for a passenger's ticketed station and the announcement of the station by the conductor and train porter in the car in which he was riding notified him of his destination in the proper and customary way, within the rule that a carrier's duty in this respect is performed if the name of a station is so announced by a train employee as to inform the passenger thereof a reasonable time before he is to get off. *Central, etc., R. Co. v. Crane*, 11 Ala. App. 249, 65 So. 868, cited in note in L. R. A. 1915C, 665.

§ 171. Actions Arising Out of Breach of Contract.

§ 171½. — Nature and Form.

A passenger's ticket, not entitling him to ride to his destination on the train he

boarded, it, under the carrier's rules, not stopping there, any right of action for being put off at an intermediate station to await his train is not for breach of his ticket contract, but for misinformation given him by the ticket agent. Louisville, etc., R. Co. v. Maxwell, 190 Ala. 47, 66 So. 669, cited in notes in L. R. A. 1915D, 705, 713; Ann. Cas. 1916E, 1220, 1221.

§ 172. — Pleading.

§ 172 (1) Complaint.

Allegations as to Carrying Passenger beyond Destination. — Birmingham R., etc., Co. v. Arnold, 7 Ala. App. 521, 60 So. 988; Louisville, etc., R. Co. v. Cornelius, 183 Ala. 203, 62 So. 710. See the title CARRIERS, § 172 (1), vol. 2, p. 725.

Necessity for Pleading Special Damages.—Louisville, etc., R. Co. v. Sanders, 7 Ala. App. 543, 61 So. 482. See the title CARRIERS, § 172 (1), vol. 2, p. 725.

Complaints Held Sufficient.—The complaint by a passenger, founded on the negligent failure of the conductor to notify when he took up the ticket that plaintiff was on the wrong train, held to state a cause of action. Southern R. Co. v. Farquhar, 192 Ala. 415, 68 So. 289.

In an action by a passenger, each of two counts of a complaint held to state a cause of action for failure to carry in accordance with the contract. Birmingham R., etc., Co. v. Scisson, 186 Ala. 70, 63 So. 332.

A complaint alleging that plaintiff was a passenger on a train, that defendant failed to announce her station, whereupon she was carried beyond the same, etc., to her injury held to state a good cause of action. Alabama, etc., R. Co. v. Lawrence (Ala. App.), 77 So. 432.

A complaint against a street railway company for carrying a passenger beyond her destination, alleging a request to be put off at or near a designated street, held not demurrable for use of the words "at or near." Birmingham, etc., R. Co. v. Wilson, 14 Ala. App. 235, 69 So. 312.

Complaint Held Faulty.—A complaint in an action against a carrier, based on the negligent failure of the conductor to stop the train and allow a passenger who got on by mistake to alight, which

fails to exclude the presence of circumstances rendering it unsafe to stop the train short of the point where the passenger was allowed to get off, is faulty. Southern R. Co. v. Farquhar, 192 Ala. 415, 68 So. 289.

Intentional or Wanton Injury.—A complaint, in an action against a street railroad for punitive damages, averred that plaintiff was a passenger, that, notwithstanding defendant's duty to afford him a reasonable opportunity to alight at destination, he was carried three miles past, as a proximate result of which he had to leave the car at an unsuited place, and suffered trouble, inconvenience, and expense in getting back, that defendant's servant in charge of the car, acting within his authority, "wantonly or intentionally caused plaintiff to suffer such injury by wantonly and intentionally carrying him past his destination," but omitted the disjunctive averment that the action was wantonly done, averring only that it was intentionally done. Held, that as against a demurrer, the complaint was insufficient to allege that the action was malicious or even wrongful, in that it did not allege a breach of defendant's duty. Birmingham R., etc., Co. v. McLeod, 9 Ala. App. 637, 64 So. 193.

§ 172 (3) Issues, Proof and Variance.

Matters to Be Proved.—Birmingham R., etc., Co. v. Arnold, 7 Ala. App. 521, 60 So. 988. See the title CARRIERS, § 172 (3), vol. 2, p. 725.

Damage for Selling Wrong Transportation—Variance.—In a passenger's action against a railroad for damages for the wrong of the railroad's agent at B. in selling mileage scrip, he could not use in the purchase of a ticket for his return trip from L. to B., where it was clear from plaintiff's version of the facts that whatever wrong was done him was done by the railroad's agent at an intermediate point, M., and not by its agent at B., while the wrong was of a different character than alleged, consisting of refusal to accept scrip for a ticket rather than wrongful sale of scrip, the road was entitled to the general charge on the counts of the complaint declaring as for the wrong in selling scrip plaintiff could not use in the purchase of a return

ticket. *Central, etc., R. Co. v. Lanier* (Ala.), 73 So. 821.

§ 173. — Evidence.

Admissibility of Evidence.—In action for failure to deliver telegraphed ticket promptly, it was error to admit testimony of a witness that he caused his stenographer to inquire at different railroad offices whether the transportation had arrived. *Southern R. Co. v. Rowe* (Ala.), 73 So. 634.

Where plaintiff sought to recover damages for being carried beyond her destination, evidence of resulting loss of earnings while incapacitated was properly received. *Birmingham R., etc., Co. v. Torpy*, 14 Ala. App. 320, 70 So. 198.

In an action for carrying a street car passenger beyond her destination, evidence that the company's employees were in the habit of carrying plaintiff beyond her street was not admissible as showing a habit of the particular employees in charge of that car. *Birmingham R., etc., Co. v. Hass*, 190 Ala. 273, 67 So. 504.

In an action for damages for failure to carry plaintiff to her destination by issuing a transfer to an intersecting line, evidence for plaintiff that had she remained on the car she might have finally reached a point still more remote from her destination with the probability of greater injury in retracing her way or prosecuting her journey, held admissible. *Birmingham R., etc., Co. v. Hatton*, 187 Ala. 573, 65 So. 934.

Weight and Sufficiency of Evidence.—Mental suffering need not be positively proven, but may be inferred from the circumstances, including the relation of the parties, as where there has been failure to promptly deliver a telegraphed railroad ticket to plaintiff's dying husband. *Southern R. Co. v. Rowe* (Ala.), 73 So. 634.

Evidence held to authorize a finding that a street railway company carried a passenger beyond her destination. *Birmingham, etc., R. Co. v. Wilson*, 14 Ala. App. 235, 69 So. 312.

In passenger's action for negligence in failing to properly call the plaintiff's station, and in not stopping at such station, verdict for plaintiff held against the preponderance of the evidence. *Southern*

R. Co. v. Grady, 192 Ala. 515, 68 So. 346.

Evidence held not to justify a finding that the station was not called and that the train did not stop there a reasonable time. *Southern R. Co. v. Herron*, 189 Ala. 662, 66 So. 627, cited in note in *Ann. Cas.* 1916B, 250.

§ 174. — Damages.

§ 174 (1) Elements and Measure of Damages in General.

In General.—*Birmingham R., etc., Co. v. Arnold*, 7 Ala. App. 521, 60 So. 988. See the title CARRIERS, § 174 (1), vol. 2, p. 728.

Special Damages.—*Louisville, etc., R. Co. v. Sanders*, 7 Ala. App. 543, 61 So. 482. See the title CARRIERS, § 174 (1), vol. 2, p. 728.

Physical Suffering and Inconvenience.—*Louisville, etc., R. Co. v. Sanders*, 7 Ala. App. 543, 61 So. 482. See the title CARRIERS, § 174 (1), vol. 2, p. 728.

A passenger set down at a place other than his destination may recover for expenses, suffering, etc., in reaching his destination, but can not ordinarily recover for occurrences thereafter. *Central, etc., R. Co. v. Barnitz* (Ala.), 73 So. 471, reversing judgment 14 Ala. App. 354, 70 So. 945.

A passenger wrongfully carried past her destination to which she returned can not recover for injuries received while going from the depot at destination to her mother's home, although she paid her own passage back to destination. *Central, etc., R. Co. v. Barnitz* (Ala.), 73 So. 471, reversing judgment 14 Ala. App. 354, 70 So. 945.

A railroad passenger set down at a place other than his destination to recover for damages incurred after reaching such destination must show the carrier's notice of the peculiar circumstances causing damage. *Central, etc., R. Co. v. Barnitz* (Ala.), 73 So. 471, reversing judgment 14 Ala. App. 354, 70 So. 945.

In action for failure to deliver promptly ticket telegraphed to plaintiff's dying husband, an element of damages was the excess over the ticket price of the expenses of the transportation of such husband's remains. *Southern R. Co. v. Rowe* (Ala.), 73 So. 634.

§ 174 (3) Mental Suffering.

Damages for mental anguish are recoverable for failure to promptly deliver telegraphed ticket, where the railway agent knew it was sent to husband seriously ill that wife might have him with her when he died, such damages being within the contemplation of the contracting parties. *Southern R. Co. v. Rowe* (Ala.), 73 So. 634.

§ 174 (4) Exemplary Damages.

Malice is the basis of punitive damages in an action for intentionally and wantonly carrying a passenger past his destination. *Birmingham R., etc., Co. v. McLeod*, 9 Ala. App. 637, 64 So. 193.

§ 174 (5) Excessive Damages.

Verdict Held Excessive. — *Louisville, etc., R. Co. v. Sanders*, 7 Ala. App. 543, 61 So. 482. See the title CARRIERS, § 174 (5), vol. 2, p. 730.

Damages Not Excessive.—An award of \$400 in favor of a female passenger for damages for being carried beyond her destination held not excessive. *Birmingham R., etc., Co. v. Torpy*, 14 Ala. App. 320, 70 So. 198.

Where a passenger was misdirected by the carrier's servants, causing him to board the wrong train, or he was negligently carried to a station on the wrong train, when he might with all prudence have been allowed to leave the train nearer to the station where he got on, he could recover the damages naturally resulting therefrom, and an award of \$100 could not be disturbed as excessive. *Southern R. Co. v. Farquhar*, 192 Ala. 415, 68 So. 289.

§ 175. — Trial.**§ 175 (1) Questions for Jury.**

Whether passenger made inquiries as to whether the train she took was the right train to her destination, and was misinformed by railroad's agents, was for the jury in action for damages from being negligently directed to the wrong train. *Southern R. Co. v. Pruett* (Ala.), 77 So. 49.

In action for damages by female passenger compelled, by misdirection of railroad as to trains, to remain all night in a town not her home, whether her illness resulted from her sitting up all

night in the depot after she refused railroad's offer to take her to a hotel or send her home in an automobile was for the jury. *Southern R. Co. v. Pruett* (Ala.), 77 So. 49.

In action by passenger for damages from being negligently directed to take the wrong train, whether a maid at the station assisting female passengers on and off trains was an agent of the railroad for directing passengers to trains was for the jury. *Southern R. Co. v. Pruett* (Ala.), 77 So. 49.

Gross Negligence. — *Birmingham R., etc., Co. v. Arnold*, 7 Ala. App. 521, 60 So. 988. See the title CARRIERS, § 175 (1), vol. 2, p. 730.

Failure to Notify Passenger of Stopping Place.—In an action for carrying a passenger past his destination, evidence held not to raise the pleaded issue of failure to notify him of his stopping place so as to authorize its submission to the jury. *Anniston Elect., etc., Co. v. Anderson*, 11 Ala. App. 554, 66 So. 924, cited in note in *L. R. A.* 1915C, 668.

Wanton or Intentional Misconduct.—In an action by a passenger for failure to carry her to her destination, the court properly refused to charge that there was no proof of any wanton or intentional misconduct, the question being for the jury. *Birmingham R., etc., Co. v. Scisson*, 186 Ala. 70, 65 So. 332.

§ 175 (2) Instructions.

Instructions Held Proper.—In an action by a passenger against a railroad for negligently causing her to alight at the wrong station, a charge that "it is the duty of a common carrier of passengers to use the highest degree of care in carrying passengers to their destination," was not erroneous, as requiring a higher degree of care than that required by law. *Louisville, etc., R. Co. v. Myers*, 14 Ala. App. 310, 70 So. 186.

Instructions as to the damages to which a passenger is entitled for refusal of a street railroad company to issue her a transfer held sufficient. *Birmingham R., etc., Co. v. Cohill*, 196 Ala. 278, 73 So. 126.

Instructions Properly Refused. — In action against carrier for failure to notify passenger of her arrival at her destination, instruction to find for defend-

ant if station was called in the usual manner held properly refused; as the evidence would have justified a finding that the customary announcement was negligently made. *Central, etc., R. Co. v. Crane*, 189 Ala. 538, 66 So. 604.

In an action for damages for failure to carry plaintiff to her destination, defendant's charges that it was not liable for the fact that plaintiff had no money after her fare was paid, or if because of her weakened condition she was unable to stand the trip and suffered a relapse, held properly refused as misleading. *Birmingham R., etc., Co. v. Hatton*, 187 Ala. 573, 65 So. 934.

Carrying Passenger beyond Destination.—*Louisville, etc., R. Co. v. Cornelius*, 183 Ala. 203, 62 So. 710. See the title CARRIERS, § 175 (2), vol. 2, p. 731.

(D) PERSONAL INJURIES.

§ 176. Care Required and Liability of Carrier in General.

§ 176 (1) Care Required in General.

In General.—*Louisville, etc., R. Co. v. Dilburn*, 178 Ala. 600, 59 So. 438. See the title CARRIERS, § 176 (1), vol. 2, p. 732.

Highest Degree of Care Used by Persons in That Business.—*Alabama, etc., R. Co. v. Robinson*, 183 Ala. 265, 62 So. 813; *Louisville, etc., R. Co. v. Glasgow*, 179 Ala. 251, 60 So. 103. See the title CARRIERS, § 176 (1), vol. 2, p. 732.

The law imposes upon all carriers duty of exercising highest degree of care, skill, and diligence in transportation of passengers. *Franklin v. Southern R. Co.*, 196 Ala. 118, 72 So. 11; *Seaboard, etc., R. Co. v. Mobley*, 194 Ala. 211, 69 So. 614; *Nashville, etc., Railway v. Crosby*, 194 Ala. 338, 70 So. 7; *Southern R. Co. v. Hayes*, 194 Ala. 194, 69 So. 641.

The carrier of passengers for hire is not an insurer, but his duty is commensurate with the highest degree of care, and, to make it liable for injury, it must be shown that it or its servants were guilty of some negligence. *Alabama, etc., R. Co. v. Johnson*, 14 Ala. App. 558, 71 So. 620.

As to passengers actually on a train, the carrier must exercise a very high degree of care. *Seaboard, etc., R. Co. v. Mobley*, 194 Ala. 211, 69 So. 614.

Highest Degree of Care Defined.—*Birmingham R., etc., Co. v. Barrett*, 179 Ala. 274, 60 So. 262. See the title CARRIERS, § 176 (1), vol. 2, p. 732.

Duty to Protect from Violence and Insults.—*Birmingham R., etc., Co. v. Glenn*, 179 Ala. 263, 60 So. 111. See the title CARRIERS, § 176 (1), vol. 2, p. 733.

It is the duty of a common carrier of passengers to take the greatest care to conserve the safety of a passenger and to make his journey safe from harm and insult, and for failure to observe such duty, proximately resulting in injury, the carrier is liable. *Nashville, etc., Railway v. Crosby*, 194 Ala. 338, 70 So. 7.

Duration of Duty.—*Nashville, etc., Railway v. Crosby*, 183 Ala. 237, 62 So. 889. See the title CARRIERS, § 176 (1), vol. 2, p. 733.

Proper Care Commensurate with Dangers of Mode of Conveyance.—Common carriers of passengers must use proper care, commensurate with the dangers of the particular mode of conveyance used, to effect the safe carriage of passengers. *Orr v. Boockholdt*, 10 Ala. App. 331, 65 So. 430.

In Selection of Competent Servants.—Carriers of passengers must use reasonable care and diligence in selecting competent servants. *Alabama City, etc., R. Co. v. Bessiere*, 190 Ala. 59, 66 So. 805.

§ 176 (2) Liability of Street Railroad Companies.

A street car company is not the insurer of the safety of its passengers. *O'Brien v. Birmingham R., etc., Co.*, 197 Ala. 97, 72 So. 343.

A carrier of passengers, by street car, owes to its passengers the duty to exercise the highest degree of skill and diligence known to very skillful and diligent persons engaged in like business, consistent with the practical operation thereof. *Birmingham R., etc., Co. v. Scisson*, 188 Ala. 348, 66 So. 2; *Birmingham R., etc., Co. v. Gray*, 196 Ala. 42, 71 So. 689; *Mobile, etc., R. Co. v. Hughes*, 190 Ala. 216, 67 So. 278.

If the wire which caught deceased was accidentally attached to the street car while in operation, and the operatives had no knowledge of its presence, and were not negligent in failing to discover

it, the verdict could not be for plaintiff on account of the operatives' negligently allowing the wire to become attached to the car. *O'Brien v. Birmingham R., etc., Co.*, 197 Ala. 97, 72 So. 343.

§ 176 (3) Liability as to Passenger in Station.

In General.—*Nashville, etc., Railway v. Crosby*, 183 Ala. 237, 62 So. 889. See the title CARRIERS, § 176 (3), vol. 2, p. 733.

§ 176 (6) Care as to Passengers Who Do Not Pay Fare.

A person riding on a free pass is entitled to all the care and protection which the carrier is under obligation to furnish paying passengers. *Louisville, etc., R. Co. v. Dawson*, 11 Ala. App. 621, 66 So. 905.

A motorist who undertakes to transport another gratuitously is liable for injuries received by such person resulting from negligence. *Galloway v. Perkins (Ala.)*, 73 So. 956.

§ 176 (7) Liability of Carrier Not a Common Carrier of Passengers.

See ante, "Care as to Passengers Who Do Not Pay Fare," § 176 (6).

Private carriers of passengers must use proper care, commensurate with the dangers of the particular mode of conveyance used, to effect the safe carriage of passengers. *Orr v. Boockholdt*, 10 Ala. App. 331, 65 So. 430, cited in note in Ann. Cas. 1916E, 1114.

One not a common carrier, who voluntarily undertakes to transport another, is responsible for injury to the person transported resulting from negligence, whether the service was for compensation or was gratuitous. *Perkins v. Galloway*, 194 Ala. 265, 69 So. 875.

Owner and driver of automobile owes to occupant of car the duty to exercise such care not to injure him as a man of reasonable prudence under like circumstances would exercise for his own protection. *Perkins v. Galloway*, 194 Ala. 265, 69 So. 875.

§ 178. Persons to Whom Carrier Is Liable.

An intending passenger in defendant's waiting room, who was a mere licensee, could not recover for injuries sustained

in falling from an unlighted platform when ordered out by defendant's agent. *Widener v. Alabama, etc., R. Co.*, 194 Ala. 115, 69 So. 558.

§ 179. Acts or Omissions of Carrier's Employees.

§ 179 (1) Who Are Employees.

Employee Not Connected with Carriage of Passengers.—*Alabama, etc., R. Co. v. Pouncey*, 7 Ala. App. 548, 61 So. 601. See the title CARRIERS, § 179 (1), vol. 2, p. 735.

§ 179 (2) For What Acts of Employee Carrier Liable in General.

Both common and private carriers of passengers are liable for the negligence of servants, in the absence of any limitation in the contract, or by implication from the situation of the parties. *Orr v. Boockholdt*, 10 Ala. App. 331, 65 So. 430.

Liability Based on Breach of Absolute Duty.—*Nashville, etc., Railway v. Crosby*, 183 Ala. 237, 62 So. 889. See the title CARRIERS, § 179 (2), vol. 2, p. 736.

Indecent Language.—A passenger may recover for mental suffering caused by indecent language of fellow passengers which might have been prevented by the trainmen. *Seaboard, etc., R. Co. v. Mobley*, 194 Ala. 211, 69 So. 614.

§ 179 (3) Assault or Personal Violence.

In General.—*Southern R. Co. v. Hanby*, 183 Ala. 255, 62 So. 871, cited in notes in L. R. A. 1915C, 683, 684. See the title CARRIERS, § 179 (3), vol. 2, p. 737.

Trainmen, having reasonable grounds for believing that any passenger will act in a violent manner, must take steps to prevent such conduct or exclude offending passenger from the train. *Seaboard, etc., R. Co. v. Mobley*, 194 Ala. 211, 69 So. 614.

Violence and Insults.—A carrier must protect its passengers against the violence and insults of strangers, but a fortiori against the violence and insults of its own servants. *Louisville, etc., R. Co. v. Laney*, 14 Ala. App. 287, 69 So. 993.

A carrier is bound to carry its passengers safely and properly, and to treat

them respectfully, and to protect them from violence and insults, and, if it intrusts such duty to its servants, it is responsible for their execution thereof. *Louisville, etc., R. Co. v. Laney*, 14 Ala. App. 287, 69 So. 993.

Where, through the negligence of trainmen, a passenger was not protected from assault or insult, the carrier failed in its duty to the passenger, and a charge that, though the conductor was negligent, yet if he did not know the facts there could be no liability was properly refused. *Seaboard, etc., R. Co. v. Mobley*, 194 Ala. 211, 69 So. 614.

Two drunken male passengers entered the ladies' toilet of a coach in which a female passenger was riding. The female passenger, when attempting to enter the toilet, was assaulted by the men and thrown violently to the floor. She complained to the conductor and porter, and the conductor locked the men in the closet, and while so confined they used obscene, indecent, threatening, profane, and insulting language in the hearing of the female passenger and in close proximity to her. Held, that the carrier was liable for all the injuries sustained by the female passenger, because it was the duty of the carrier to apprehend the injurious misconduct if it could have been foreseen in time to prevent its occurrence, or, if not, to prevent its continuation on discovery. *Seaboard, etc., R. Co. v. Mobley*, 194 Ala. 211, 69 So. 614.

Pointing Pistol at Passenger.—*Birmingham R., etc., Co. v. Tate*, 7 Ala. App. 517, 61 So. 32, cited in note in L. R. A. 1915E, 673; *Birmingham R., etc., Co. v. Coleman*, 181 Ala. 478, 61 So. 890. See the title CARRIERS, § 179 (3), vol. 2, p. 737.

Aiding Illegal Search.—*Nashville, etc., Railway v. Crosby*, 183 Ala. 237, 62 So. 889. See the title CARRIERS, § 179 (3), vol. 2, p. 738.

Acts Not Constituting Assault.—That a depot agent revokes the right of a licensee to remain in the depot and addresses him angrily constitutes no assault, for which he may recover redress in an action counting entirely on bodily injuries. *Widener v. Alabama, etc., R. Co.*, 194 Ala. 115, 69 So. 558.

§ 179 (4) Abusive and Insulting Language.

See ante, "Assault or Personal Violence," § 179 (3).

In General.—*Birmingham R., etc., Co. v. Glenn*, 179 Ala. 263, 60 So. 111. See the title CARRIERS, § 179 (4), vol. 2, p. 739.

Independent of damages for other personal injury, substantial damages may be recovered by a female passenger for fright and shock due to profane and insulting language, used in her presence and hearing by fellow passengers after knowledge by the conductor that the fellow passengers were drunk. *Seaboard, etc., R. Co. v. Mobley*, 194 Ala. 211, 69 So. 614.

An insult to a passenger by a carrier's servant resulting in humiliation and mental distress to the passenger, unaccompanied by any physical hurt, will sustain a cause of action, though the action is brought for breach of the duty growing out of the contract of carriage, and the liability in such case is not limited to female passengers. *Southern R. Co. v. Carroll*, 14 Ala. App. 374, 70 So. 984.

§ 180. Acts of Fellow Passengers or Other Third Persons.

§ 180 (1) Duty to Protect Passenger from Acts of Fellow Passengers.

A carrier must protect its passengers against the violence and insults of strangers. *Louisville, etc., R. Co. v. Laney*, 14 Ala. App. 287, 69 So. 993.

Regardless of who the aggressor in an altercation on a street car may be, the carrier's servants are under the duty if they foresee possible injury in time to interfere and prevent it if possible. *Birmingham R., etc., Co. v. Lipscomb (Ala.)*, 73 So. 962.

Anticipating Misconduct.—*Nashville, etc., Railway v. Crosby*, 183 Ala. 237, 62 So. 889; *Southern R. Co. v. Hanby*, 183 Ala. 255, 62 So. 871. See the title CARRIERS, § 180 (1), vol. 2, p. 739.

Death Occurring During Difficulty between Employees and Fellow Passenger.—*Gooch v. Birmingham R., etc., Co.*, 177 Ala. 293, 58 So. 196, cited in note in 49 L. R. A., N. S., 810. See the title CARRIERS, § 180 (1), vol. 2, p. 740.

Use of Profane and Insulting Language.—*Birmingham R., etc., Co. v. Glenn*, 179 Ala. 263, 60 So. 111. See the title CARRIERS, § 180 (1), vol. 2, p. 739.

§ 180 (2) Acts of Third Persons in General.

In General.—*Birmingham R., etc., Co. v. Glenn*, 179 Ala. 263, 60 So. 111. See the title CARRIERS, § 180 (2), vol. 2, p. 740.

Action of Officers of the Law.—*Nashville, etc., Railway v. Crosby*, 183 Ala. 237, 62 So. 889, cited in note in 52 L. R. A., N. S., 792. See the title CARRIERS, § 180 (2), vol. 2, p. 741.

Where known officer of the law, in apparent exercise of his official authority, disturbs peace and personal security of passenger, it is not incumbent upon the carrier's servants in charge of the train to interfere unless the officer's conduct is illegal. *Birmingham R., etc., Co. v. Lipscomb* (Ala.), 73 So. 962.

Where defendant railroad's station agent did not instigate plaintiff's being searched for a stolen watch by an officer and another, the road was not liable to plaintiff, though the agent designated a place in the station where the search was made. *Nashville, etc., Railway v. Crosby*, 194 Ala. 338, 70 So. 7.

The duty of a railroad to protect its passengers against search and arrest at stations by a known officer does not require that the road or its agents offer resistance or inquire into the authority under which such known officer assumes to act. *Nashville, etc., Railway v. Crosby*, 194 Ala. 338, 70 So. 7.

Injury Not Reasonably Anticipated.—*Nashville, etc., Railway v. Crosby*, 183 Ala. 237, 62 So. 889. See the title CARRIERS, § 180 (2), vol. 2, p. 740.

Obstructions in Aisles.—A carrier is liable to passenger who is injured by falling over baggage or other obstructions placed in the aisles of its car by other passengers, if by ordinary care its servants or agents should have known of obstruction and negligently failed to remove it or make passage safe. *Atkinson v. Dean* (Ala.), 73 So. 479.

Where injury to passenger is caused by negligence of other passengers in obstructing aisles and carrier or its agents

did not know of obstruction and could not know of it by exercise of proper care, carrier is not liable because guilty of no negligence. *Atkinson v. Dean* (Ala.), 73 So. 479.

§ 182. Condition and Use of Premises.

§ 182 (1) In General.

See post, "Duty with Regard to Means of Entrance to and Exit from Premises," § 182 (2).

Right to Use Depot.—*Waldrop v. Nashville, etc., Railway*, 183 Ala. 226, 62 So. 769. See the title CARRIERS, § 182 (1), vol. 2, p. 741.

Refusing Use of Accommodations to Sick Passenger.—A passenger alighting from a railroad train at a regular station had a right to enter the waiting room for passengers, and remain a reasonable length of time, and it was an actionable wrong for the station agent to refuse a sick passenger, unable to care for himself, admission upon request while his son could obtain a conveyance, thereby aggravating his sickness. *Brewer v. Nashville, etc., Railway*, 184 Ala. 410, 63 So. 972.

Duty as to Care of Passenger at Destination—Ejection from Waiting Room.—*Waldrop v. Nashville, etc., Railway*, 183 Ala. 226, 62 So. 769. See the title CARRIERS, § 182 (1), vol. 2, p. 741.

§ 182 (2) Duty with Regard to Means of Entrance to and Exit from Premises.

In General.—*Waldrop v. Nashville, etc., Railway*, 183 Ala. 226, 62 So. 769. See the title CARRIERS, § 182 (2), vol. 2, p. 741.

It is the duty of a carrier of passengers to provide safe and convenient stations, with a safe means of ingress and egress. *Central, etc., R. Co. v. Campbell*, 10 Ala. App. 288, 64 So. 540.

Where a person goes to a station at a reasonable time to take passage, the carrier then is bound to furnish him with a safe station and means of ingress and egress. *Central, etc., R. Co. v. Campbell*, 10 Ala. App. 288, 64 So. 540.

§ 182 (3) Duty to Keep Premises Lighted.

A carrier is not bound to keep its

premises lighted at all times, but only a reasonable time before the arrival of trains, when passengers may be expected. *Central, etc., R. Co. v. Campbell*, 10 Ala. App. 288, 64 So. 540.

§ 183. Taking up Passengers.

§ 183 (½) In General.

A carrier of passengers is under a positive duty to so operate its train in approaching a flag station as reasonable prudence and care would suggest to avoid the danger of injuring persons waiting at flag stations to board its trains. *Alabama City, etc., R. Co. v. Bessiere*, 197 Ala. 5, 72 So. 325.

Crowded Passageway Adjacent to Tracks.—Where the crowded condition of a passageway adjacent to tracks at a station, and the platform, could have been seen a considerable distance, and a passenger, pushed forward by a crowd, was struck by the approaching train, the fact that the engineer, in approaching the station, propelled his train at a rate of speed of from 15 to 20 miles per hour, will support a finding for negligence. *Alabama, etc., R. Co. v. Bell (Ala.)*, 76 So. 920.

Same—Failure of Engineer to Keep Lookout.—Where engineer, proceeding through populous city and approaching populous station, kept no lookout to see whether passengers might be crowded so near tracks as to be injured, negligence may be inferred from such failure regardless of statute or ordinance. *Alabama, etc., R. Co. v. Bell (Ala.)*, 76 So. 920.

Same—Passenger Pushed into Position of Danger.—Where it did not appear that a depot and passageway was ordinarily insufficient, or that railroad company had reasonable grounds for anticipating that there would be an extraordinary rush and collision between the passengers, whereby one in the front would be shoved or pushed on the track in front of an approaching train, the fact that a passenger was pushed into such a position of danger, and injured, does not establish negligence on the part of the company in failing to take precautions against crowding. *Alabama, etc., R. Co. v. Bell (Ala.)*, 76 So. 920.

§ 183 (1) Starting Car Prematurely or Allowing Passenger Insufficient Time to Board Car.

Railroad conductor must hold train only for reasonably sufficient time for passengers to get on with safety, unless he knows or ought to know that movement of train after that time would probably injure a passenger getting on. *Louisville, etc., R. Co. v. Banks (Ala. App.)*, 76 So. 472.

§ 184. Sufficiency and Safety of Means of Transportation.

§ 185. — In General.

Freight Elevators.—Though one properly riding on a freight elevator in an office building was a passenger and the owner of the building was required to exercise the highest degree of care and diligence in the operation and management of the elevator for his safety, he assumed the risk and inconveniences incident to such conveyance, and negligence could not be predicated on the failure to equip the elevator as a passenger elevator should be equipped, where it was properly guarded and properly constructed as a freight elevator. *O'Rourke v. Woodward (Ala.)*, 77 So. 679.

§ 186. — Railroad Locomotives and Cars.

Duty to Furnish Seats.—It is the duty of common carriers of passengers to furnish seats. *Southern R. Co. v. Hayes*, 194 Ala. 194, 69 So. 641.

§ 189. Management of Conveyances.

§ 190. — In General.

Where a passenger on a railroad train, by reason of its crowded condition, could find no unoccupied seat, and of necessity reasonably apparent stood on a car platform, and while there prudently guarded herself from being thrown down, the situation being known to the train crew, who nevertheless ran the train at such a careless rate of speed as to cause plaintiff to fall and be injured, the railroad was liable. *Southern R. Co. v. Hayes*, 194 Ala. 194, 69 So. 641.

Management of Elevators.—Owner of office building held entitled to carry warehouse trucks on freight elevator on

which plaintiff was riding to accompany freight, but if they fell and injured plaintiff because car was negligently operated, plaintiff could recover. *O'Rourke v. Woodward* (Ala.), 77 So. 679.

§ 191. — Overloading or Crowding.

When a street car company permits passengers to ride on the steps and platform of its vehicles, it must exercise care proportionate to the risk occasioned by the overcrowding. *Mobile, etc., R. Co. v. Hughes*, 190 Ala. 216, 67 So. 278.

§ 192. — Rate of Speed.

A motorman running his car at excessive speed, endangering passengers, is negligent. *Mobile, etc., R. Co. v. Hughes*, 190 Ala. 216, 67 So. 278.

The conductor of a street car is negligent if he allows the motorman to proceed at excessive speed so as to endanger passengers. *Mobile, etc., R. Co. v. Hughes*, 190 Ala. 216, 67 So. 278.

§ 193. — Sudden Jerks and Jolts.

It is culpable negligence for a motorman in charge of a car on a steep up grade to suddenly move car, either by releasing brake or applying power to the motor, while a passenger is alighting. *Erwin v. Birmingham R., etc., Co. (Ala.)*, 76 So. 915.

§ 196. Protection of Passengers from Incidental Dangers.

Falling over Baggage.—To hold carrier liable to passenger for injuries received by falling over baggage or other obstructions left in aisles or on platform of cars by other passengers, carrier or its agents or servants must have had actual or constructive notice of such obstructions. *Atkinson v. Dean* (Ala.), 73 So. 479.

Freight Elevator.—Owner of office building held entitled to carry warehouse trucks on freight elevator on which plaintiff was riding to accompany freight, but if they fell and injured plaintiff because negligently placed, plaintiff could recover. *O'Rourke v. Woodward* (Ala.), 77 So. 679.

§ 197. Setting Down Passengers.

§ 197 (1) In General.

Blowing Whistle on Leaving Stopping Place.—Code 1907, § 5473, requiring

the engineer to blow the whistle immediately on leaving a stopping place, is not intended for the protection of a passenger who, having had ample time to alight, neglects to do so and remains upon the train without permission. *Southern R. Co. v. Norwood*, 186 Ala. 49, 64 So. 604.

Duty to Stop Train Reasonable Length of Time.—See post, "Starting Train before Passenger Has Alighted or While He Is Alighting," § 197 (2).

§ 197 (2) Starting Train before Passenger Has Alighted or While He Is Alighting.

In General.—*Louisville, etc., R. Co. v. Dilburn*, 178 Ala. 600, 59 So. 438. See the title CARRIERS, § 197 (2), vol. 2, p. 747.

A railroad company is required to stop its train long enough to give a passenger a reasonable opportunity to safely alight, and is liable for injuries resulting from its failure to do so, whether the conductor knew of the passenger's dangerous position or not; but, after the train has stopped a reasonable length of time, the conductor may, in the absence of contrary knowledge, assume that all passengers have alighted. *Central, etc., R. Co. v. Mathis*, 9 Ala. App. 643, 64 So. 197.

To render a carrier liable for an injury to a passenger while alighting from a train, either the stop must have been insufficient, or if sufficient it must have negligently started the train knowing the danger of the passenger. *Southern R. Co. v. Norwood*, 186 Ala. 49, 64 So. 604.

Wanton Negligence.—While simple negligence may be grounded either upon actual knowledge of a passenger's peril in alighting or upon a duty to know thereof, to establish wanton negligence in that respect, the company must have had knowledge of the passenger's perilous condition at the time the train was started while he was alighting. *Central, etc., R. Co. v. Mathis*, 9 Ala. App. 643, 64 So. 197.

If a passenger train did not stop long enough for passengers to alight, wanton negligence in starting the car may be based upon knowledge of the trainmen

of the general conditions as to the likelihood of passengers to be alighting when the train was started so as to probably injure them. *Central, etc., R. Co. v. Mathis*, 9 Ala. App. 643, 64 So. 197.

To constitute wanton negligence, the car must have been intentionally started with a present knowledge of the probable consequences of such act and a reckless indifference thereto. *Central, etc., R. Co. v. Mathis*, 9 Ala. App. 643, 64 So. 197.

Assumption of Risk.—*Southern R. Co. v. Morgan*, 178 Ala. 590, 59 So. 432. See the title CARRIERS, § 197 (2), vol. 2, p. 748.

Passenger Alighting after Lapse of Reasonable Time.—*Louisville, etc., R. Co. v. Dilburn*, 178 Ala. 600, 59 So. 438. See the title CARRIERS, § 197 (2), vol. 2, p. 748.

If the train has stopped a reasonable time, the company's liability for injuries to passengers in alighting must be based upon the conductor's actual knowledge of the danger, or the circumstances must be such as to lead him to reasonably believe that the passenger is in peril. *Central, etc., R. Co. v. Mathis*, 9 Ala. App. 643, 64 So. 197.

Railroad conductor must hold train only for reasonably sufficient time for passengers to get off with safety, unless he knows or ought to know that movement of train after that time would probably injure a passenger then getting off. *Louisville, etc., R. Co. v. Banks* (Ala. App.), 76 So. 472.

Starting Train with Jerk.—A carrier was not negligent in starting a train with a jerk injuring a passenger as she was alighting; the jerk not being in any way violent or unusual. *Southern R. Co. v. Norwood*, 186 Ala. 49, 64 So. 604.

§ 197 (3) Starting Street Car before Passenger Has Alighted or While He Is Alighting.

In General.—*Birmingham R., etc., Co. v. Mayo*, 181 Ala. 525, 61 So. 289. See the title CARRIERS, § 197 (3), vol. 2, p. 748.

Sudden Movement as Negligence Dependent on Circumstances. — *Birmingham R., etc., Co. v. Barrett*, 179 Ala. 274,

60 So. 262. See the title CARRIERS, § 197 (3), vol. 2, p. 749.

§ 197 (6) Duty to Assist Passenger in Alighting.

Aside from passengers under known physical or mental disability, it is the conductor's duty to care for all passengers alike. *Louisville, etc., R. Co. v. King* (Ala.), 73 So. 456.

Where plaintiff, an able-bodied young woman, was injured in alighting from a train, while carrying two hand bags, and not requesting assistance, her injury can not be referred to negligence of conductor. *Louisville, etc., R. Co. v. King* (Ala.), 73 So. 456.

§ 197 (9) Passenger Leaving Station or Car at Other than Regular Station or Place.

Duty to Inform Passenger.—Where a railroad flagman, the train having stopped at a switch near a depot, believed that a woman passenger was not aware that the train was not at its regular stopping place, it was his duty to inform her, particularly where the ground at the switch was rough and unsafe. *Franklin v. Southern R. Co.*, 196 Ala. 118, 72 So. 11.

Safe Place.—Where railroad passenger's destination was called, and train soon came to stop, though it was at switch, there was implied invitation for passenger to alight, and road was liable for negligent failure to provide a safe place. *Franklin v. Southern R. Co.*, 196 Ala. 118, 72 So. 11.

§ 198. Care as to Persons Accompanying Passengers.

One entering a train to keep a passenger company until the departure of the train is at best a bare licensee, and the carrier owes to him only the duty of using due care to avoid injuring him when the trainmen discover him in a place of peril. *Whaley v. Louisville, etc., R. Co.*, 186 Ala. 72, 65 So. 140, 52 L. R. A., N. S., 179.

A carrier owes to a person entering a train with knowledge of the trainmen, to assist a passenger to board it, the duty of exercising ordinary and reasonable care not to injure him, and to allow him a reasonable opportunity to safely alight.

Whaley v. Louisville, etc., R. Co., 186 Ala. 72, 65 So. 140, 52 L. R. A., N. S., 179.

Where, in an action for injuries to a licensee on a train, there was no evidence that the flagman saw plaintiff or that, if the flagman saw him, there was anything to suggest that he was in danger, or that the flagman had time to signal the engineer to stop the train, there could be no recovery. *Whaley v. Louisville, etc., R. Co.*, 186 Ala. 72, 65 So. 140, 52 L. R. A., N. S., 179.

§ 199. Proximate Cause of Injury.

§ 199 (½) In General.

Common carriers are responsible to their passengers as for injuries and damages suffered, proximately resulting from the negligence of their agents while acting within the line and scope of their authority. *Southern R. Co. v. Pruett (Ala.)*, 77 So. 49.

Failure to Stop at Station—Negligence of Conductor—Sickness—Remote Result.

—In an action against a railroad for damages caused by failure to stop a train, where it appeared that the conductor sent the plaintiff home in an automobile, and that the plaintiff had an attack of typhoid fever later, the fever was not proximately caused by the conductor's negligence, so as to constitute an element of recoverable damages against the railroad, and the admission of any testimony on the point was error. *Seaboard, etc., R. Co. v. Standifer*, 190 Ala. 260, 67 So. 391.

§ 199 (4) Negligence of Third Person Contributing to Injury.

Anticipated Conduct of Stranger.—

Nashville, etc., Railway v. Crosby, 183 Ala. 237, 62 So. 889. See the title CARRIERS, § 199 (4), vol. 2, p. 752.

§ 200. Companies or Persons Liable.

A carrier can not avoid its duty of caring for safety of passengers by delegating it to a contractor. *Western Railway v. Turrentine*, 197 Ala. 603, 73 So. 40.

§ 201. Actions for Injuries.

§ 204. — Pleading.

§ 204 (1) Declaration, Complaint, or Petition in General.

Counts failing to show any duty ow-

ing by the carrier to plaintiff were fatally defective. *Knight v. Tombigbee Valley R. Co.*, 190 Ala. 140, 67 So. 238.

A complaint for injury to a passenger must allege duty owing from carrier to passenger, or allege facts which show duty and breach of that duty and damages in consequence of breach. *Atkinson v. Dean (Ala.)*, 73 So. 479.

Manner in Which Plaintiff Injured.—

Louisville, etc., R. Co. v. Glasgow, 179 Ala. 251, 60 So. 103. See the title CARRIERS, § 204 (1), vol. 2, p. 753.

Complaint Held Sufficient. —

Counts which allege that the defendant was a common carrier of passengers, that plaintiff was a passenger, and that defendant so negligently conducted itself in her carriage that at a certain time and place plaintiff was thrown or caused to fall from car, are sufficient. *Birmingham R., etc., Co. v. Gray*, 196 Ala. 42, 71 So. 689.

§ 204 (2) Allegations as to Relation of Carrier and Passenger.

In a count in a passenger's action, alleging the relation of passenger and carrier, for injury by simple negligence in the operation of the car on which she was a passenger "as aforesaid," the words "as aforesaid" referred to the relation of passenger and carrier thereinbefore described, and not to a previous description of the quo modo constituting the negligence. *Birmingham R., etc., Co. v. Friedman*, 187 Ala. 562, 65 So. 939.

§ 204 (3) Allegations as to Negligence in General.

Sufficiency of complaint in a passenger's action for injuries while alighting from a street car which charges specific negligence proximately causing the injury held to be tested by the same rules of pleading as cases where the relation of passenger and carrier is not present. *Birmingham R., etc., Co. v. O'Brien*, 185 Ala. 617, 64 So. 343.

Complaints Held Sufficient.—In an action against a carrier for personal injuries sustained by a passenger who fell down a flight of steps leading to the carrier's station, the complaint held sufficient. *Central, etc., R. Co. v. Campbell*, 10 Ala. App. 288, 64 So. 540.

A count of a complaint, in a passenger's action for personal injury, setting up the relationship of passenger, and averring in general terms that plaintiff was injured "by reason of and as a proximate consequence of the negligence of the defendant," is sufficient. *Alabama, etc., R. Co. v. Johnson*, 14 Ala. App. 558, 71 So. 620.

Complaint alleging that at specified time and place plaintiff was a passenger on defendant's street car line, and was thrown to the ground, and received specified injuries, proximately caused by defendant's negligence in and about the transportation of plaintiff as a passenger, is certain, and sufficiently avers defendant's duty to conserve plaintiff's safety as a passenger. *Birmingham R., etc., Co. v. Hunt (Ala.)*, 76 So. 918.

An allegation that a passenger was negligently injured while standing at defendant's station waiting for a train by the act or omission of defendant's servants in charge of a freight train, then being operated over defendant's tracks, held sufficient. *Central, etc., R. Co. v. Bell*, 187 Ala. 541, 65 So. 835.

Sufficient Averment of Breach of Duty.—A count of a complaint, alleging that while plaintiff was passing down the aisle of a street car looking for a seat she tripped over a suit case, projecting into the aisle and fell violently upon the floor, and that such fall and her injury were proximately caused by the defendant's servants in negligently permitting the aisle of the car to be obstructed sufficiently averred a breach of duty. *Alabama, etc., R. Co. v. Johnson*, 14 Ala. App. 558, 71 So. 620.

Count Held Demurrable.—A count of a complaint reading: "Plaintiff claims of defendant * * * the sum of * * * damages, for that, to wit, * * * plaintiff, while a passenger on defendant's railway on Third avenue in the city of Birmingham, was injured as follows: * * * Plaintiff avers that such injuries were proximately caused by defendant in and about the carriage of plaintiff as a passenger of defendant"—was demurrable, as omitting the word "negligence," and not attempting to state facts showing negligence. *Birmingham R., etc., Co. v. Garrett (Ala.)*, 73 So. 818.

ham R., etc., Co. v. Garrett (Ala.), 73 So. 818.

Complaint Not Showing Contributory Negligence.—A complaint alleging that plaintiff's intestate was killed by the negligent operation of a freight car by defendant's employees, while at a station awaiting a passenger train on which he intended to take passage, and while standing in the zone intended for passengers, held not objectionable, as showing that decedent was negligent. *Central, etc., R. Co. v. Bell*, 187 Ala. 541, 65 So. 835.

General Averment of Negligence.—Where, in an action for injuries by negligence, the general averment of negligence is made dependent on the particular facts stated, unless such facts constitute actionable negligence, the complaint is subject to demurrer. *Birmingham R., etc., Co. v. Frazier*, 14 Ala. App. 269, 69 So. 969.

A complaint for injuries to a passenger, charging that the injury was due to the willful and wanton acts of defendant, who was then and there operating its trains, etc., which train was operated without a headlight, though the injury was done at night, was demurrable under the rule that where a complaint avers negligence generally, and then charges particular acts as constituting negligence, without more, it is insufficient, unless the acts specified in themselves constitute negligence as a matter of law. *Knight v. Tombigbee Valley R. Co.*, 190 Ala. 140, 67 So. 238.

Necessity for Specifying Particular Act of Diligence Omitted.—A complaint for injuries to a passenger of a private carrier may count on the breach of a general duty to use proper care to carry safely, without specifying the particular act of diligence omitted. *Orr v. Boockholdt*, 10 Ala. App. 331, 65 So. 430.

Negligence in Furnishing Unskillful Servant.—A complaint in an action for injuries to a passenger of a private carrier, which alleges that the carrier did not furnish a skillful driver, but a negligent one, as a result of whose negligence the injuries occurred, shows the causal connection between the injuries and the negligence in furnishing an un-

skillful servant. *Orr v. Boockholdt*, 10 Ala. App. 331, 65 So. 430.

§ 204 (4) Wanton or Willful Injury.

The complaint of a passenger for injury, on a carrier's depot platform, though alleging defendant wantonly or intentionally left or permitted a hole in the platform, is insufficient as one for wantonness; the circumstances averred not justifying an inference of intentional wrong. *Western Railway v. Turrentine*, 197 Ala. 603, 73 So. 40.

Counts of a complaint, averring the relationship of passenger and carrier, between plaintiff and defendant, which charged that after plaintiff had reached her destination defendant's train on which she was being carried did not stop a reasonably sufficient length of time for her to alight, and that while she was near the steps of the coach one of defendant's servants recklessly, wantonly, and intentionally injured plaintiff by taking hold of her and pulling her off the train while it was in motion, charged wanton negligence, and are not objectionable as charging both wanton and simple negligence. *Central, etc., R. Co. v. Mathis*, 196 Ala. 32, 71 So. 674.

§ 204 (5a) Negligent Acts of Employees.

Name of Negligent Employee.—*Birmingham R., etc., Co. v. Goldstein*, 181 Ala. 517, 61 So. 281. See the title CARRIERS, § 204 (5a), vol. 2, p. 756.

Acts of Servant Causing Violent Jolt.—*Western Railway v. Foshee*, 183 Ala. 182, 62 So. 500. See the title CARRIERS, § 204 (5a), vol. 2, p. 757.

Employees of Receivers.—A complaint, alleging that the receivers of a railroad company through their servants, agents, and employees, while acting within the scope of their authority, willfully and wantonly injured plaintiff by causing her to be thrown as she was disembarking from a passenger train, states a cause of action in trespass, charging the defendant itself with intentionally and wantonly participating in the injury. *Newberry v. Atkinson*, 184 Ala. 567, 64 So. 46.

§ 204 (5b) Wanton or Willful Acts.

Necessity and Sufficiency of Averment as to Anticipation of Wrong.—*Southern*

R. Co. v. Hanby, 183 Ala. 255, 62 So. 871. See the title CARRIERS, § 204 (5b), vol. 2, p. 759.

§ 204 (5c) Assaults or Abusive Language.

Averring Acts within Scope of Authority.—*Alabama, etc., R. Co. v. Pouncey*, 7 Ala. App. 548, 61 So. 601. See the title CARRIERS, § 204 (5c), vol. 2, p. 759.

§ 204 (5d) Acts of Fellow Passengers and Third Persons.

A complaint, in an action by a passenger for an assault by a third party while in defendant's depot, which alleged that defendant's agent knew of the impending assault, being informed thereof, and refused to intervene, etc., stated sufficient facts to show a duty upon the part of defendant, and a breach of that duty. *Southern R. Co. v. Haynes*, 186 Ala. 60, 65 So. 339, cited in note in *L. R. A.* 1915C, 684.

Complaint, alleging that a passenger was injured through a negligent failure to preserve order among fellow passengers, who were permitted to engage in disorderly conduct, is good as against a general demurrer. *Seaboard, etc., R. Co. v. Mobley*, 194 Ala. 211, 69 So. 614.

Necessity and Sufficiency of Averments as to Anticipation of Wrong.—*Nashville, etc., Railway v. Crosby*, 183 Ala. 237, 62 So. 889; *Southern R. Co. v. Hanby*, 183 Ala. 255, 62 So. 871. See the title CARRIERS, § 204 (5d), vol. 2, p. 759.

§ 204 (7) Management of Conveyances.

A complaint in an action for injuries to a passenger, caught, while hanging on the handrail of a car step, between the car and a platform, which alleges that the train was rapidly approaching the platform, does not necessarily aver that the train was going at a rapid speed, but may apply to the time between his mounting the step of the car and the approach to the platform. *Central, etc., R. Co. v. Hinson*, 186 Ala. 40, 65 So. 45.

Averment as to Negligent Operation Causing Fall.—*Western Railway v. Foshee*, 183 Ala. 182, 62 So. 500. See the title CARRIERS, § 204 (7), vol. 2, p. 760.

§ 204 (8) Setting Down Passengers.

A complaint which charged that de-

defendant's street car conductor negligently started the car without allowing plaintiff to alight where she desired to, and that the injury was due to "the willfulness, or wantonness, or the gross carelessness or gross negligence" of the conductor, did not sufficiently charge that the injury was wantonly or intentionally inflicted. *Birmingham R., etc., Co. v. Williams*, 10 Ala. App. 284, 64 So. 642.

Complaint Held Sufficient.—*Birmingham R., etc., Co. v. Gonzalez*, 183 Ala. 273, 61 So. 80. See the title CARRIERS, § 204 (8), vol. 2, p. 762.

General Averments Not Overcome by Particular Allegations.—*Birmingham R., etc., Co. v. Wilcox*, 181 Ala. 512, 61 So. 908. See the title CARRIERS, § 204 (8), vol. 2, p. 762.

"Engaged in Alighting."—Where a complaint alleged that plaintiff, a passenger, was thrown down and injured while engaged in alighting, the term "engaged in alighting" includes all the acts transpiring from the moment the passenger rises for that purpose until he gets clear of the car, provided there is no interruption of his passage. *Birmingham R., etc., Co. v. Glenn*, 179 Ala. 263, 60 So. 111.

"In or About Alighting."—Where a complaint for injuries to a passenger alleged that she was engaged "in or about alighting" from the car, the words "in or about" were sufficiently broad in their signification to cover the entire passage from the car from beginning to end. *Birmingham R., etc., Co. v. Glenn*, 179 Ala. 263, 60 So. 111.

§ 204 (9) Averments as to Proximate Cause.

In General.—*Western Railway v. McGraw*, 183 Ala. 220, 62 So. 772, cited in note in L. R. A. 1916A, 937. See the title CARRIERS, § 204 (9), vol. 2, p. 765.

Complaint for injuries to a passenger, stating fact of injury and concluding with general averment that she was injured as a proximate result of carrier's negligence, is good as against demurrer. *Seaboard, etc., R. Co. v. Mobley*, 194 Ala. 211, 69 So. 614.

A complaint, alleging that plaintiff was injured while passenger and that said

injury "was proximately caused by negligence of defendant's servants in and about the carriage of plaintiff as a passenger," held good in action for injuries suffered by plaintiff in stumbling over baggage in aisle of car. *Atkinson v. Dean (Ala.)*, 73 So. 479.

In an action for injuries to a passenger, the complaint alleged that plaintiff's decedent went to the defendant's depot to take passage on one of defendant's passenger trains, where defendant's servants in charge of a freight train wantonly caused a freight car to run against plaintiff's decedent, knocking him down and causing injuries, as a proximate consequence of which he died, etc. Held, that the complaint was not demurrable for failure to aver a sufficient relation between the wrongful cause and the damaging effect; it being sufficient to charge that the wrong was a proximate cause of the injury suffered. *Central, etc., R. Co. v. Bell*, 187 Ala. 541, 65 So. 835.

Dependent Averment of Proximate Cause.—Where, in an action against a street railroad by a passenger for personal injuries, the first count of the complaint averred that defendant's servants in charge of the car so negligently conducted themselves in its management that plaintiff was thrown violently to the ground and had her hip injured, etc., and rendered for a long time unable to work, and was permanently injured, continuing, "and plaintiff avers her said wounds and injuries were the proximate consequence and caused by reason of the negligence of defendant's servants or agents as aforesaid," the complaint was proper, and not subject to demurrer; for, although the quoted averment was dependent, it was fully sustained by the general averment of negligence in the body of the count. *Birmingham R., etc., Co. v. Frazier*, 14 Ala. App. 269, 69 So. 969.

Failure to Allege Specific Act of Negligence.—*Western Railway v. McGraw*, 183 Ala. 220, 62 So. 772. See the title CARRIERS, § 204 (9), vol. 2, p. 765.

§ 204 (11) Plea or Answer.

Failure to Negative Negligence Concurring with Act of Third Person.—*Western Railway v. McGraw*, 183 Ala.

220, 62 So. 772. See the title CARRIERS, § 204 (11), vol. 2, p. 766.

§ 205. — Issues, Proof and Variance.

§ 205 (1) Issues Raised by and Evidence Admissible under Pleadings.

In action for assault made by railroad conductor, where plaintiff's evidence did not identify any particular conductor, but showed an assault on February 3d, which was denied by defendant's train crew, plaintiff, after such refutation, could not recover for assault at different time. *Lacy v. Louisville, etc., R. Co.*, 197 Ala. 539, 73 So. 81.

Under a complaint charging that defendant so negligently conducted its business of carrying passengers as to injure plaintiff, a passenger, proof could be made of any breach of duty, whether relating to the operation of the train, the condition of the cars and roadway, or the skill of defendant's servants; but under a specification of negligence in the "operation of train" evidence of a defective roadway, would be incompetent, so that a presumption of a negligently defective roadway would not be available to plaintiff in an action for injuries resulting from a derailment under counts charging negligence in the operation of the train and in the construction and equipment of its engines and cars, etc. *Knight v. Tombigbee Valley R. Co.*, 190 Ala. 140, 67 So. 238.

Allegation as to Injury Sustained While Engaged in Alighting.—*Birmingham R., etc., Co. v. Glenn*, 179 Ala. 263, 60 So. 111. See the title CARRIERS, § 205 (1), vol. 2, p. 767.

§ 205 (2) Matters Admissible under General Denial.

In General.—*Carlisle v. Central, etc., R. Co.*, 183 Ala. 195, 62 So. 759. See the title CARRIERS, § 205 (2), vol. 2, p. 268.

In an action against a street car company for injuries received by plaintiff in alighting from the car, where defendant's sole defense was the denial of the alleged negligence, proof thereof is available under the general issue. *Tannehill v. Birmingham R., etc., Co.*, 177 Ala. 297, 58 So. 198.

§ 205 (3) Matters to Be Proved.

Date.—Where the complaint in an action for the death of a passenger fixed, under a *videlicet*, the date of the injuries, plaintiff was not held to proof as to the exact day. *Central, etc., R. Co. v. Teasley*, 187 Ala. 610, 65 So. 981, cited in note in L. R. A. 1915A, 782.

§ 205 (4) Variance between Allegations and Proof.

Instances of Fatal Variance.—The variance between the complaint, in an action against a railroad company, based on the theory that plaintiff entered the train to assist an elderly passenger boarding it, and the proof that plaintiff entered the train solely to keep the passenger company until the departure of the train, was fatal authorizing an instruction to find for the company. *Whaley v. Louisville, etc., R. Co.*, 186 Ala. 72, 65 So. 140, 52 L. R. A., N. S., 179.

In action against street railroad for injury to passenger, where evidence showed that it was motorman's duty to look after passengers on front platform, and the conductor's on rear, and that plaintiff was injured while leaving the front platform, the general charge as to the count ascribing negligence to the conductor should have been given for variance. *Birmingham R., etc., Co. v. Washington*, 192 Ala. 617, 69 So. 65.

Where the flagman on a passenger train kicked a footstool away just as plaintiff was in the act of stepping upon it, causing plaintiff to fall and sustain injuries, his act constituted willful and wanton negligence, and proof of that act will not support a recovery under counts of the complaint charging simple negligence only. *Newberry v. Atkinson*, 184 Ala. 567, 64 So. 46.

In a personal injury action by a passenger, the complaint held to charge that the operator of the railroad company intentionally participated in the act causing plaintiff's injury, so that proof of the willful and wanton act of the flagman who kicked away the footstool just as the passenger was about to alight upon it constituted a fatal variance. *Newberry v. Atkinson*, 184 Ala. 567, 64 So. 46.

Place of Injury.—*Birmingham R., etc.,*

Co. v. Lide, 177 Ala. 400, 58 So. 990; Birmingham R., etc., Co. v. Glenn, 179 Ala. 263, 60 So. 111. See the title CARRIERS, § 205 (4), vol. 2, p. 768.

Immaterial Variance as to Which Employee Used Profane Language. — Birmingham R., etc., Co. v. Glenn, 179 Ala. 263, 60 So. 111. See the title CARRIERS, § 205 (4), vol. 2, p. 769.

Failure to Prevent Illegal Search. — Nashville, etc., Railway v. Crosby, 183 Ala. 237, 62 So. 889. See the title CARRIERS, § 205 (4), vol. 2, p. 769.

§ 206. — **Presumptions and Burden of Proof.**

§ 206 (1) **In General.**

Res Ipsa Loquitur.—Western Railway v. McGraw, 183 Ala. 220, 62 So. 772, cited in notes in Ann. Cas. 1917C, 634; L. R. A. 1916A, 937; L. R. A. 1916C, 366, 371. See the title CARRIERS, § 206 (1), vol. 2, p. 771.

Where Specific Acts of Negligence Charged.—In an action by a passenger for injury in which specific acts of negligence were charged, held that the burden of proof was governed by the same rules as cases where the relation of carrier and passenger was not present. Birmingham R., etc., Co. v. O'Brien, 185 Ala. 617, 64 So. 343.

Proof that the vehicle in which a passenger was riding was upset, causing injury to the passenger, imposes on the carrier the burden of proving that the accident was not due to any negligence on his part or on that of his servants. Orr v. Boockholdt, 10 Ala. App. 331, 65 So. 430, cited in notes in L. R. A. 1916C, 368, 372.

A passenger injured while alighting from a street car does not have the burden of showing that the step of the car was in an unsafe condition, caused by the negligence of the company. Birmingham, etc., R. Co. v. Hoskins, 14 Ala. App. 254, 69 So. 339, cited in note in L. R. A. 1916C, 369.

Burden of proof held on passenger suing street railroad for injuries while leaving car to show that she was a passenger, and that her injury resulted from defendant's operation of its car. Bir-

mingham R., etc., Co. v. Washington, 192 Ala. 617, 69 So. 65.

§ 206 (3) **Where Injury Is Caused by Sudden Jerks or by Suddenly or Prematurely Starting Car.**

In General.—Birmingham R., etc., Co. v. Mayo, 181 Ala. 525, 61 So. 289. See the title CARRIERS, § 206 (3), vol. 2, p. 772.

Inference of Negligence Justified. — Where a train stopped long enough for a passenger to get his overcoat and grip and walk out of the car and down on the bottom step, when the train suddenly started, throwing him to the ground, an inference of the carrier's negligence in operating the train was justified, authorizing a recovery by the passenger for the carrier's negligence. Louisville, etc., R. Co. v. Miller, 186 Ala. 65, 65 So. 169, cited in notes in L. R. A. 1916C, 364, 365.

§ 206 (4) **Where Injuries Are Caused by Collision, Derailment, or Breaking of Machinery, etc., and Defects Therein.**

In General.—Louisville, etc., R. Co. v. Godwin, 183 Ala. 218, 62 So. 768, cited in notes in L. R. A. 1916C, 366. See the title CARRIERS, § 206 (4), vol. 2, p. 772.

Unexplained Derailment.—A presumption of a carrier's negligence arising from an unexplained derailment held not to sustain a charge of wilful injury. Knight v. Tombigbee Valley R. Co., 190 Ala. 140, 67 So. 238.

§ 206 (6) **Where Acts Committed by Third Persons.**

Burden of Proving Knowledge of Illegality of Search.—Nashville, etc., Railway v. Crosby, 183 Ala. 237, 62 So. 889. See the title CARRIERS, § 206 (6), vol. 2, p. 773.

§ 207. — **Admissibility of Evidence.**

§ 207 (1) **In General.**

In an action for death of a passenger by being struck by a freight car while standing at a station waiting for his train, evidence that the territory was within the passenger zone, and the extent and frequency of its use by passengers, was admissible. Central, etc., R. Co. v. Bell, 187 Ala. 541, 65 So. 835.

Plaintiff sued defendant railroad for

injuries sustained by her when searched on its depot premises for a watch alleged to have been stolen by her. A witness gave testimony on direct examination for defendant tending to show that the plaintiff was the only one who had had an opportunity to steal the watch. On cross-examination plaintiff elicited testimony tending to show that her presence in the house of the person robbed had not been to steal, but had been for a commendable purpose. Held, that such testimony was admissible. *Nashville, etc., Railway v. Crosby*, 194 Ala. 338, 70 So. 7.

Time During Which Aisle Obstructed.

—In action for injuries to passenger caused by falling over baggage left in aisle of car by other passengers, evidence of time during which aisle was obstructed was important in determining whether carrier's employees knew or should have known of obstruction. *Atkinson v. Dean* (Ala.), 73 So. 479.

Evidence Showing Point of Collision.

—In an action by one injured at a station by an approaching train on which she intended to take passage, testimony that the witness saw blood on the track early the next morning after the accident was admissible, in the absence of evidence showing changed conditions, to show the exact point where the collision occurred, and how far the passenger was carried after being struck. *Alabama, etc., R. Co. v. Bell* (Ala.), 76 So. 920.

Assaulted Passenger's Failure to Continue Trip.—In an action by a passenger for an assault by a third party in defendant's depot, it was not error to permit plaintiff to show that he did not continue his trip for which he had purchased a ticket. *Southern R. Co. v. Haynes*, 186 Ala. 60, 65 So. 339.

§ 207 (2) Relation of Carrier and Passenger.

In an action for death of a passenger at a railroad station while awaiting his train, evidence of the fare to the point he desired to go and his possession of sufficient funds to pay the same at the time of his injury was admissible to show the bona fides of his intention to

become a passenger. *Central, etc., R. Co. v. Bell*, 187 Ala. 541, 65 So. 835.

§ 207 (4) Acts or Omissions, and Competency of Carrier's Employees.

In action by a passenger for injuries, under allegation that while she was alighting the car suddenly started, the motorman in charge of the car could state whether he loosened the brakes, or did anything to cause the car to start forward. *Erwin v. Birmingham R., etc., Co. (Ala.)*, 76 So. 915.

Matters Leading up to Assault—Purpose of Admission.—*Birmingham R., etc., Co. v. Coleman*, 181 Ala. 478, 61 So. 890. See the title CARRIERS, § 207 (4), vol. 2, p. 774.

Manner and Tone of Voice Accompanying Abusive Language.—*Alabama, etc., R. Co. v. Pouncey*, 7 Ala. App. 548, 61 So. 601. See the title CARRIERS, § 207 (4), vol. 2, p. 774.

§ 207 (7) Taking Up and Setting Down Passengers.

In passenger's action for injuries, under allegation that while she was alighting the car suddenly moved backwards, in the absence of evidence that the brake was released, evidence that if the brake were released at all the car would move was inadmissible. *Erwin v. Birmingham R., etc., Co. (Ala.)*, 76 So. 915.

Alighting of Other Passenger at Same Time.—*Birmingham R., etc., Co. v. Barrett*, 179 Ala. 274, 60 So. 262. See the title CARRIERS, § 207 (7), vol. 2, p. 776.

§ 207 (9) Other Accidents or Similar Transactions.

Other Accidents.—In an action for the death of a passenger, caused by the car in which she was riding being struck by another car or engine, testimony that a freight train ran into a box car some time during the summer during which the accident to the passenger occurred was irrelevant. *Central, etc., R. Co. v. Teasley*, 187 Ala. 610, 65 So. 981.

Operation of Similar Cars Under Similar Conditions.—In a passenger's action for injury from the derailment of a car, where the motorman had stated that because of wet leaves on the track he had

lost control of it, evidence that subsequently thereto he had operated similar cars under similar conditions without accident or loss of control held admissible on the issue of negligence. *Birmingham R., etc., Co. v. Friedman*, 187 Ala. 562, 65 So. 939.

§ 207 (10) Custom or Course of Business.

In an action for injuries in attempting to leave a street car when the handhold broke and precipitated plaintiff to the ground, evidence that plaintiff had on previous occasions jumped off the car at the particular point and was accustomed to jumping off as tending to show the intention of plaintiff when he rose from his seat and went to the running board of the car, was properly rejected; there having been eyewitnesses to the accident. *Montgomery Light, etc., Co. v. Devinney (Ala.)*, 75 So. 883.

§ 208. — Sufficiency of Evidence.

Unlawful Search Caused by Agent. — In an action against a railroad for damages to plaintiff when searched for a stolen watch at the order of defendant's station agent, evidence held sufficient to sustain the jury's finding that the unlawful search was approximately caused or contributed to by the agent's direction. *Nashville, etc., Railway v. Crosby*, 194 Ala. 338, 70 So. 7.

Knowledge of Intention to Search Passenger or Illegality Thereof.—*Nashville, etc., Railway v. Crosby*, 183 Ala. 237, 62 So. 889. See the title CARRIERS, § 208, vol. 2, p. 779.

Negligence in Selection of Employee.—In an action against a private carrier for injuries to a passenger, evidence held not to show negligence of the carrier in the selection of a driver. *Orr v. Boockholdt*, 10 Ala. App. 331, 65 So. 430.

Cause of Injury.—Where there is evidence affording a reasonable inference that deceased's fall from a street car was caused by the motorman's negligence in opening the door while the car was in motion, the right to recover for the death is not defeated by the mere possibility, not supported by any evidence that the fall was caused by an attack of vertigo; the rule that, where the evidence points equally to two or more

causes of injury for some of which defendant is not liable, plaintiff can not recover, not being applicable. *Selma Street, etc., R. Co. v. Vaughan*, 197 Ala. 477, 73 So. 19.

Sudden Jerks.—Evidence held insufficient to show that, as alleged by plaintiff, the car from which she was alighting jerked and moved suddenly. *Erwin v. Birmingham R., etc., Co. (Ala.)*, 76 So. 915.

Negligence in Management of Conveyance.—In an action for the death of a street car passenger, evidence held sufficient, to warrant the jury in inferring that the death was caused by the negligence of the motorman. *Selma Street, etc., R. Co. v. Vaughan*, 197 Ala. 477, 73 So. 19.

The mere fact that a suit case projected in the aisle of a street car without a showing that it was under the management or control of the defendant or its servants, and that in the ordinary course of events injury to a passenger from falling over it would not have happened but for some negligence attributable to defendant, did not make out a prima facie case of negligence for the jury. *Alabama, etc., R. Co. v. Johnson*, 14 Ala. App. 558, 71 So. 620.

Willful Injury. — Where a passenger, while standing at a station in the zone intended for passengers, awaiting a train, was struck by the negligent operation of a freight car at high speed over the area commonly used by passengers, without the observance of due precautions, the facts held sufficient to justify a finding of willfulness. *Central, etc., R. Co. v. Bell*, 187 Ala. 541, 65 So. 835.

Same—Derailment.—Where a passenger was injured by a derailment, and the evidence rebutted any presumption of defective cars, foreign obstructions, or excessive speed, a count charging that the injury was due to the willful misconduct of defendant or its servants was unsustainable. *Knight v. Tombigbee Valley R. Co.*, 190 Ala. 140, 67 So. 238.

Failure to Stop Train Constituting Simple Negligence.—Evidence held sufficient to show that conductor's failure to stop a train, as requested constituted

simple negligence. *Seaboard, etc., R. Co. v. Standifer*, 190 Ala. 260, 67 So. 391.

§ 209. — Damages.

§ 209 (2) Elements of Damage for Assault or Insulting Language by Employee or Fellow Passengers.

Damages for Mental Suffering. — *Birmingham R., etc., Co. v. Glenn*, 179 Ala. 263, 60 So. 111. See the title CARRIERS, § 209 (2), vol. 2, p. 780.

Exemplary Damages — Mitigation of Damages.—*Birmingham R., etc., Co. v. Coleman*, 181 Ala. 478, 61 So. 890, cited in notes in *L. R. A.* 1915E, 672, 673. See the title CARRIERS, § 209 (2), vol. 2, p. 780.

§ 209 (4) Excessive Damages.

In an action against defendant railroad for damages sustained by plaintiff when searched on defendant's depot premises at the instigation of its agent for a stolen watch, which search resulted in miscarriage, sickness, and mental and physical suffering, a verdict for \$7,500 was not so excessive as to indicate prejudice, passion, partiality, or corruption on the part of the jury. *Nashville, etc., Railway v. Crosby*, 194 Ala. 338, 70 So. 7.

§ 210. — Questions for Jury.

§ 210 (1) In General.

In an action against a carrier for personal injuries, where there was no evidence tending to support the averment of negligence, the refusal of the general affirmative charge for defendant was error. *Birmingham R., etc., Co. v. O'Brien*, 185 Ala. 617, 64 So. 343.

In a passenger's action against a railroad for injuries received while riding on a car platform on account of the crowded condition of the car, question of defendant's negligence was for the jury. *Southern R. Co. v. Hayes*, 194 Ala. 194, 69 So. 641.

§ 210 (2) Existence of Relation of Carrier and Passenger.

In an action for the death of a passenger at the carrier's station while awaiting for a train on which he intended to take passage, whether the relation of carrier and passenger existed at the time of the injury held for the jury. *Central, etc.,*

R. Co. v. Bell, 187 Ala. 541, 65 So. 835.

Whether plaintiff, who was struck by approaching train, on which she expected to take passage, was a passenger at the time of the accident, or whether she had forfeited her rights by taking position of danger, held for jury. *Alabama, etc., R. Co. v. Bell (Ala.)*, 76 So. 920.

Person Going to Flag Station to Take Train.—*Louisville, etc., R. Co. v. Glasgow*, 179 Ala. 251, 60 So. 103. See the title CARRIERS, § 210 (2), vol. 2, p. 782.

§ 210 (3) Acts or Omissions of Carrier's Employees.

Mental Distress as Resulting from Offensive Language. — *Birmingham R., etc., Co. v. Glenn*, 179 Ala. 263, 60 So. 111. See the title CARRIERS, § 210 (3), vol. 2, p. 782.

§ 210 (5) Acts of Fellow Passengers or Other Persons.

In action for injuries to passenger caused by falling over baggage left in aisle of car by other passengers, whether defendant's agents or servants knew, or ought to have known, of obstruction, held jury question. *Atkinson v. Dean (Ala.)*, 73 So. 479.

Consent to Illegal Search.—*Nashville, etc., Railway v. Crosby*, 183 Ala. 237, 62 So. 889. See the title CARRIERS, § 210 (5), vol. 2, p. 782.

§ 210 (6) Starting or Moving Car While Passenger Is Boarding Same.

In an action against railroad company for personal injuries sustained in attempting to board train, where evidence showed that plaintiff, with a ticket, presented herself at the platform of one of the coaches, and upon being directed to go to another coach immediately started to do so, it was a question for the jury to say whether or not defendant's agent knew or ought to have known that the movement of the train would probably result in some injury to a passenger then in the act of getting on the train. *Louisville, etc., R. Co. v. Banks (Ala. App.)*, 76 So. 472.

§ 210 (6½) Operation of Trains at Places Where Passengers Are Being Received or Discharged.

Whether a carrier exercised due pru-

dence and care in operating car approaching a flag station at high speed on a dark foggy night when the headlight did not fully perform its function held a jury question. *Alabama City, etc., R. Co. v. Bessiere*, 197 Ala. 5, 72 So. 325.

§ 210 (7) Railroad Locomotives and Cars.

Negligence in Not Having Door Fastenings in Safe Condition.—*Alabama, etc., R. Co. v. Robinson*, 183 Ala. 265, 62 So. 813. See the title CARRIERS, § 210 (7), vol. 2, p. 783.

Slipping Caused by Defects in Steps.—*Carlisle v. Central, etc., R. Co.*, 183 Ala. 195, 62 So. 759. See the title CARRIERS, § 210 (7), vol. 2, p. 783.

§ 210 (11½) Collision.

Evidence that an auto truck had broken down across the street-car track, that a passenger saw it when a great distance away, that the motorman made no effort to slacken his speed, and that a collision occurred injuring plaintiff, is sufficient to make a jury question on the negligence of the carrier. *Birmingham R., etc., Co. v. Beal (Ala.)*, 76 So. 1.

§ 210 (12) Setting Down Passengers in General.

Sufficiency of Stop.—Where, in an action for an injury to a passenger while alighting from a train, the facts were undisputed, it was a question of law whether the stop was sufficient. *Southern R. Co. v. Norwood*, 186 Ala. 49, 64 So. 604.

§ 210 (13) Starting or Moving Car While Passenger Is Alighting.

In a passenger's action against a street car company for injuries, where the jury might have found from the evidence that the conductor of a trailer signaled the movement of the cars and caused the doors to be closed at a time when he knew plaintiff was alighting and was between the doors, in such a situation that to move the cars or close the doors would probably result in injury, and that the conductor's action was characterized by a reckless indifference to the probable consequence of the movement of the cars and closing of the doors, the company was not entitled to the affirmative charge under a count alleging wan-

ton or intentional misconduct. *Birmingham R., etc., Co. v. Nalls*, 188 Ala. 352, 66 So. 5.

§ 210 (16) Proximate Cause of Injury.

In General.—*Birmingham R., etc., Co. v. Lide*, 177 Ala. 400, 58 So. 990. See the title CARRIERS, § 210 (16), vol. 2, p. 786.

§ 210 (17) Exemplary Damages.

Sudden Jerk While Passenger Alighting — Language Showing Animus of Servant.—*Birmingham R., etc., Co. v. Glenn*, 179 Ala. 263, 60 So. 111. See the title CARRIERS, § 210 (17), vol. 2, p. 786.

Compelling Passenger to Ride in Improper Place and without Comforts.—*Nashville, etc., Railway v. Blackmon*, 7 Ala. App. 530, 61 So. 468. See the title CARRIERS, § 210 (17), vol. 2, p. 786.

§ 211. — Instructions.

§ 211 (½) In General.

In an action against a carrier for personal injuries by being caught and dragged by a wire attached to a street car, where the evidence tended to show a want of due care by the conductor and motorman in stopping the car after plaintiff's peril was known, charges premitting the diligence due from the conductor, after he knew of plaintiff's peril, to promptly stop the car, or predicated nonliability upon a hypothesis omitting negligence on the part of either the conductor or the motorman, there being evidence that each was negligent, were properly refused. *Birmingham R., etc., Co. v. O'Brien*, 185 Ala. 617, 64 So. 343.

Obscure Instruction. — Instruction, on recovery by passenger for injuries due to being dragged by wire attached to car, held erroneous, as obscure and not sufficiently clear. *O'Brien v. Birmingham R., etc., Co.*, 197 Ala. 97, 72 So. 343.

Riding on Steps. — Where evidence showed that a street car company customarily received passengers greatly in excess of the seating capacity of its cars, an instruction, in an action by a passenger who fell from the steps on which he was riding, that, if passengers were riding on the steps because of the crowded condition of the car and plat-

form, it was the duty of the motorman and conductor to exercise skill and care to avoid injuring them, is warranted. *Mobile, etc., R. Co. v. Hughes*, 190 Ala. 216, 67 So. 278.

Requested Instruction Too Favorable—Adverse Party.—In an action against a street railroad, where the defendant was refused a charge that the burden of proof was on the plaintiff to show that she was injured while leaving the defendant's car, the plaintiff could not urge that the charge was properly refused, as it did not state the necessity that the jury's satisfaction should arise out of the evidence, as any such defect was favorable to her. *Birmingham R., etc., Co. v. Washington*, 192 Ala. 617, 69 So. 65.

§ 211 (3) Degree of Care Required in General.

A charge that the obligation of a carrier is to carry its passengers safely and properly and treat them respectfully, and that it is obliged to protect them from violence and insult from whatever source, and must use all such reasonable precautions as human judgment and foresight are capable of to make passengers safe and comfortable, is not objectionable as making the carrier an insurer of the passengers. *Seaboard, etc., R. Co. v. Mobley*, 194 Ala. 211, 69 So. 614.

"Highest Degree of Care."—The term "highest degree of care" is a relative term, and its use, in an instruction, with respect to the degree of care required to be exercised in the operation of a car by a carrier of passengers was not erroneous, where it was not followed by the words "known to human skill and foresight," as it did not require a superlative degree of care, or that extraordinary skill that is possible without regard to the nature of the duties to be performed, but only required the care and skill exacted of persons engaged in the same or similar business as such carrier. *Birmingham R., etc., Co. v. Cockrell*, 10 Ala. App. 578, 65 So. 704.

§ 211 (3) Acts of Carrier's Employees, Fellow Passengers, or Third Persons.

Assault by Conductor—Misleading In-

structions.—In an action for injuries to a street car passenger by being assaulted by the conductor, requests to charge that if plaintiff was between the gates of the car when he was struck by the conductor he was yet a passenger, and the relationship of carrier and passenger had not ceased, and that the relation of carrier and passenger existed until plaintiff passed from the gates of the car, were calculated to mislead the jury and was properly refused. *Beyer v. Birmingham R., etc., Co.*, 186 Ala. 56, 64 So. 609, cited in note in *L. R. A.* 1915E, 673.

Injury Caused by Crowding of Other Passengers.—Where plaintiff, injured when struck by a train on which she expected to take passage, asserted that, though she was pushed into a position of danger by the crowding of passengers, her injury resulted from the negligent operation of the train, a requested charge that, if plaintiff was struck as the sole and proximate result of being forced too close to the track by the misconduct of another passenger, verdict should be for defendant, was improperly refused; it not appearing that the railroad company was negligent in failing to take precautions with respect to crowding. *Alabama, etc., R. Co. v. Bell (Ala.)*, 76 So. 920.

Ejection by Officer.—In action for injuries to street car passenger ejected by a third person, it was error to refuse charge that a street car motorman or conductor had no right to interfere with the city police officer in the conduct of his affairs unless it is plain to them that he is the aggressor and is abusing his authority the charge not being abstract, and the word "plain" meaning only clearly or plainly apparent. *Birmingham R., etc., Co. v. Lipscomb (Ala.)*, 73 So. 962.

§ 211 (3 1/2) Setting Down Passengers in General.

In a passenger's action for personal injuries, an instruction, hypothesizing the allegations of the complaint, that if the plaintiff was injured as alleged, as proximate consequence of defendant's negligence as alleged, and if the defendant negligently closed its gates on plaintiff as

alleged, while plaintiff was alighting from its car, the plaintiff could recover, is properly given. *Birmingham R., etc., Co. v. Gray*, 196 Ala. 42, 71 So. 689.

The giving of instructions in an action for injuries to a female passenger while alighting from a car, caused by the conductor stepping on her dress, causing her to fall, as to the burden of proof and the preponderance of the evidence, held not ground for reversing a judgment for the carrier. *Green v. Birmingham R., etc., Co.*, 187 Ala. 508, 65 So. 781.

In an action for an injury to a passenger alighting from a train, an instruction that it was the duty of the engineer to ring the bell or blow the whistle "immediately before the train is put in motion" was erroneous; Code 1907, § 5473, specifying "immediately before or at the time of leaving the station." *Southern R. Co. v. Norwood*, 186 Ala. 49, 64 So. 604.

§ 211 (4) Starting or Moving Car While Passenger Is Boarding Same.

Where, in a husband's action for his damages from injuries to his wife while alighting from a street car, there was evidence from which it might be inferred that defendant was negligent in prematurely starting the car, though the starting was properly done, a requested instruction that "it is not negligence for those in charge of a street car to start the same in a proper manner while a passenger is inside of the car walking toward the door" was properly refused. *Birmingham R., etc., Co. v. Roach*, 188 Ala. 306, 66 So. 82.

§ 211 (10) Proximate Cause of Injury.

Charges Held Proper. — *Birmingham R., etc., Co. v. Barrett*, 179 Ala. 274, 60 So. 262. See the title CARRIERS, § 211 (10), vol. 2, p. 791.

An instruction, if the injuries were sustained as the proximate consequence of a mere accident, to find for the carrier, is proper, since it must be interpreted as excluding culpable negligence. *O'Brien v. Birmingham R., etc., Co.*, 197 Ala. 97, 72 So. 343.

§ 211 (11) Presumptions and Burden of Proof.

Proving Plea of Justification of As-

sault.—*Birmingham R., etc., Co. v. Coleman*, 181 Ala. 478, 61 So. 890. See the title CARRIERS, § 211 (11), vol. 2, p. 792.

(E) CONTRIBUTORY NEGLIGENCE OF PERSON INJURED.

§ 212. Application of the Doctrine to Carriers in General.

A passenger should not be deemed guilty of contributory negligence when he takes only such risks as under the same circumstances a prudent man, whose senses were not impaired, would take. *Southern R. Co. v. Hayes*, 194 Ala. 194, 69 So. 641.

§ 212½. Care Required of Passengers in General.

Primarily, passenger is under no absolute duty to be on lookout for obstructions in aisle of car, but has right to presume that aisle is clear from such obstructions. *Atkinson v. Dean (Ala.)*, 73 So. 479.

§ 213. Awaiting and Seeking Transportation.

While one at a railroad station, waiting to take passage on a train, who voluntarily gets on the track or dangerously near thereto, without stopping, looking, or listening, is not only guilty of negligence, but may become a trespasser, a passenger, though she left the waiting room at the station and took her position on a passageway adjacent to the tracks, is not guilty of negligence, where she was pushed by the crowd into a position of danger. *Alabama, etc., R. Co. v. Bell (Ala.)*, 76 So. 920.

Standing Near Track.—*Louisville, etc., R. Co. v. Glasgow*, 179 Ala. 251, 60 So. 103. See the title CARRIERS, § 213, vol. 2, p. 793.

§ 214. Entering Conveyance.

Boarding Moving Car.—For a passenger to attempt to board a freight box car, with no platform and steps, but merely an iron grabrod and cross-bars, when it is going six miles an hour, is negligence. *Travis v. Alabama, etc., R. Co. (Ala.)*, 73 So. 983.

A passenger attempting to board a moving train after he had alighted at an

intermediate point need exercise only ordinary care. *Central, etc., R. Co. v. Hingson*, 186 Ala. 40, 65 So. 45, cited in note in *L. R. A.* 1915C, 187.

Invitation to Board Moving Train.—A signal of a brakeman, even if amounting to an invitation to board a train, does not save from contributory negligence a passenger attempting to board a freight box car, with no platform and steps, but merely an iron grabrod and cross-bars, when it was going six miles an hour, as prudence suggests nonacceptance of the invitation. *Travis v. Alabama, etc., R. Co. (Ala.)*, 73 So. 983.

§ 215. In Transit.

§ 216. — Dangerous Position.

§ 216 (½) In General.

Freight Elevator.—If an accident to plaintiff while riding on a freight elevator in an office building was the result of plaintiff's sitting down on the trucks on the elevator, causing them to move and carry him into the open space between the floor of the elevator and the ceiling of the floor above, he could not recover. *O'Rourke v. Woodward (Ala.)*, 77 So. 679.

§ 216 (2) Riding on Platform.

Where a passenger on a train exercised due diligence in ascertaining whether there was a seat for her in a car, it appearing to her that there was no available space on the inside, though there was in fact standing room, her action in riding on the platform was not negligence, contributing to her injury by being thrown to its floor by a lurching of the train. *Southern R. Co. v. Hayes*, 194 Ala. 194, 69 So. 641.

Where a passenger, upon being told by the conductor that there was no unoccupied seat on the inside of the car, remained on the platform with other passengers, to the knowledge of the train crew, who nevertheless ran the train at such great speed as to cause it to lurch, throwing plaintiff to the floor of the platform, plaintiff, merely by reason of being on the platform, was not guilty of such contributory negligence as to bar her recovery. *Southern R. Co. v. Hayes*, 194 Ala. 194, 69 So. 641.

Compulsion or Necessity.—A passenger on a train is not under duty to the carrier to pay an additional fare and ride in the Pullman or sleeping car, and if such one finds the day coach so crowded that he can not enter with reasonable effort, and the conductor fails to provide a seat on request, in law such passenger's riding on the platform is by compulsion or necessity. *Southern R. Co. v. Hayes*, 194 Ala. 194, 69 So. 641.

§ 218. Leaving Conveyance.

§ 218 (2) Preparing to Leave Conveyance before It Stops.

In General.—*Birmingham R., etc., Co. v. Barrett*, 179 Ala. 274, 60 So. 262. See the title CARRIERS, § 218 (2), vol. 2, p. 797.

§ 218 (3) Alighting at Place Other than Station or Platform.

Alighting between Stations in General.—*Tannehill v. Birmingham R., etc., Co.*, 177 Ala. 297, 58 So. 198. See the title CARRIERS, § 218 (3), vol. 2, p. 797.

§ 218 (4) Alighting from Moving Train or Car in General.

In action for injuries to city marshal in attempting to leave moving train, if jury found road was guilty of negligence but were not reasonably satisfied that marshal's subsequent conduct was negligent, they were bound to find for him. *Louisville, etc., R. Co. v. Martin (Ala.)*, 73 So. 909.

Where railroad's agent requested city marshal to board train and eject hoboes, and, just as marshal entered car and was confronted by seven or eight tramps, train began to pull out, so that he debarked hastily, road was not liable if he attempted to leave in negligent manner and was injured thereby. *Louisville, etc., R. Co. v. Martin (Ala.)*, 73 So. 909.

Care Required.—*Louisville, etc., R. Co. v. Dilburn*, 178 Ala. 600, 59 So. 438. See the title CARRIERS, § 218 (4), vol. 2, p. 798.

§ 223. Proximate Cause of Injury.

Common carriers are not liable for injuries or damages to passenger proximately resulting from the passenger's negligence or willful act. *Southern R. Co. v. Pruett (Ala.)*, 77 So. 49.

Action against carrier for injuries to passenger caused by falling over baggage left in aisles of car, by other passengers, may be defeated if passenger was guilty of contributory negligence, but negligence of stranger in obstructing aisle concurring with that of carrier will not defeat action. *Atkinson v. Dean* (Ala.), 73 So. 479.

Standing on Platform Not Proximate Cause of Injury.—A railroad passenger, forced to ride on a platform by the crowded condition of a car, was injured by a sudden lurch of the train, which might have happened, had she been standing beside the car. Held, that her standing on the platform was not the proximate cause of the injury. *Southern R. Co. v. Hayes*, 194 Ala. 194, 69 So. 641.

§ 224. Willful Injury by Carrier's Employees.

In General.—*Carlisle v. Central, etc., R. Co.*, 183 Ala. 195, 62 So. 759. See the title CARRIERS, § 224, vol. 2, p. 803.

§ 225. Contributory Negligence as Ground of Defense.

§ 226. — Pleading.

Sufficiency of Plea—Standing in Car.—*Birmingham R., etc., Co. v. Gonzalez*, 183 Ala. 273, 61 So. 80. See the title CARRIERS, § 226, vol. 2, p. 803.

Pleas Held Bad.—In action for injuries to passenger by falling over baggage placed in aisle of car by passenger, plea of contributory negligence, alleging that plaintiff negligently failed to look out for a suit case while walking in said aisle, but not showing a duty to look, held bad on demurrer. *Atkinson v. Dean* (Ala.), 73 So. 479.

Plea of contributory negligence in passenger's action, that after conductor had signaled the car to be started, as was known to plaintiff, he negligently attempted to alight from it, without waiting for it to be stopped, is bad, in assuming it had started simultaneously with the signal, and had attained speed making it negligence to alight from it, as such a plea must not stop short of averring facts to which the law attaches the conclusion of negligence. *Birmingham*

R., etc., Co. v. Hunt (Ala.), 76 So. 918.

§ 228. — Admissibility of Evidence.

In a passenger's action against a railroad for injuries, plaintiff's testimony that upon reaching the platform of the day coach, after leaving a Pullman, the passengers standing there told her she could not get into the coach on account of its crowded condition, was admissible, since an apparent necessity for remaining on the platform excused plaintiff from any imputation of contributory negligence by so doing, as well as a real necessity. *Southern R. Co. v. Hayes*, 194 Ala. 194, 69 So. 641.

Decedent's Knowledge of Surroundings.—*Louisville, etc., R. Co. v. Dilburn*, 178 Ala. 600, 59 So. 438. See the title CARRIERS, § 228, vol. 2, p. 805.

§ 229. — Sufficiency of Evidence.

Last Chance Doctrine.—The last chance doctrine does not apply, though when a passenger, attempting to board a moving freight box car, caught the grabiron, the car gave a "snatch," there being no evidence that the servant causing this knew of the passenger's position, or that the flagman who saw him before he attempted to board the car discovered his perilous position in time to have the person in charge slacken or stop the car before the accident. *Travis v. Alabama, etc., R. Co.* (Ala.), 73 So. 983.

§ 230. — Questions for Jury.

§ 230 (1) In General.

Whether a passenger came to the station at an unreasonable time before the arrival of a train held for the jury. *Central, etc., R. Co. v. Campbell*, 10 Ala. App. 288, 64 So. 540.

§ 230 (1½) Awaiting and Seeking Transportation.

Whether plaintiff, struck by an approaching train on which she expected to take passage, was guilty of negligence in going upon or in dangerous proximity to the tracks held for the jury. *Alabama, etc., R. Co. v. Bell* (Ala.), 76 So. 920.

Whether plaintiff was negligent in

standing near defendant railroad's tracks while its train on which she intended to become a passenger was approaching the station held a jury question. *Seaboard, etc., Railway v. Laney* (Ala.), 75 So. 15.

§ 230 (3) Boarding Moving Conveyance.

Whether a passenger, who attempted to board a moving train, and succeeded in grabbing the handrail of the step leading to the vestibule of a sleeping car, and held onto the same, was negligent in failing to jump off the train while running three or four miles an hour, instead of hanging on and being caught between the train and a station platform, held for the jury. *Central, etc., R. Co. v. Hingson*, 186 Ala. 40, 65 So. 45, cited in note in L. R. A. 1915C, 187.

§ 230 (4) Conduct While in Transit in General.

In action for personal injuries to passenger caused by falling over baggage placed in aisle by other passengers, evidence on issue of contributory negligence held to present jury question. *Atkinson v. Dean* (Ala.), 73 So. 479.

§ 230 (5) Riding on Platform.

In a passenger's action for injuries received while riding on a car platform on account of the crowded condition of the car, whether plaintiff was guilty of contributory negligence was for the jury. *Southern R. Co. v. Hayes*, 194 Ala. 194, 69 So. 641.

Where plaintiff was injured while riding on a vestibuled car platform on account of the crowded condition of the car, the railroad was not entitled to the affirmative charge, because the proof showed she failed to cling to the handholds. *Southern R. Co. v. Hayes*, 194 Ala. 194, 69 So. 641.

In a passenger's action for injuries received by being thrown to the floor of a car platform by the lurching of the train, whether or not there had been a real or apparent necessity to ride on the platform on account of the crowded condition of the car, as it appeared to her after the exercise of due diligence to ascertain if she could obtain a seat therein, was a question for the jury. *Southern R. Co. v. Hayes*, 194 Ala. 194, 69 So. 641.

§ 230 (5½) Riding on Steps or Foot-board.

It is not contributory negligence as a matter of law, for a passenger on a crowded street car to ride on the steps where the company countenanced the practice. *Mobile, etc., R. Co. v. Hughes*, 190 Ala. 216, 67 So. 278.

§ 230 (8) Alighting from Moving Conveyance.

In General.—*Birmingham R., etc., Co. v. Lide*, 177 Ala. 400, 58 So. 990; *Louisville, etc., R. Co. v. Dilburn*, 178 Ala. 600, 59 So. 438, cited in note in L. R. A. 1915C, 186. See the title CARRIERS, § 230 (8), vol. 2, p. 808.

Where plaintiff contended that when she alighted from a moving train she did so at the request and with the assistance of the porter, it is improper for the court to declare, as a matter of law, that such act was contributory negligence; for the question whether one is guilty of negligence in voluntarily alighting from a moving train depends on the circumstances, the speed of the train, etc. *Central, etc., R. Co. v. Mathis*, 196 Ala. 32, 71 So. 674.

§ 230 (12) Acts in Emergencies.

In action by city marshal for injuries in leaving moving train which he had boarded to eject tramps, whether plaintiff's conductor was negligent under unusual circumstances held for jury. *Louisville, etc., R. Co. v. Martin* (Ala.), 73 So. 909.

§ 230 (14) Proximate Cause of Injury.

In General.—*Birmingham R., etc., Co. v. Lide*, 177 Ala. 400, 58 So. 990. See the title CARRIERS, § 230 (14), vol. 2, p. 810.

§ 231. — Instructions.

§ 231 (1) In General.

In General.—*Southern R. Co. v. Morgan*, 178 Ala. 590, 59 So. 432. See the title CARRIERS, § 231 (1), vol. 2, p. 810.

In an action against a street railroad for injuries to a passenger, where the defendant's evidence tended to show that plaintiff had left the car and was injured by a fall in the street, a requested charge that the burden of proof was on

the plaintiff, and that she could not recover unless the jury was reasonably satisfied that she was entitled to recover, was erroneously refused. *Birmingham R., etc., Co. v. Washington*, 192 Ala. 617, 69 So. 65.

Misleading Instructions.—In a passenger's action for injuries received while riding on the platform of a moving car on account of its crowded condition, the evidence having shown that the train made no stop between the towns between which plaintiff received her injuries, and that it was in motion when plaintiff took up her position on the platform, and continued so until she was injured, an instruction that if the defendant's train was overcrowded, and plaintiff could not obtain the accommodations to which she was entitled, she had a right to refuse to ride upon such train, and if she elected to ride on the train, and voluntarily assumed an obviously hazardous position thereon, it was her duty to protect herself from being thrown to the floor by any lurch no more violent than the necessary lurching incident to a rapidly moving train operated with due care, was properly refused, as tending to confuse the jury. *Southern R. Co. v. Hayes*, 194 Ala. 194, 69 So. 641.

In an action by a passenger for injuries received when she was thrown to the floor of a car platform by the lurching of the train, a charge that necessity alone could warrant the plaintiff at the time in question in taking up her position upon the platform, if the train was rapidly moving at the time, and said platform was an obviously unsafe place to ride, was properly refused, as tending to mislead the jury, because an apparent necessity for so riding would have excused the plaintiff, as would necessity itself. *Southern R. Co. v. Hayes*, 194 Ala. 194, 69 So. 641.

A charge that, if plaintiff found the seats in the day coach occupied by other passengers and could not obtain accommodations there, then she had a right to take a seat in the dining car, if such car was a safe place, and safer than the platform, was properly refused, as having a tendency to mislead the jury into the belief that it was plaintiff's duty to

seek the dining car, instead of standing on the platform. *Southern R. Co. v. Hayes*, 194 Ala. 194, 69 So. 641.

§ 231 (2) Awaiting and Seeking Transportation.

In General.—*Louisville, etc., R. Co. v. Glasgow*, 179 Ala. 251, 60 So. 103. See the title CARRIERS, § 231 (2), vol. 2, p. 810.

§ 231 (5) Alighting from Moving Conveyance.

In General.—*Tannehill v. Birmingham R., etc., Co.*, 177 Ala. 297, 58 So. 198; *Southern R. Co. v. Morgan*, 178 Ala. 590, 59 So. 432; *Birmingham R., etc., Co. v. Lide*, 177 Ala. 400, 58 So. 990. *Louisville, etc., R. Co. v. Dilburn*, 178 Ala. 600, 59 So. 438, cited in notes in *L. R. A.* 1915C, 182, 186. See the title CARRIERS, § 231 (5), vol. 2, p. 811.

(F) EJECTION OF PASSENGERS AND INTRUDERS.

§ 231½. Rights of Carrier in General.

Segregation of Races.—Code 1907, § 5487, provides that all railroads carrying passengers in the state, shall provide equal but separate accommodations for white and colored races by providing separate cars or by partitions securing separate accommodations; section 5488, authorizes and requires the conductor of each passenger train to assign each passenger to the car or the division of the car designated for his race, and providing that if any passenger refuses to take the place assigned the conductor may refuse to carry him, and that for such refusal neither the conductor nor the carrier shall be liable in damages, and excepting passengers entering the state under transportation contracts made in another state; and section 7684, provides that any person who, in violation of the provisions for equal and separate accommodations for the white and negro races, rides or attempts to ride in a coach or partition designated for the other race must on conviction, be fined not more than \$100. Under such provisions there is no exception in favor of prisoners, and a white sheriff with a negro prisoner, and responsible for his safe-keeping, and, under Code 1907, § 6858 et

seq., criminally liable for permitting him to escape, although having two regular tickets, was not entitled to have the prisoner ride with him in the compartment for white passengers, and, on his refusal to go with his prisoner into the compartment for negro passengers or to send the prisoner there and remain in the compartment for white passengers if he chose, the conductor was authorized and required to eject him, and, where that was done without violence or indignity, the carrier was not liable to the sheriff in damages. *Mobile, etc., R. Co. v. Spenny*, 12 Ala. App. 375, 67 So. 740, cited in notes in L. R. A. 1916E, 281, certiorari denied in *Spenny v. Mobile, etc., R. Co.*, 192 Ala. 483, 68 So. 870.

§ 233. Failure to Procure Ticket or Pay Fare.

§ 234. — In General.

Where fare demanded by carrier was that fixed and filed under Code 1907, §§ 5521, 5523, 5667, and §§ 5527, 5531, as amended by Acts 1909, p. 210, a passenger can not maintain action at common law on ground that rate's are unreasonable; the remedy being through the Railroad Commission. *Adams v. Central, etc., R. Co. (Ala.)*, 73 So. 650.

§ 235. — Defective or Invalid Tickets.

Where an initial carrier sold plaintiff a ticket over a prohibited route, and it was refused by a connecting carrier, and plaintiff was ejected, his right of action was against the initial carrier for selling the invalid ticket and not for ejection. *Seaboard, etc., R. Co. v. Patrick*, 10 Ala. App. 341, 65 So. 437.

§ 237. — Tender or Payment of Fare to Avoid Ejection.

A conductor may eject a passenger who refuses to pay his fare, except in exchange for a transfer, as the right to a transfer does not exist until the fare is paid. *Willoughby v. Birmingham R., etc., Co.*, 11 Ala. App. 611, 66 So. 887.

A conductor accepting a pass from a person not entitled to it is under Code 1907, § 7691, bound to withdraw such acceptance as soon as he knows the fact, and there could be no question of estoppel, but he should not eject until he has given the passenger a chance to pay fare.

Louisville, etc., R. Co. v. Dawson, 11 Ala. App. 621, 66 So. 905, cited in notes in Ann. Cas. 1915D, 560, 561.

Conceding that a conductor had the power to withdraw in transit a free pass lawfully issued, the passenger could not be ejected before an opportunity had been given him to pay his fare. *Louisville, etc., R. Co. v. Dawson*, 11 Ala. App. 621, 66 So. 905.

§ 251. Actions for Wrongful Ejection.

§ 253. — Pleading.

§ 253 (1) Declaration, Complaint, or Petition.

In General.—*Birmingham R., etc., Co. v. Tate*, 7 Ala. App. 517, 61 So. 32. See the title CARRIERS, § 253 (1), vol. 2, p. 818.

Plaintiff, in an action against a street railway for wrongful ejection from its cars, need not allege that he boarded the car at the proper time and place to make his transfer good, under defendant's rule or custom as to the time and place of acceptance. *Birmingham R., etc., Co. v. Smith*, 14 Ala. App. 264, 69 So. 910.

Ejection from Station.—*Louisville, etc., R. Co. v. Kay*, 8 Ala. App. 562, 62 So. 1014. See the title CARRIERS, § 253 (1), vol. 2, p. 818.

Conditions of Transfer.—Plaintiff, in an action against a street railway for wrongful ejection from its cars, may rest his case upon the obligation of the company to transport him on a transfer given, and need not depend upon the conditions of the transfer. *Birmingham R., etc., Co. v. Smith*, 14 Ala. App. 264, 69 So. 910.

Matter of Defense.—That plaintiff boarded the car of defendant at a place or time which made his transfer, stipulating the time and place for use, invalid, is a matter of defense, the truth of which the plaintiff need not deny in his petition. *Birmingham R., etc., Co. v. Smith*, 14 Ala. App. 264, 69 So. 910.

Complaints Held Sufficient.—In an action against a railroad company, a complaint alleging that plaintiff purchased and had in his possession a ticket over defendant's road, that, when the ticket was demanded by the conductor, he had misplaced it, and that the conductor,

though informed of this fact, ejected him, without allowing him a reasonable time to find the ticket, was not demurrable as failing to show that the ejection was wrongful or unlawful. *Louisville, etc., R. Co. v. Mason*, 10 Ala. App. 263, 64 So. 154.

Where a complaint against a carrier for putting plaintiff off at the wrong station alleged that he purchased transportation from Johns to Birmingham and was put off at Bessemer, it necessarily appeared that Bessemer was an intermediate point, and the complaint was not demurrable for failure to allege such fact in terms. *Louisville, etc., R. Co. v. Grimes*, 184 Ala. 413, 63 So. 554.

A count of a complaint, showing the relation of passenger and carrier between plaintiff and defendant and defendant's duty to safely carry the plaintiff, and averring that while plaintiff was on the train at a point near defendant's station the conductor, servant, or agent of defendant in charge of the train ejected plaintiff therefrom, sufficiently showed defendant's liability for the acts of its servant or agent. *Louisville, etc., R. Co. v. Laney*, 14 Ala. App. 287, 69 So. 993.

§ 253 (2) Plea or Answer.

In an action for wrongful ejection of a passenger riding on a pass, a defense that the pass rejected was a free one which the conductor withdrew could be availed of only by special plea confessing the pass and setting up the withdrawal to avoid it. *Louisville, etc., R. Co. v. Dawson*, 11 Ala. App. 621, 66 So. 905.

Whether an action against a street railway for wrongful ejection of plaintiff from its cars be *ex contractu* or *ex delicto*, defendant must plead as defensive matter the conditions of the transfer presented by the plaintiff, making it invalid at the time presented. *Birmingham R., etc., Co. v. Smith*, 14 Ala. App. 264, 69 So. 910.

§ 253 (4) Issues, Proof and Variance.

Variance—Moving Train.—*Louisville, etc., R. Co. v. Penick*, 8 Ala. App. 558, 62 So. 965. See the title CARRIERS, § 253 (4), vol. 2, p. 822.

§ 254. — Evidence.

§ 254 (1) Presumptions and Burden of Proof.

In an action against a street railway for wrongful ejection of the plaintiff, whose transfer was refused, it is to be presumed that the transfer was valid until the contrary appears. *Birmingham R., etc., Co. v. Smith*, 14 Ala. App. 264, 69 So. 910.

§ 254 (2) Admissibility in General.

Where, in an action by a passenger for being required to leave the train before reaching his destination, there was no allegation of wantonness in the complaint, evidence that the train was an accommodation train very much crowded, and that passengers along the route were notified that a stop would be made at the place plaintiff was required to alight, and that the train would then double back to S. and get the passengers who could not be accommodated, etc., was inadmissible. *Louisville, etc., R. Co. v. Grimes*, 184 Ala. 413, 63 So. 554.

Order of Railroad Commission.—In a passenger's action for injuries in being ejected from defendant's waiting room, an order of the state Railroad Commission requiring the station to be open one hour before the arrival of trains was properly admitted as establishing the reasonableness of the time during which defendant must keep its waiting room open. *Widener v. Alabama, etc., R. Co.*, 194 Ala. 115, 69 So. 558.

Contents of Transfer.—It is error to exclude evidence of the contents of a transfer presented by plaintiff, and upon refusal to honor which he was ejected from the defendant's cars. *Birmingham R., etc., Co. v. Smith*, 14 Ala. App. 264, 69 So. 910.

Alighting at Wrong Destination—Incumbrances.—In an action against a carrier for causing plaintiff to alight at the wrong destination on a cold, rainy, night, evidence that plaintiff had a child in his arms when he got off the train was admissible, though no wantonness or willful wrong was charged, as a circumstance bearing on how plaintiff should have conducted himself after alighting and whether he should have sought shel-

ter at the place where he alighted instead of going to destination by trolley. *Louisville, etc., R. Co. v. Grimes*, 184 Ala. 413, 63 So. 554.

Same—Being in Rain after Leaving Train.—In an action against a carrier for causing plaintiff to leave the train before reaching his destination, it having been proved that defendant's waiting room was not lighted or comfortable and that it was raining, evidence that plaintiff had to be in the rain after leaving the train was admissible as bearing on the issue whether plaintiff should have remained in the depot or sought shelter by going through the rain to more comfortable quarters or for the purpose of taking a trolley to his destination. *Louisville, etc., R. Co. v. Grimes*, 184 Ala. 413, 63 So. 554.

Same—Children Getting Wet.—Where plaintiff and certain children were traveling together at the time he was compelled to alight short of his destination in the rain, evidence that the children got wet tended to show that plaintiff got wet and was therefore not irrelevant. *Louisville, etc., R. Co. v. Grimes*, 184 Ala. 413, 63 So. 554.

§ 254 (3) Weight and Sufficiency.

Evidence held sufficient to warrant passenger's recovery for ejection from defendant's railway train for nonpayment of additional fare demanded where no ticket was purchased. *Louisville, etc., R. Co. v. Boggs (Ala.)*, 74 So. 337.

§ 255. — Damages.

§ 255 (1) Elements in General.

A railroad breaching its contract to safely and properly carry plaintiff as a passenger, and to protect him from violence, etc., was liable in at least nominal damages, and, in addition thereto, to all actual damages directly consequent on the breach, including damages for personal injury, indignity suffered from abuse and insults from its agents or servants, mental and physical pain and anguish, resulting from such breach, as well as all the necessary expense incident to plaintiff's reaching his destination. *Louisville, etc., R. Co. v. Laney*, 14 Ala. App. 287, 69 So. 993.

Cost of Meals.—In an action for

wrongful ejection of a passenger, the price paid by plaintiff for a meal for another is not an element of damage, nor is the price paid for a meal for himself an element of damage except to the extent that the cost exceeded what plaintiff would have had to pay if permitted to ride. *Louisville, etc., R. Co. v. Dawson*, 11 Ala. App. 621, 66 So. 905.

Attorney's fees may not be recovered as special damages in an action for wrongful ejection of a passenger. *Kimbrell v. Louisville, etc., R. Co.*, 191 Ala. 392, 67 So. 586.

§ 255 (4) Exemplary Damages.

In General.—*Louisville, etc., R. Co. v. Kay*, 8 Ala. App. 562, 62 So. 1014. See the title CARRIERS, § 255 (4), vol. 2, p. 825.

Punitive Damages Properly Allowed.—Where a passenger had a ticket, and informed the conductor that he had one, but that he had misplaced it, and was endeavoring to produce it, and the conductor, in wanton, willful, or knowing disregard of the passenger's right to a reasonable time within which to find the ticket, immediately stopped the train, and ejected the passenger, the jury was warranted in inflicting punitive damages, though the ejection was not accompanied by any insulting language or rough handling of the passenger's person, since a wrongful ejection, though the action be for a breach of the contract, incidently involves a trespass *vi et armis*, and the passenger, by yielding to slight force, does not escape the indignity resulting from the assault, the unjust imputation on his character, the humiliation, or the physical inconvenience in getting to his destination. *Louisville, etc., R. Co. v. Mason*, 10 Ala. App. 263, 64 So. 154, cited in note in *L. R. A.* 1916D, 1189.

§ 255 (5) Inadequate or Excessive Damages.

Where passenger refused to pay 15 cents additional fare demanded and told conductor he would have to forcibly put the passenger off, and that he would make a test case of it, and was evidently laying the foundation for a lawsuit, plaintiff was not damaged to amount of \$250 by his humiliation; where he suf-

ferred no actual injury beyond having to walk a mile and to wait a half hour for another train. *Louisville, etc., R. Co. v. Boggs* (Ala.), 74 So. 337.

In action for damages resulting from conductor's insistence that passenger get off upon his refusal to pay additional fare demanded, where no ticket had been purchased, compelling plaintiff to walk a mile and wait a half hour for another train, from which he suffered no harmful consequences, a verdict of \$250 will be reduced to \$25. *Louisville, etc., R. Co. v. Boggs* (Ala.), 74 So. 337.

§ 256. — Questions for Jury.

In an action for wrongful ejection from a train, defendant is entitled to an affirmative charge as to counts based on the fact that plaintiff has paid his fare, where the evidence showed that he rode on a pass. *Louisville, etc., R. Co. v. Dawson*, 11 Ala. App. 621, 66 So. 905.

In an action for the ejection of a passenger for failure to pay the fare demanded, where the defendant's evidence failed to show affirmatively that the fare demanded was that fixed by the schedule of rates duly published and in force at the time plaintiff was ejected, it was error to give the general affirmative charge for defendant. *Adams v. Central, etc., R. Co.* (Ala.), 73 So. 650.

Whether or not a person is a passenger is generally a question for the jury, and always so when different inferences may be drawn from the testimony. *Widener v. Alabama, etc., R. Co.*, 194 Ala. 115, 69 So. 558.

Awaiting Transportation — Reasonable Time.—*Louisville, etc., R. Co. v. Kay*, 8 Ala. App. 562, 62 So. 1014. See the title CARRIERS, § 256, vol. 2, p. 825.

§ 257. — Instructions.

Damages.—*Louisville, etc., R. Co. v. Penick*, 8 Ala. App. 558, 62 So. 965. See the title CARRIERS, § 257 (4) vol. 2, p. 827.

§ 257½. Verdict and Findings.

Several Issues—Effect of Determination of One.—The rule that a verdict for defendant under a simple negligence count does not acquit defendant of willful or wanton misconduct charged in an-

other count has no application, where one count in the complaint counted on the wrongful ejection of a passenger, and the other charged the same cause of action, with the addition of the words "willful" and "wanton," as such words added nothing to the cause of action in either count. *Kimbrell v. Louisville, etc., R. Co.*, 191 Ala. 392, 67 So. 586.

(G) PASSENGERS' EFFECTS.

§ 259. Articles Constituting Personal Baggage.

Question what constitutes baggage depends much on circumstances of each case, conveniences required for journey, duration of absence, and position of parties. *Louisville, etc., R. Co. v. Hestle* (Ala.), 75 So. 885.

Thimble was appropriate article to be carried by plaintiff, mother of small children, on visit to her mother in country, and so was "baggage." *Louisville, etc., R. Co. v. Hestle* (Ala.), 75 So. 885.

An article for use in housekeeping after the end of a passenger's journey is not baggage. *Louisville, etc., R. Co. v. Fletcher*, 194 Ala. 257, 69 So. 634.

Quilts, feather pillows, bedticking, pillow cases, and sheets in a passenger's trunk, intended for use "in and about his housekeeping when he reached his home," were not baggage, and the common carrier was not liable for their loss. *Central, etc., R. Co. v. Courson*, 10 Ala. App. 581, 65 So. 698.

§ 259½. Extra Baggage and Special Contracts.

A carrier's undertaking to carry hunting dogs checked by a hunting party is separable from the undertaking to carry the party. *Louisville, etc., R. Co. v. Dickson* (Ala. App.), 73 So. 750, certiorari denied in 74 So. 1005.

§ 262. Loss or Injury.

§ 263. — Baggage in General.

Necessity that Passenger Accompany Baggage.—It is not essential to the relation of carrier and passenger, so as to render the carrier liable for loss of baggage checked, that the passenger should accompany the baggage. *Alabama, etc., R. Co. v. Knox*, 184 Ala. 485, 63 So. 538,

49 L. R. A., N. S., 411; cited in note in L. R. A. 1915E, 283.

Trunk Lost or Stolen. — Southern R. Co. v. Foster, 7 Ala. App. 487, 60 So. 993. See the title CARRIERS, § 263, vol. 2, p. 828.

Purchase of Tickets by Joint Owner of Dogs.—Where a railroad sold, to one of two joint owners of hunting dogs authorizing to act for the other, tickets for the transportation of the party and their dogs, it was liable to both owners for loss or injury of such dogs. Louisville, etc., R. Co. v. Dickson (Ala. App.), 73 So. 750, certiorari denied in 74 So. 1005.

In an action against a railroad by the joint owners of hunting dogs for their death by poisoning when checked, it was no defense that one of the owners was absent when the tickets were purchased by the other owner, and that the absent owner was therefore not a party to the contract since the purchasing owner acted for the other owner. Louisville, etc., R. Co. v. Dickson (Ala. App.), 73 So. 750, certiorari denied in 74 So. 1005.

§ 263½. — Merchandise Other than Personal Baggage.

A carrier's liability does not extend to things in a trunk which are not baggage. Central, etc., R. Co. v. Courson, 10 Ala. App. 581, 65 So. 698.

§ 264½. — Property under Control of Passenger.

Where baggage retained in the passenger's custody is lost through the carrier's negligence or fault, the carrier is liable, not as common carrier, but as ordinary bailee for hire. Louisville, etc., R. Co. v. Dickson (Ala. App.), 73 So. 750, certiorari denied in 74 So. 1005.

The owner of baggage, not delivering it to the carrier, but retaining it in his possession can not hold the carrier for its loss, unless occurring through carrier's fault or negligence, in which event the carrier is liable, not as a common carrier, but as an ordinary bailee for hire. Louisville, etc., R. Co. v. Dickson (Ala. App.), 73 So. 750, certiorari denied in 74 So. 1005.

§ 266. Carrier as Warehouseman.

Consignee of freight is allowed rea-

sonable time to remove goods after arrival, and, until such opportunity, liability of road as carrier continues, but thereafter it is responsible only as warehouseman or keeper for hire. Louisville, etc., R. Co. v. Hestle (Ala.), 75 So. 885.

Where a railroad received a trunk to be transported as baggage, which it promptly did, its agent at destination taking charge of the trunk on arrival at 1 p. m., and being immediately ready, willing, and anxious to deliver to the passenger, who had arrived on the same train, and the agent remained at the station until 5 a. m., continuing ready, willing, and anxious to deliver to the passenger, who did not call for the trunk, so that the agent, at 5 a. m., the usual hour of closing, placed the trunk in the railroad's warehouse, carefully and securely locking it up, the liability of the road as an insurer for the safety of the trunk ended. Louisville, etc., R. Co. v. Hestle (Ala.), 75 So. 885.

Construction of Statute. — Gen. Acts 1915, p. 710, dealing with excess baggage and charges therefor, § 4, fixing time within which no storage shall be charged by carrier, did not fix time within which road's liability for baggage as carrier shall continue. Louisville, etc., R. Co. v. Hestle (Ala.), 75 So. 885.

§ 268. Connecting Carriers.

Notice to Initial Carrier.—Southern R. Co. v. Foster, 7 Ala. App. 487, 60 So. 993. See the title CARRIERS, § 266, vol. 2, p. 829.

§ 269. Actions.

§ 269 (1) Rights of Action.

Where plaintiff, when he took certain household goods to a depot to be transported as freight, also took two trunks to the depot and informed the agent that they were to be carried as baggage, but, before he returned to the depot later to obtain his ticket and have the trunks checked, they were sent forward by freight, and were never delivered, plaintiff could sue for the breach of duty arising, by operation of law, out of the carrier's dealing with the trunks as freight, or in trover on the carrier's exercise of dominion over his property in de-

fiance of his right to have it carried as baggage or not at all. *Southern R. Co. v. Brown*, 192 Ala. 389, 68 So. 321.

§ 269 (2) Pleading.

Plea Held Demurrable.—In an action against a railroad for failure to deliver a trunk and contents, when a plea sought to limit the amount of recovery to the sum of \$100 by virtue of a notice printed on the back of the baggage check delivered by the road to plaintiff, but showed no special contract in consideration of reduced charges or special concessions, and did not negative the unreasonableness of the limitation, plaintiff's demurrer thereto was properly sustained. *Louisville, etc., R. Co. v. Hestle (Ala.)*, 75 So. 885.

Replication.—If there were any peculiar circumstances excusing plaintiff passenger, suing road for loss of trunk, for failure to call for it at destination within time shown in road's plea, they should have been presented by replication. *Louisville, etc., R. Co. v. Hestle (Ala.)*, 75 So. 885.

§ 269 (3) Evidence.

Presumption and Burden of Proof — Loss after Receipt.—*Southern R. Co. v. Foster*, 7 Ala. App. 487, 60 So. 993. See the title CARRIERS, § 269 (3), vol. 2, p. 830.

Admissibility — Deviation. — *Southern R. Co. v. Foster*, 7 Ala. App. 487, 60 So. 993. See the title CARRIERS, § 269 (3), vol. 2, p. 831.

§ 269 (4) Damages.

Where baggage of a passenger is lost as the result of mere negligence of the carrier, the only damage recoverable is the pecuniary loss at the time of nondelivery, or any time subsequent thereto, with interest, in the absence of any evidence authorizing a recovery for inconvenience, worry, or annoyance. *Louisville, etc., R. Co. v. Fletcher*, 194 Ala. 257, 69 So. 634.

The expense and loss of time incurred by a passenger in making a trip to see about his lost baggage, to identify, to gather up and inspect it, or to investigate the damage done, or the cause of nondelivery, are not recoverable from the carrier, guilty of negligence causing the loss

of the baggage, for they are not the proximate or natural consequence of the carrier's breach of contract for delivery of the baggage. *Louisville, etc., R. Co. v. Fletcher*, 194 Ala. 257, 69 So. 634.

§ 269 (5) Questions for Jury.

In action against road for failure to deliver trunk, question whether trunk ever reached station to which it was checked, held for jury. *Louisville, etc., R. Co. v. Hestle (Ala.)*, 75 So. 885.

§ 269 (6) Instructions.

In an action for death by poisoning of hunting dogs checked with carrier, an instruction for defendant in case servants of plaintiff were left in charge, with instructions to look after the dogs after their delivery to the carriers, was properly refused, as relieving the carrier from duty notwithstanding its servants were negligent in respect to the protection of its custody. *Louisville, etc., R. Co. v. Dickson (Ala. App.)*, 73 So. 750.

(H) PALACE CARS AND SLEEPING CARS.

§ 272. Contracts for Accommodations.

Where plaintiff, who reserved Pullman accommodations, took passage in reliance thereon and incurred expenses, defendant can not escape liability because its agent did not understand the legal effect of the reservation. *Pullman Co. v. Meyer*, 195 Ala. 397, 70 So. 763.

§ 275. Companies and Persons Liable.

Where plaintiff, a passenger, delivered his ticket to the conductor on the sleeping car, and the conductor failed to return it to him, but gave it to some other passenger, the defendant was responsible for the conductor's act. *Louisville, etc., R. Co. v. Laney*, 14 Ala. App. 287, 69 So. 993.

§ 276. Actions for Breach of Contract.

Admissibility of Evidence.—Where the question of the authority of the persons through whom Pullman reservations were made was for the jury, evidence that facts showing special injuries for failure to furnish accommodations were communicated to such persons is admis-

sible. *Pullman Co. v. Meyer*, 195 Ala. 397, 70 So. 763.

In an action for failure to furnish Pullman accommodations, evidence of the happenings at the place where the accommodations were to be furnished held admissible. *Pullman Co. v. Meyer*, 195 Ala. 397, 70 So. 763.

Sufficiency of Evidence.—In an action against defendant for failure to furnish reserved Pullman accommodations, evidence held to warrant a finding that the failure caused a relapse upon the part of plaintiff's neurasthenic wife. *Pullman Co. v. Meyer*, 195 Ala. 397, 70 So. 763.

Question for Jury.—In an action for defendant's failure to furnish reserved

Pullman accommodations, the question whether those agents of the railroad company through whom plaintiff contracted were authorized to make the sales held for the jury. *Pullman Co. v. Meyer*, 195 Ala. 397, 70 So. 763.

Damages.—Where defendant failed to furnish Pullman accommodations reserved, and such failure resulted in a relapse of plaintiff's neurasthenic wife, who at the time was being taken to a coast resort for convalescence, an award of \$1,000 was not excessive, where the woman's recovery was much retarded. *Pullman Co. v. Meyer*, 195 Ala. 397, 70 So. 763.

Carrying Arms.

See post, WEAPONS.

Case Certified.

See ante, APPEAL AND ERROR.

Casualty Insurance.

See post, INSURANCE.

CEMETERIES.

§ 4. Title and Rights of Owners of Lots in General.

§ 4½. Right of Burial.

Cross References.

See the title CEMETERIES, vol. 3, p. 1, and references there given.

In addition, see post, DEAD BODIES; DEDICATION; NUISANCES.

§ 4. Title and Rights of Owners of Lots in General.

Title—Character of Right of Burial.—

A formal deed to a cemetery lot is not needed to confer an exclusive right to use such lot for burial purposes, which may be acquired by adverse possession for the statutory period since a purchaser gets only a license to bury, and does not acquire title to the soil even though an absolute deed is given. *Union Cemetery Co. v. Alexander*, 14 Ala. App. 217, 69 So. 251.

Mortgage.—Mortgage of one's lot in public cemetery may not be declared or enforced. *Kerlin v. Ramage* (Ala.), 76 So. 360.

§ 4½. Right of Burial.

See ante, "Title and Rights of Owners of Lots in General," § 4.

Denial of Right.—Cemetery association which, after plaintiff opened grave for grandchild in lot of which she had rightful possession, prevented her from using such grave, delaying funeral, causing plaintiff mental anguish, and forcing her to open grave in other lot, was liable to plaintiff. *Union Cemetery Co. v. Alexander*, 14 Ala. App. 217, 69 So. 251.

Action for Denial—Case for Jury.—In trespass by a lot owner against a cemetery for its refusal to allow plaintiff to bury her grandchild in a grave she had opened on her lot, the case held for the jury under the evidence. *Union Cemetery*

Co. v. Alexander, 14 Ala. App. 217, 69 So. 251.

Punitive Damages.—Where plaintiff, rightfully in possession of a lot in defendant cemetery, had caused a grave to be opened thereon to bury her grandchild, and defendant wrongfully prevented her from using the lot for the burial, thus delaying the funeral ceremony, and humiliating and embarrassing plaintiff, and causing her to suffer great mental distress, forcing her to have another grave opened on another lot, plaintiff was entitled to recover punitive damages. *Union Cemetery Co. v. Alexander*, 14 Ala. App. 217, 69 So. 251.

Same—Sufficiency of Evidence.—In an action against a cemetery for refusing to allow plaintiff to bury her grandchild in a lot of which she had exclusive possession, and in which she had opened a grave, evidence held sufficient to justify an award of punitive damages and damages for mental anguish. *Union Cemetery Co. v. Alexander*, 14 Ala. App. 217, 69 So. 251.

Nonexcessive Verdict.—Where defendant cemetery refused to permit plaintiff to bury her grandchild in a grave which she had opened in a lot of which she had exclusive possession, delaying the funeral, causing the plaintiff to suffer mental anguish, and forcing her to open another grave in another lot, a verdict for \$400 was not excessive. *Union Cemetery Co. v. Alexander*, 14 Ala. App. 217, 69 So. 251.

Certificate of Acknowledgment.

See ante, ACKNOWLEDGMENTS.

Certificate of Stock.

See post, CORPORATIONS.

Certified Copies.

See post, EVIDENCE.

CERTIORARI.

I. Nature and Grounds.

- § 1. Nature and Scope of Remedy in General.
- § 2. Existence of Other Remedy in General.
- § 5. Discretion as to Grant of Writ.
- § 6. Decisions and Proceedings of Courts, Judges, and Judicial Officers.
- § 9. — Courts and Other Tribunals Subject to Review.
- § 15. Grounds in General.
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- § 17. Errors and Irregularities.

II. Proceedings and Determination.

- § 20. Jurisdiction.
- § 21. Presentation of Objections and Exceptions in Original Proceeding.
- § 23. Time of Taking Proceedings.
- § 24. Petition or Other Application.
- § 30. Return and Record.
- § 32. Quashing or Dismissal.
- § 34. Review.
- § 35. — Scope and Extent in General.
- § 36. — Mode of Review and Trial De Novo.
- § 38. — Questions of Fact.
- § 40. Appeal or Other Proceedings for Review.

Cross References.

See the title CERTIORARI, vol. 3, p. 4, and references there given.
In addition, see post, CRIMINAL LAW.

I. NATURE AND GROUNDS.

§ 1. Nature and Scope of Remedy in General.

Functions of Common-Law Certiorari.
—Cook v. Court of County Comm'rs, 178 Ala. 394, 59 So. 483. See the title CERTIORARI, § 1, vol. 3, p. 5.

§ 2. Existence of Other Remedy in General.

The writ of common-law certiorari will not lie if an appeal or writ of error will do the same service. Wright v. Court County Comm'rs, 180 Ala. 534, 61 So. 918.

§ 5. Discretion as to Grant of Writ.

Common-Law Certiorari. — Wright v. Court County Comm'rs, 180 Ala. 534, 61 So. 918. See the title CERTIORARI, § 5, vol. 3, p. 8.

§ 6. Decisions and Proceedings of Courts, Judges, and Judicial Officers.

§ 9. — Courts and Other Tribunals Subject to Review.

Though Code 1907, § 5430, subd. 3, makes statutory certiorari applicable only to civil judgment of a justice of peace, it extends to the court of common pleas of Birmingham in view of Loc. Laws 1911, p. 375, § 10, making the law applicable in appeals and certiorari to justices of the peace applicable to court of common pleas of Birmingham. Steading v. Wheeler (Ala.), 78 So. 962.

§ 15. Grounds in General.

A judgment of an inferior court, being void, was properly quashed on petition for common-law certiorari. Finney v. Baker (Ala.), 78 So. 875.

§ 16. Want or Excess of Jurisdiction.

Absence of Power to Make Order. — Where board of revenue of a county or courts of county commissioners have no power to make an order, a party complaining has adequate remedy by common-law certiorari but the chancery court has no jurisdiction. *Board v. Merrill*, 193 Ala. 521, 68 So. 971.

Review by Supreme Court of Judgment of Appellate Court.—Although in ordinary cases an appellee should have sought a review by the supreme court of the overruling of a motion in the court of appeals to dismiss the appeal, the supreme court will consider such matter on certiorari by the appellant to review the subsequent judgment in the appellate court, where it goes to the jurisdiction of such court, and the revision by the supreme court of a void judgment. *Birmingham v. Collins* (Ala.), 78 So. 385.

County Commissioners Acting under Unconstitutional Statute.—Where county commissioners passed certain orders intended to initiate work of cattle tick eradication in the county under an unconstitutional statute, certiorari was a proper remedy to review and vacate the same. *Ferguson v. Commissioners' Court*, 187 Ala. 645, 65 So. 1028.

Appearing of Record. — *Endowment Department v. Harvey*, 6 Ala. App. 239, 60 So. 602. See the title CERTIORARI, § 16, vol. 3, p. 12.

Technical Error in Entering Judgment by Default.—*Endowment Department v. Harvey*, 6 Ala. App. 239, 60 So. 602. See the title CERTIORARI, § 17, vol. 3, p. 13.

Absence of Process. — Although the petition shows that the judgment was rendered without service, and therefore coram non iudice, statutory certiorari was available to review the judgment (following *Roddam v. Brown* [Ala.], 77 So. 403). *Steading v. Wheeler* (Ala.), 78 So. 962.

§ 17. Errors and Irregularities.

Common-law certiorari will not lie to correct a judgment which is not void. *Kenedy v. Miller Mill Co.* (Ala. App.), 75 So. 191.

Order of Probate Court Ordering Resale.—An interlocutory order of the probate court setting aside a sale of real estate and ordering a resale is reviewable under Code 1907, § 4867, on certiorari with a bill of exceptions. *Reed v. Hughes*, 192 Ala. 162, 68 So. 334.

Jurisdiction Not Affected.—*Wright v. Court County Comm'rs*, 180 Ala. 534, 61 So. 918. See the title CERTIORARI, § 17, vol. 2, p. 13.

Jurisdiction of Inferior Tribunal Shown by Transcript.—*Cook v. Court County Comm'rs*, 178 Ala. 394, 59 So. 483. See the title CERTIORARI, § 17, vol. 3, p. 13.

Judgment Entry Not Showing Ascertainment of Facts.—Code 1907, §§ 3306, 3312, 5881, give courts of county commissioners complete authority over stock law elections, and provide for the requisites of the petition, and require that the court shall inquire whether the petition contains one-fourth of the freeholders of the beat and shall indorse entries thereon and spread on their minutes their findings, and if they are in the affirmative shall order the election. Held, that an election properly had pursuant to such statute could not be quashed on common-law certiorari because the judgment entry did not affirmatively show that the court ascertained the facts stated in the petition, or that it was signed by the requisite number of qualified persons. *Wright v. Court County Comm'rs*, 180 Ala. 534, 61 So. 918.

II. PROCEEDINGS AND DETERMINATION.

§ 20. Jurisdiction.

Under Code, § 5430, prescribing authority of judge of probate, such judge has authority to issue only statutory writ of certiorari, not a common-law certiorari. *Straughn v. Brake*, 197 Ala. 683, 73 So. 371.

On certiorari to review a proceeding of the Public Service Commission where the court has not before it the evidence or facts upon which the commission proceeded, its inquiry is limited to whether the commission had jurisdiction and the regularity of such proceeding, as it can only answer the questions raised on the

face of the record. *Ex parte Birmingham* (Ala.), 74 So. 51.

§ 21. Presentation of Objections and Exceptions in Original Proceeding.

To grant writ of certiorari on a point or for reasons not presented to court of appeals, when petition for writ urged only grounds presented to such court, is in direct violation of rule 42 (175 Ala. xx), providing for hearing on certiorari only on matters for which rehearing in court of appeals has been refused. *Ex parte Strawbridge* (Ala.), 77 So. 356.

§ 22. Time of Taking Proceedings.

To Quash Void Judgment.—Since a void judgment will not support an appeal, certiorari to quash such judgment rendered by an inferior court or justice of the peace will lie during the period in which an appeal may in a proper case be taken and effected and a trial de novo had in circuit court. *Finney v. Baker* (Ala.), 78 So. 875.

Rule of Court.—A petition for certiorari not filed within 15 days of the overruling of petitioner's application for rehearing in the court of appeals as required by court rule 42 (175 Ala. xx) will be dismissed. *Ex parte Mobile Light, etc., Co.* (Ala.), 75 So. 940.

Final Writ.—Where the fiat of the probate judge on statutory certiorari to the court of common pleas was issued within six months of the rendition of the judgment, it was immaterial that the writ as finally issued by the circuit clerk was more than six months after the judgment. *Steading v. Wheeler* (Ala.), 78 So. 962.

Statutory Limitations.—Acts 1915, p. 606, as to furnishing certified copy of the opinions of the court of appeals and giving notice within five days after the rendition of the decision to the attorneys, has no effect upon rule 42 (175 Ala. xx), as to time for making applications for certiorari to review judgment of the court of appeals. *Ex parte Mobile Light, etc., Co.* (Ala.), 75 So. 940.

§ 24. Petition or Other Application.

While good pleading requires that petition for statutory certiorari name the judge or division of the court rendering

the judgment sought to be reviewed, failure to do so does not invalidate an otherwise sufficient petition. *Steading v. Wheeler* (Ala.), 78 So. 962.

Where the record on statutory certiorari showed that it was to review judgment of the court of common pleas of Birmingham, failure to name the judge did not defeat the writ, since under *Loc. Laws* 1911, p. 372, the court of common pleas of Birmingham is a single court, although composed of two judges. *Steading v. Wheeler* (Ala.), 78 So. 962.

Where supreme court was not informed of nature of suit, nor what were issues and evidence, and without such information it was impossible to know whether determination by the court of appeals as to refusal of charges was error, application for certiorari to review determination of court of appeals must be denied. *Ex parte Cox* (Ala.), 76 So. 911.

§ 30. Return and Record.

What Return of Writ Should Consist of in General.—*Cook v. Court County Comm'rs*, 178 Ala. 394, 59 So. 483. See the title CERTIORARI, § 30, vol. 3, p. 18.

Necessity of Showing Jurisdiction.—The court of county commissioners being a court of limited jurisdiction, its records, when assailed on certiorari, must affirmatively show jurisdiction. *Ferguson v. Commissioners' Court*, 187 Ala. 645, 65 So. 1028.

Conclusiveness and Effect.—*Cook v. Court County Comm'rs*, 178 Ala. 394, 59 So. 483. See the title CERTIORARI, § 30, vol. 3, p. 18.

Defects and Objections.—*Cook v. Court County Comm'rs*, 178 Ala. 394, 59 So. 483. See the title CERTIORARI, § 30, vol. 3, p. 18.

Amendment and Further Return.—*Cook v. Court County Comm'rs*, 178 Ala. 394, 59 So. 483. See the title CERTIORARI, § 30, vol. 3, p. 18.

§ 32. Quashing or Dismissal.

Want of Service.—*United States Health, etc., Ins. Co. v. Hill*, 9 Ala. App. 222, 62 So. 954. See the title CERTIORARI, § 32, vol. 3, p. 20.

§ 34. Review.

§ 35. — Scope and Extent in General.

On certiorari to review opinion of court of appeals in case of interpleader, the supreme court will not look beyond facts stated in affidavit of original defendant supporting its right to interplead, set out verbatim in opinion of the court of appeals. *Ex parte Bailey Grocery Co. (Ala.)*, 77 So. 373.

§ 36. — Mode of Review and Trial De Novo.

Where the allegations of the petition for common-law certiorari showed that the judgment complained of was merely erroneous, and not void, the writ issued may be treated as a statutory writ of certiorari, removing the case from the common pleas to the circuit court for trial de novo, so that it was error to quash the writ issued, and order a writ of procedendo to issue to the court of common pleas. *McCarty-Rawson Furniture Co. v. Armstrong (Ala. App.)*, 64 So. 168.

§ 38. — Questions of Fact.

In General.—On certiorari proceedings from court of appeals, the supreme court is limited to questions of law, and can not review findings of fact made by trial court or court of appeals. *Moragne v. State (Ala.)*, 77 So. 322.

The supervisory power of a superior over an inferior legal tribunal by common-law certiorari extends only to questions touching the jurisdiction of the subordinate tribunal or the regularity of its proceedings as shown upon the face of the record, and conclusions of fact can not be reviewed, unless specially authorized by statute. *Kirby v. Commissioners' Court*, 186 Ala. 611, 65 So. 163.

The supreme court will not issue certiorari to review the decision of the

court of appeals on the facts, or in the application of the law to the facts, but will only revise the holding of such court on a question of law. *Postal Tel. Cable Co. v. Minderhout*, 195 Ala. 420, 71 So. 91.

A writ of certiorari to review a decision of the court of appeals will be denied where only debatable question presented is one of fact. *Ex parte Addington (Ala.)*, 76 So. 6.

Findings of Fact by Court of Appeals.—*Ex parte Burnett*, 180 Ala. 540, 61 So. 920. See the title CERTIORARI, § 38, vol. 3, p. 22.

Findings of fact by the court of appeals are not reviewable by the supreme court on certiorari. *Ex parte Atlantic, etc., R. Co.*, 190 Ala. 132, 67 So. 256, reversing judgment *Atlantic, etc., R. Co. v. Jones*, 9 Ala. App. 499, 63 So. 693.

The intention to include, in an assignment of fees, unearned fees, the contract not expressly providing therefor, and the amount of fees earned and unearned, are questions of fact and not reviewable on appeal. *Ex parte Stewart*, 185 Ala. 216, 64 So. 36, modifying judgment *Stewart v. Sample*, 8 Ala. App. 663, 62 So. 338.

§ 40. Appeal or Other Proceedings for Review.

A motion to dismiss an appeal from a judgment for the petitioner in a common-law certiorari proceeding on the grounds that the appellant failed to comply with the law and the rules of court in reference to the preparation of briefs, that no exception was taken to the judgment and no bill of exceptions was filed, and that the record shows an appearance by the appellant which dispensed with service of notice of the granting of the certiorari, held not well taken. *Foster v. Thompson*, 10 Ala. App. 365, 65 So. 414.

Challenge.

See post, JURY.

CHAMPERTY AND MAINTENANCE.

- § 2. Champertous Contracts in General.
- § 3. Contracts and Transactions with Attorneys.
- § 4. Transfers of Claims for Purpose of Litigation.
- § 5. Grants of Land Held Adversely.
 - § 5 (1) Validity of Deed to Land Held Adversely in General.
 - § 5 (4) Persons Entitled to Make Objections.
 - § 5 (5) Operation and Effect.

Cross References.

See the title CHAMPERTY AND MAINTENANCE, vol. 3, p. 24, and references there given.

§ 2. Champertous Contracts in General.

Indemnity for Costs.—Whether an insured suing for himself and the insurer for damages for destruction of his property by fire, is indemnified by the insurer as to the costs of the litigation is immaterial to the person sued; the doctrine of maintenance not being applicable to such an indemnity contract. *Coffman v. Louisville, etc., R. Co.*, 184 Ala. 474, 63 So. 527, cited in note in L. R. A. 1916E, 73.

Transfer of Mortgage of Crop Claimed Adversely.—Where prior legal mortgagee of a cotton crop transferred to plaintiff, after claimant had bought the cotton in the hands of a warehouseman from the mortgagor, but where claimant was not in exclusive possession, plaintiff was not precluded from suing for possession in his own name. *Houston Nat. Bank v. Edmonson & Co. (Ala.)*, 75 So. 568.

§ 3. Contracts and Transactions with Attorneys.

Setting up Defense of Invalidity.—Where plaintiff, suing a railroad for personal injuries, recovered judgment, which was reversed, and, pending second trial, released the road, the contract of employment between plaintiff and his attorney being void, because champertous or otherwise against public policy, defendant road should have set up the defense in the attorney's continuance of plaintiff's original suit against it to enforce his attorney's lien for fees in securing the judgment by special pleas, by rejoinders to the attorney's replications, or by answer to his motion to be allowed to

prosecute the suit, but not by demurrer to the attorney's replications, not showing on their face that the contract of employment was void. *Lowery v. Illinois Cent. R. Co.*, 195 Ala. 144, 69 So. 954.

§ 4. Transfers of Claims for Purpose of Litigation.

If transfer of a mortgage on the property in question to defendant in detinue was merely for use in defending action and to be transferred back at close of action, it was champertous and void. *McCart v. Smith (Ala. App.)*, 77 So. 967.

Warehouseman Paying for Goods after Wrongful Delivery.—Where plaintiff, a warehouseman who had wrongfully delivered goods to defendant, who received the same in good faith, thereafter paid the true owner the value of goods, while the owner's title vested in the warehouseman as between itself and such owner, the transfer did not pass to plaintiff the owner's right of action against defendant for conversion, since the property was adversely held at the time of the transfer. *Pope & Co. v. Union Warehouse Co.*, 195 Ala. 309, 70 So. 159.

§ 5. Grants of Land Held Adversely.

§ 5 (1) Validity of Deed to Land Held Adversely in General.

Deeds Fully Executed.—Where deeds have been fully executed, they will not be canceled on the ground that they were given in consideration of a champertous contract. *Sellers v. Knight*, 185 Ala. 96, 64 So. 329.

Validity as to Adverse Possessor or His Privies.—*Hornsby v. Tucker*, 180

Ala. 418, 61 So. 928. See the title CHAMPERTY AND MAINTENANCE, § 5 (1), vol. 3, p. 30.

Purchase at Judicial Sale of Land Held Adversely. — *Singleton v. Jackson*, 177 Ala. 123, 59 So. 45. See the title CHAMPERTY AND MAINTENANCE, § 5 (1), vol. 3, p. 30.

The law of maintenance does not apply to judicial sales, and hence a guardian's deed, which consummated a judicial sale of land held adversely to the wards, is not inadmissible in evidence. *Hicks v. Burgess*, 185 Ala. 584, 64 So. 290.

§ 5 (4) Persons Entitled to Make Objections.

Doctrine of Champerty Not for Offense.—*Nichols v. Nichols*, 179 Ala. 611, 60 So. 855. See the title CHAMPERTY AND MAINTENANCE, § 5 (4), vol. 3, p. 34.

§ 5 (5) Operation and Effect.

Defense. — A conveyance of land in

controversy in statutory ejectment executed by plaintiff pending the action and after filing by defendant of plea of not guilty, and after Code 1907, § 3839, providing that statutory ejectment may be brought in the name of the real owner, though he may have obtained his title by conveyance made by the grantor not in possession at the time the execution of the conveyance became effective, defeats a recovery and permits defendant to avail himself, in defense, of the conveyance. *Burnett v. Roman*, 192 Ala. 188, 68 So. 353.

Express or Implied Covenants of Deed Available to Grantee. — *Mackintosh v. Stewart*, 181 Ala. 328, 61 So. 956. See the title CHAMPERTY AND MAINTENANCE, § 5 (5), vol. 3, p. 34.

As to Adverse Holder.—*Hornsby v. Tucker*, 180 Ala. 418, 61 So. 928. See the title CHAMPERTY AND MAINTENANCE, § 5 (5), vol. 3, p. 34.

Chancery.

See post, COURTS; EQUITY.

Change of Venue.

See post, CRIMINAL LAW; VENUE.

Character.

See post, CRIMINAL LAW; EVIDENCE; WITNESSES.

Charge to Jury.

See post, CRIMINAL LAW; TRIAL.

CHARITIES.

I. Creation, Existence and Validity.

§ 12. Certainty as to Beneficiary.

§ 12 (1) In General.

§ 12 (2) Beneficiary to Be Designated by Trustees or Donees.

II. Construction, Administration, and Enforcement.

§ 16. Trustees or Donees.

§ 20½. Rights, Duties and Liabilities of Charitable Societies and Trustees.

Cross References.

See the title CHARITIES, vol. 3, p. 36, and references there given.

In addition, see post, DEEDS; TRUSTS; WILLS.

As to judicial notice of charitable corporations, see post, EVIDENCE.

I. CREATION, EXISTENCE AND VALIDITY.

§ 12. Certainty as to Beneficiary.

§ 12 (1) In General.

Charitable gifts are not invalid because the trustee or donee is erroneously or uncertainly designated, where it can be made clear what was intended from the context of the instrument of gift, or by parol evidence of the surrounding circumstances, and where a corporation is indicated by an erroneous name, the mistake will not avoid the gift where it is possible to identify the corporation intended. *National Jewish Hospital v. Coleman*, 191 Ala. 150, 67 So. 699.

§ 12 (2) Beneficiary to Be Designated by Trustees or Donees.

Sufficiency of Designation. — *Crim v. Williamson*, 180 Ala. 179, 60 So. 293. See the title CHARITIES, § 12 (2), vol. 3, p. 38.

II. CONSTRUCTION, ADMINISTRATION, AND ENFORCEMENT.

§ 16. Trustees or Donees.

Testator made a gift to "the Jewish Hospital for Consumptives at Denver." There was at Denver a "National Jewish Hospital for Consumptives" and a "Jewish Consumptives' Relief Society" located in a suburb, but with its business office in Denver. The National Jewish Hospital was supported chiefly by Jews of the reformed faith while the "Relief Society" was con-

trolled very largely by the Jews of the orthodox faith. Testator belonged to the orthodox faith, but there was nothing to show that he was dominated in his charities by sectarian feeling. He was well acquainted with both institutions. Held, that the gift was to the National Jewish Hospital for Consumptives. *National Jewish Hospital v. Coleman*, 191 Ala. 150, 67 So. 699.

Testator, a Russian Polish Jew who had lived in Jerusalem, and while there had been a member of a congregation composed of Polish Jews, made a gift to "the Jewish Hospital at Jerusalem." At the time of his residence at Jerusalem there were two Jewish hospitals, the Bicur Cholim and the Rothschild. The support of the congregation of which he had been a member went to the Bicur Cholim. He had personal knowledge and acquaintance with this institution and had upon one occasion been a patient therein. The Rothschild Hospital was supported by the Rothschild family, and had never received nor solicited private contributions. Testator had never been interested in other Jewish hospitals in Jerusalem established after he left there. During his lifetime he had made several donations to the Bicur Cholim and had referred to it as "the Jewish Hospital at Jerusalem." Held, that the gift was to the Bicur Cholim Hospital. *National Jewish Hospital v. Coleman*, 191 Ala. 150, 67 So. 699.

§ 20½. Rights, Duties and Liabilities of Charitable Societies and Trustees.

Liability of Fraternal Order for Death of Candidate during Initiation. — That supreme lodge of fraternal order had established a home for orphans and widows of its members maintained by its members did not relieve it from liability for death of candidate while being initiated into a local lodge, as candidate was neither seeking nor receiving charity. *Supreme Lodge v. Kenny* (Ala.), 73 So. 519.

Liability for Negligence of Nurse — Form of Action.—A charitable hospital corporation, having no stock and no stockholders and not operated for profit, treating the indigent freely, and requiring and receiving pay from patients able to pay, and using the money so received in its work, as to a patient injured by the negligence of a nurse employed by it, in whose selection and retention it exercised due care, and of whose incompetency, if any, it had no notice, though it exercised reasonable care with respect to the competency of nurses, is subject to the same liability whether the injury is declared to be a breach of an express contract or of a contract implied by law. *Tucker v. Mobile Infirmary Ass'n*, 191 Ala. 572, 68 So. 4.

Same—Respondeat Superior. — A charitable hospital's exemption, if any, from liability for injuries to a patient, can not rest on the theory that the rule of respondeat superior does not apply to such institutions for the reason that its servants in the exercise of their duties are

not engaged in work which is for the profit of the corporation. *Tucker v. Mobile Infirmary Ass'n*, 191 Ala. 572, 68 So. 4.

Same—Trust Fund Theory.—Charitable hospital's exemption, if any, from liability for negligent injury to a patient, can not rest on the theory that its funds are held in trust for its particular charitable purpose, and that it would be a breach of trust to apply them to any other purpose, and that the payment of damages resulting from negligence of its servants is not a purpose contemplated by the trust. *Tucker v. Mobile Infirmary Ass'n*, 191 Ala. 572, 68 So. 4.

Same—No Assumption of Risk by Patient.—A hospital treating indigent patients freely and requiring and receiving pay from patients able to pay, which had issued no stock and had no stockholders, which was not operated for profit, and which used the money so received in the operation and extension of its hospital work, and exercised due care in the selection and retention of a nurse and as to her competency, and did not know of her incompetency, if any, was not exempt from liability for damages to a patient received for a reasonable compensation for a surgical operation, and who, after the operation, was scalded internally and externally by reason of the negligence of a nurse; the patient in such case not impliedly assenting to and assuming the risk of such negligent injury, nor waiving the corporation's liability therefor. *Tucker v. Mobile Infirmary Ass'n*, 191 Ala. 572, 68 So. 4.

Charter.

See post, CORPORATIONS; MUNICIPAL CORPORATIONS; RAILROADS.

CHATTEL MORTGAGES.

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- (A) Nature and Essentials of Transfers of Chattels as Security.
 - § 3. Mortgage Distinguished from Other Transactions.
 - § 4. — In General.
 - § 5. — Sale.
 - § 6. — Pledge.
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 - § 9. — Crops.
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 - § 19. Consideration.
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- (B) Form and Contents of Instruments.
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- (C) Execution and Delivery.
 - § 38. Execution in General.
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- § 46½. Statutory Provisions.
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§ 125. — Property Mortgaged.

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§ 131. Rights and Liabilities of Purchaser or Transferee.

§ 132. — As to Mortgagee in General.

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- § 183. Right to Redeem in General.
- § 184. Persons Entitled to Redeem.

Cross References.

See the title CHATTEL MORTGAGES, vol. 3, p. 42, and references there given. In addition, see ante, APPEAL AND ERROR; post, EVIDENCE; SALES; WITNESSES.

I. REQUISITES AND VALIDITY.

(A) NATURE AND ESSENTIALS OF TRANSFERS OF CHATTELS AS SECURITY.

§ 3. Mortgage Distinguished from Other Transactions.

§ 4. — In General.

A transfer and assignment by a borrower to a lender as trustee of all the borrower's one-half interest in a corporation as security for a loan held a mortgage on the borrower's stock or interest in the corporation. *Boyett v. Hahn*, 197 Ala. 439, 73 So. 79.

§ 5. — Sale.

Executory Contract.—An agreement by defendants in consideration of plaintiff's acceptance of a draft for \$500 in favor of defendants to allow plaintiffs to hire a barge which the agreement recited was valued at \$1,200 for one-half the usual charges of barge hire, when idle, and to forfeit the barge to plaintiffs if defendants did not retire the draft, was not a legal chattel mortgage, as it did not purport to transfer the legal title, nor a pledge, defendants retaining possession of the property, nor was it a sale, as there was no delivery, and the ownership remained in defendants, and moreover a sale was not intended, but was only an executory contract, and for a breach thereof plaintiffs' remedy was an action for the breach, and he could not maintain deti-

nue, since a mere equitable title or a right resting on an unexecuted executory contract does not entitle one to maintain such an action. *Minge & Co. v. Barrett Bros. Shipping Co.*, 10 Ala. App. 592, 65 So. 671.

Instances of Transactions Held to Be Chattel Mortgages.—*Dilworth v. Holmes Furniture, etc., Co.*, 183 Ala. 608, 62 So. 812. See the title CHATTEL MORTGAGE, § 5, vol. 3, p. 60.

§ 6. — Pledge.

Pledge.—The requirement that possession must be delivered and retained in order to sustain the validity of a pledge distinguishes a pledge from a chattel mortgage. *Clanton Bank v. Robinson*, 195 Ala. 194, 70 So. 270.

The distinction between a mortgage and a pledge is that in the mortgage the legal title is vested in the mortgagee, leaving the mortgagor with only an equitable title, which only a court of equity can enforce, while in the pledge the pledgor retains his legal title to the property, which a court of law can act upon and enforce. *Hinge v. Clark*, 196 Ala. 617, 72 So. 167.

§ 7. Property Which May Be Subject of Mortgage.

§ 9. — Crops.

See post, "Title or Interest of Mortgagor," § 11.

Necessity of Present Interest in Land.—A mortgage of crops in futuro is valid

only when the mortgagor at the time of executing the mortgage had a present interest in the land upon which they were to be raised. *Littleton v. Abernathy*, 195 Ala. 65, 70 So. 282; *Phillips-Neely Mercantile Co. v. Banks*, 8 Ala. App. 549, 63 So. 31.

A mortgage on cotton to be grown is not valid where, at the time of the execution of the mortgage, the mortgagor had as yet no valid lease of the land where the crop was to be raised, but was merely negotiating for a lease, for the crop had no potential existence. *Sellers, etc., Co. v. Hardaway*, 188 Ala. 388, 66 So. 460, cited in note in L. R. A. 1917C, 15.

A mortgage on crops to be grown is invalid, and not admissible in evidence, where the mortgagor at the time of its execution had no rent agreement or contract for the land on which the crops were to be planted, for the crops have no potential existence. *Pinckard v. Cas-sels*, 195 Ala. 353, 70 So. 153.

§ 11. — Title or Interest of Mortgagor.

See ante, "Crops," § 9.

Crop Mortgage—Ten Years' Possession.—One in possession of land, who had been in such possession for ten years, cultivating it and paying the taxes thereon, had such interest therein as authorized him to mortgage crops to be grown thereon by him. *Kilgore v. Jones* (Ala. App.), 73 So. 832.

Same—Mortgagor of Land in Possession.—Mortgagor of land to loan company, who, when he executed subsequent crop mortgage, and when he brought crop into existence and gathered it, was in possession of land, had such interest that he could mortgage crops to grow or that were grown thereon. *Metcalf v. Clemmons-Powers & Co.* (Ala.), 76 So. 9.

Same—Voidable Rental Contract. — A verbal rental contract will create a sufficient interest in the land to support a mortgage of crops to be grown thereon, though the contract could be avoided on account of the statute of frauds, since such a contract is not void, but merely voidable. *Phillips-Neely Mercantile Co. v. Banks*, 8 Ala. App. 549, 63 So. 31, cited in note in L. R. A. 1917C, 16.

Same—Absence of Potential Interest in Land.—Mortgagor of crops not having potential interest in the lands on which they were grown at time of execution of mortgages to defendant, such mortgages did not convey any interest in crops grown on the lands, as against plaintiffs, as later mortgagees. *Hamner & Son v. Johnson* (Ala. App.), 77 So. 446.

§ 19. Consideration.

Guaranty by third party of payment of rent by proposed mortgagee if proposed mortgagor would give a mortgage to secure payment of his debt already existing to such mortgagee was sufficient consideration to sustain the mortgage. *Rogers v. Whittle* (Ala. App.), 74 So. 96.

§ 20. Equitable Mortgage.

An instrument which, to secure the payment of a note, gave to payee "a mortgage lien" upon personal property, created an equitable mortgage, giving payee the right in equity to have the property sold to pay the note, but confers neither title to the property nor a right of action for it, a "lien," without possession, being a "right to have a debt satisfied out of a particular thing," or a "claim which one person has upon the property of another as security for a debt," while a "mortgage" is a "contract whereby a debtor grants or conveys some estate or interest in lands, or transfers certain goods and chattels, to his creditor, subject to a proviso that if the debt is discharged by a day named the grant or transfer shall be void, and the debtor may retake the property." *Bank v. Smith*, 11 Ala. App. 358, 66 So. 832.

§ 22. Evidence as to Character of Transaction or Instrument.

§ 28. — Weight and Sufficiency.

Mortgageable Interest in Crop.—In an action to foreclose chattel mortgage on crops, evidence held sufficient to show that, at the time of the growing of the crops, the mortgagor was a tenant on the land on which they were grown, and hence had a mortgageable interest in the crops. *Butler & Co. v. Henry & Co.* (Ala.), 78 So. 912.

(B) FORM AND CONTENTS OF INSTRUMENTS.**§ 28. Necessity and Sufficiency of Writing in General.**

Statutory Rule as to Necessity of Writing.—*Interstate Lumber Co. v. Duke*, 183 Ala. 484, 62 So. 845, cited in note in *L. R. A.* 1916B, 53. See the title **CHATTEL MORTGAGES**, § 28, vol. 3, p. 60.

Under Code 1907, § 4288, providing that a mortgage of personal property is not valid unless made in writing and subscribed by the mortgagor, where M. went B.'s security for a buggy purchased by B. on credit, an oral agreement by B. that his share of a crop should be good for the buggy gave M. no contractual lien on B.'s portion of the crop. *Johnson v. McFry*, 14 Ala. App. 170, 68 So. 716.

An oral agreement for the exchange of cows, whereby one of the parties was to receive cash "boot," to be a lien on the cow traded by him, was void, under Code, § 4288, as an attempt to create a verbal mortgage. *Dickey v. Vaughn* (Ala.), 73 So. 507.

§ 32. Description of Property.**§ 33. — Certainty in General.**

In the absence of proof of the identity of the property covered by a chattel mortgage, held, that the mortgage was void for uncertainty in the description. *Smith v. Davenport & Co.*, 12 Ala. App. 456, 68 So. 545.

§ 34. — Crops.

A crop mortgage declaring that mortgagee shall have a lien on the crops of cotton raised by the mortgagor on the "Creek Place" in a named county or any other place in county is not bad for indefiniteness. *Roy v. Greil* (Ala. App.), 77 So. 64.

Description by chattel mortgage of property covered as "200 bushels of corn of my 1912 crop from my said farm" held sufficient as against third persons; the total crop failing to reach 200 bushels. *Mitchell v. Abernathy*, 194 Ala. 608, 69 So. 824.

§ 36. Description of Debts or Liabilities Secured.

Chattel mortgage given to secure ad-

vances for prosecution of mortgagor's business is valid, though not declaring purpose on face. *Manchuria S. S. Co. v. Donald & Co.* (Ala.), 77 So. 12.

(C) EXECUTION AND DELIVERY.**§ 38. Execution in General.**

Though mortgage on property in Alabama was headed "State of Alabama, Barbour County," yet where signature of mortgagor was witnessed by notary public of Georgia, the mortgage did not on its face show that it was executed in Alabama. *Covey Cotton Oil Co. v. Bank* (Ala. App.), 74 So. 87, certiorari denied in 75 So. 1003.

§ 39. Signature.

The execution of a note and chattel mortgage securing it is not necessarily invalid because the signature was "Calhan," and not "Calahan," where the maker treated the signature as his own; for a person is said to sign an instrument when he writes or marks thereon something in token of his intention to be bound, and any mark is sufficient which shows an intention to be bound. *Barksdale v. Bullington*, 194 Ala. 624, 69 So. 891.

A chattel mortgage is properly executed where the grantee wrote the name of the grantor, who held the pen, intending to execute the instrument; the signing being attested by another witness. *Barksdale v. Bullington*, 194 Ala. 624, 69 So. 891.

§ 41½. Delivery.

The delivery and acceptance of a chattel mortgage are essential to its validity. *Wertheimer Bag Co. v. Hill*, 14 Ala. App. 623, 71 So. 618.

§ 42. Acceptance.

The delivery and acceptance of a chattel mortgage are essential to its validity. *Wertheimer Bag Co. v. Hill*, 14 Ala. App. 623, 71 So. 618.

§ 43. Evidence.

Sufficiency of Proof by Subscribing Witness.—Under Code 1907, §§ 4004, 4005, relating to proof of the execution of private documents by subscribing witnesses thereto, the execution of a chattel

mortgage which was directly in issue must be proven by one or more of the subscribing witnesses, unless the case falls within one of the exceptions. *Barksdale v. Bullington*, 194 Ala. 624, 69 So. 891.

The execution of a chattel mortgage is sufficiently proven by the testimony of a subscribing witness, where he was positive either that the mortgage was signed in his presence by the mortgagor, or that the mortgagor acknowledged his signature at the time of the attestation. *Barksdale v. Bullington*, 194 Ala. 624, 69 So. 891.

§ 43½. Questions for Jury.

Whether a chattel mortgagor who misspelled his name in his signature intended to be bound held for the jury. *Barksdale v. Bullington*, 194 Ala. 624, 69 So. 891.

(D) VALIDITY.

§ 44. Fraud, Duress, or Undue Influence.

Mortgagee's Reliance on False Representations.—*Batson v. Alexander City Bank*, 179 Ala. 490, 60 So. 313. See the title CHATTEL MORTGAGES, § 44, vol. 3, p. 66.

§ 44½. Illegality.

Compounding Felony.—Under Code 1907, § 6469, relating to compounding felony, that a note and mortgage were given to compromise criminal prosecution was defense to detinue by one claiming under the mortgage. *West v. Teabo*, 14 Ala. App. 575, 70 So. 957.

Warrants charging the issuing of checks with intent to injure or defraud, though inapt in expression, were sufficient as the commencement of a prosecution for false pretenses, to render invalid a mortgage executed in compromise of the prosecutions and to secure their withdrawal and an agreement not to prosecute the cases. *West v. Teabo*, 14 Ala. App. 575, 70 So. 957.

§ 45. Estoppel or Waiver as to Defects or Objections.

Waiver.—*Batson v. Alexander City Bank*, 179 Ala. 490, 60 So. 313. See the title CHATTEL MORTGAGES, § 45, vol. 3, p. 66.

§ 46. Evidence.

Compounding Felony—Admissibility of Evidence.—Where defendant in detinue pleaded that the mortgage under which plaintiff claimed was given to compromise a prosecution for felony, evidence that shortly prior to the swearing out of the warrants in the prosecution, the plaintiff sued defendant on dishonored checks, and defendant claimed his exemptions against the attachment or judgment, after which the warrants were sworn out, which were dismissed and the checks surrendered on execution of the mortgage, was admissible. *West v. Teabo*, 14 Ala. App. 575, 70 So. 957.

Where defendant in detinue pleaded that the mortgage under which plaintiff claimed was given to compromise a prosecution for felony, defendant's testimony that plaintiff agreed to and did dismiss prosecutions against defendant on execution of the mortgage mentioned, and that plaintiff then surrendered certain checks which defendant had given, but which had not been honored because of lack of funds, was admissible. *West v. Teabo*, 14 Ala. App. 575, 70 So. 957.

Where defendant in detinue pleaded that the mortgage under which plaintiff claimed was given to compromise a prosecution, and the warrants issued were vague and indefinite as to the offense charged, the dishonored checks issued by defendant were properly admitted in evidence, together with evidence that the giving of the checks was the occasion of the swearing out of the warrants. *West v. Teabo*, 14 Ala. App. 575, 70 So. 957.

Where defendant in detinue pleaded that the mortgage under which plaintiff claimed was given to compromise a prosecution for felony, testimony of a deputy sheriff that he arrested defendants under warrants, a copy of one of which was introduced in evidence, and that the warrants were subsequently withdrawn by plaintiff was admissible. *West v. Teabo*, 14 Ala. App. 575, 70 So. 957.

II. FILING, RECORDING, AND REGISTRATION.

§ 46½. Statutory Provisions.

Code 1907, § 3373, under which the

recording of a mortgage on a crop of cotton operates as notice of the contents thereof, is not repealed by Uniform Warehouse Receipts Act (Acts 1915, p. 661) § 41, providing that a person to whom a negotiable receipt has been duly negotiated acquires such title as the person negotiating had or had ability to convey to a purchaser in good faith for value, and such title as the depositor or person to whose order the goods were to be delivered by the terms of the receipt had or had ability to convey to a purchaser in good faith for value, and the direct obligation of the warehouseman to hold possession for him according to the terms of the receipt. *Brown Mercantile Co. v. Yielding Bros. Dept. Store (Ala.)*, 76 So. 4.

§ 51. Place.

Where the mortgagor of a mule lived in Morgan county, while the barn, lot, and pasture in which the mule was kept was in Cullman county, and the mule was never kept in Morgan county, but at all times kept in Cullman county, except when the mortgagor had it in Morgan county for temporary use, Code 1907, § 3376, providing for the recordation of conveyances of personal property to secure debts in the county in which the grantor resides, and also in the county where the property is at the date of the conveyance, unless the property is immediately removed to the county of the mortgagor's residence, required the recording of the mortgage in both counties for it to constitute constructive notice. *Kinney Bros. v. Cole (Ala. App.)*, 77 So. 242.

§ 54½. Effect of Failure to File or Record as between Parties to Instrument.

Where the mules covered by a chattel mortgage were in W. county when the mortgage was executed to secure the purchase price, and the purchaser intended to remove them from that county possibly before the mortgage could have been recorded therein, the failure to record the mortgage in that county until after an attachment was levied upon them did not thereby render the mortgage void as between the parties thereto, and it was as valid as against the mortgagor as if

properly recorded in all the counties required by Code 1907, § 3376, which merely controls as to the county in which the mortgage shall be recorded in order to guard against § 3386 relating to effect of failure to record. *Hill v. Rentz (Ala.)*, 78 So. 881.

§ 54½a. Questions for Jury.

Where, in detinue to recover two mules under descriptions in chattel mortgages reading, "all our live stock and increase * * * also all other personal property not herein specifically named owned by me or us now or at the maturity of this paper," there was evidence to show that defendant signed the mortgages without reading them, on the representations that they were only to cover the property specifically described, and that they did not include any other property, the question of fraud was for the jury. *Jernigan v. Cox (Ala. App.)*, 74 So. 736.

III. CONSTRUCTION AND OPERATION.

(A) GENERAL RULES OF CONSTRUCTION.

§ 56½. Construing Instruments Together.

Where, on delivery of a chattel mortgage to the mortgagee, the latter gave the mortgagor, and the mortgagor accepted, a receipt reading: "Received of [the mortgagor] one mortgage * * * to cover account due, payable \$10.00 each month. Failure to pay any monthly installment will make the whole amount fall due, payable on demand"—the two instruments constituted a single transaction, and together evidenced the parties' agreement, so that the receipt was admissible in evidence. *Wertheimer Bag Co. v. Hill*, 14 Ala. App. 623, 71 So. 618.

§ 57½. Questions for Jury.

Where a chattel mortgage was to secure "payment of a [certain] note and other sums I may owe the payees before the note is paid," and was made to D. Bros., one of whom was a physician, independent of the firm to which the debts were owing by the mortgagee, it is a question for the jury whether the mortgage secured the debt to the physician, and whether the payment of the debt to

D. Bros. satisfied the mortgage. *Denton Bros. v. Foster*, 195 Ala. 53, 70 So. 152.

In an action by the assignee of a chattel mortgagee for destruction of the lien, evidence held sufficient to take to the jury the question whether the description was sufficient so that the recordation thereof imported constructive notice. *Lowery v. Haley*, 12 Ala. App. 448, 68 So. 539.

(C) PROPERTY MORTGAGED, AND ESTATES AND INTERESTS OF PARTIES THEREIN.

§ 62. Crops.

See post, "After-Acquired Property or Interest," § 64.

Title and Interest of Mortgagee in General.—Where an unplanted crop when it comes into existence is delivered to the mortgagee, his legal title becomes complete, and he may maintain trespass, trover, or detinue against any one disturbing his possession, or if before it is delivered to the mortgagee the mortgagor or his assignee with knowledge of the mortgage lien should receive and dispose of it, either or both, would be liable in case to the mortgagee for its value. *Houston Nat. Bank v. Edmonson & Co.* (Ala.), 75 So. 568.

Where a tenant executed a mortgage on the crops grown on the leased land during 1910 and every year thereafter until the debt was paid, the mortgagee acquired the legal title to all crops grown on the land for 1910 and the equitable title to crops grown thereafter during the life of the lease but no longer. *Whaley v. Bright*, 189 Ala. 134, 66 So. 644, cited in notes in L. R. A. 1917C, 12, 16, 23.

Grown on Leased Land.—Under Code 1907, § 4894, held, that a mortgage executed after January 1st on the entire crop of cotton to be raised by the mortgagors during the year, conferred on the mortgagee the legal title to cotton raised by the mortgagors on land of which they had possession under lease when the mortgage was executed. *Hughes, etc., Supply Co. v. Bussey*, 14 Ala. App. 388, 70 So. 997.

Part Raised by Mortgagee's Son. — Where part of a tenant's crop was raised

by his son, without a cropping contract, the whole was subject to the tenant's crop mortgage executed by the tenant on his whole crop. *Maybank v. Lumpkin*, 189 Ala. 559, 66 So. 584.

§ 63. Animals and Increase.

Offspring.—Mortgage incumbrance on female animal continues on offspring, as between the parties, regardless of the offspring's age and development. *McCarver v. Griffin*, 194 Ala. 634, 69 So. 920.

The offspring of female animals when they come into visible existence and are endowed with independent life rest at birth under the same title or ownership as the dam, and are subject to any existing mortgage incumbrance upon her. *McCarver v. Griffin*, 194 Ala. 634, 69 So. 920.

§ 64. After-Acquired Property or Interest.

See ante, "Crops," § 62.

Where a mortgage on crops grown in 1915 was executed in 1914, the legal title never passed by the mortgage, but, at most, only the equitable right to subject the crops to payment of debt. *Butler Cotton Oil Co. v. Collins* (Ala.), 75 So. 975.

§ 66. Extension to or Substitution of Other Property.

Chattel mortgage provision allowing mortgagors to swap or exchange mortgaged property, the property secured in exchange to stand in place of exchanged property, is valid between the parties. *Bright v. Mack*, 197 Ala. 214, 72 So. 433.

§ 68. Estates and Interests of Parties.

§ 69. — Under Mortgages in General.

Mortgage as Security Merely. — In equity, a mortgage is security, and not conveyance, in the sense that title is thereby divested. *Metcalf v. Clemmons-Powers & Co.* (Ala.), 76 So. 9.

Crops Not in Existence When Mortgage Executed.—Where cotton, the subject of a mortgage, was not in existence at the time of the execution of the mortgage, the mortgagee acquired at best only an equitable right or lien, and not the legal title. *Anders Mercantile Co. v. Rice Bros.*, 187 Ala. 468, 65 So. 388.

Under Code 1907, § 4894, a chattel

mortgage after the first of the year in which a cotton crop was grown conveyed the legal title and after the law day the right to possession of the cotton, but a mortgage executed before the first of such year, covering particular cotton, conveyed only an equitable title. *Houston Nat. Bank v. Edmonson & Co. (Ala.)*, 75 So. 568.

Under Code 1907, § 4894, declaring that a mortgage of unplanted crops or agricultural products executed on or after the 1st day of January of the year in which such crops are grown, conveys the legal title thereto in all respects as if the crops were then planted, one whose mortgage was executed after January 1st has the legal title to that year's crops, and a mortgage on the same crops executed a year earlier conveys only an equitable interest; therefore the subsequent mortgagee may maintain trover for conversion. *Pinckard v. Cassels*, 195 Ala. 353, 70 So. 153.

After default the legal title is in the mortgagee, and the only office of a foreclosure is to cut off the equity of redemption. *Harmon v. Dothan Nat. Bank*, 136 Ala. 360, 64 So. 621.

(D) LIEN AND PRIORITY.

§ 69½. Scope and Extent of Lien.

A mortgagee of crops is entitled to the surplus remaining after the lien of the mortgagor's lessor for rent and advances is discharged. *Head v. Knox & Co.*, 14 Ala. App. 221, 69 So. 257.

§ 70. Waiver or Loss of Lien.

Estoppel.—The levy of an attachment by a chattel mortgagee on the mortgaged property as the property of the mortgagor does not waive the title of the mortgagee, or estop him from bringing detinue to recover the mortgaged property, since, under Code 1907, § 4091, a chattel mortgagor has an equity in the mortgaged property subject to levy. *Ex parte Logan*, 185 Ala. 525, 64 So. 570, denying certiorari *Logan v. Smith Bros. & Co.*, 9 Ala. App. 459, 63 So. 766.

The transferee's knowledge that the mortgagee transferred would place the cotton with factors for storage or even for sale on the transferee's account could

not estop it from asserting its rights in the cotton or its proceeds, that being the usual course of dealing, especially as the contract between the factors and the mortgagee requiring him to ship to them all cotton raised, handled, or controlled by him carried a sufficient warning to them that cotton so shipped might be the property of third persons, and where it did not appear that he represented to the factors that the cotton in question was his individual property, and it did appear that, although his agreement required him to turn over all collaterals to them, he turned over no collaterals for the cotton in question. *Baker, etc., Co. v. American Agri. Chemical Co. (Ala.)*, 77 So. 866.

§ 71. Priorities of Mortgages in General.

§ 71 (1) Priority Between Mortgages and Other Liens or Claims in General.

Execution Creditor of Mortgagor. —

Under Code 1907, § 6039, providing for the delivery of goods levied upon to a stranger claiming by alleging paramount title or prior lien upon his giving sufficient bond, where there was evidence that the claimant had a mortgage on crops to be grown during the succeeding year, and that the mortgagor was in possession of the land in the first year of a three-year verbal lease, and that a balance was due under the mortgage, it was error to give a general charge for the plaintiff, an execution creditor of the mortgagor in his action to try the right of property. *Littleton v. Abernathy*, 195 Ala. 65, 70 So. 282.

Alleged Fraudulent Note for Rent. —

Where vendor of land sought attachment on cotton raised thereon under alleged fraudulent note given lien as for rent, in absence of evidence establishing relation of landlord and tenant between vendor and purchaser, chattel mortgagee of the cotton should prevail. *Herzfeld v. Hayne (Ala.)*, 76 So. 973.

Rights of Son in Crop from Father's Land. —

Where an agreement was entered into between father and son subsequent to the execution of a mortgage on the crop by the father, any rights acquired by the son under it were subordinate to the rights of the mortgagee, provided the

son had notice of the mortgage at the time of contracting. *Hairslip v. Brannum* (Ala.), 73 So. 464.

Liens of Cotton Factors. — Where a transferee of chattel mortgages redelivered them to the mortgagee for collection as its trustee, and when cotton was delivered to him by the mortgagors for sale and credit on their account he consigned the cotton to cotton factors, plaintiff's legal title acquired prior to the factors' possession as such was superior to their claim based on their lien as against the mortgagee. *Baker, etc., Co. v. American Agri. Chemical Co.* (Ala.), 77 So. 866.

Mortgage on Crops and Assignment of Rent Note. — Where a tenant contracted to pay one bale of cotton rent for the use of the land for 1912, and both landlord and tenant joined in a mortgage on the crops raised by or for them during that year, such mortgage operated as an assignment of the landlord's lien on the crops raised during that year for the payment of the rent which was prior in right to a subsequent assignment of the landlord's rent note, binding the tenant to pay the landlord one bale of cotton for the use of the land for that year, to an assignee with notice. *Gilliland Mercantile Co. v. Pond Bros.*, 189 Ala. 542, 66 So. 480.

Crop Mortgage and Cropper's Lien. — Where, after a tenant had executed a crop mortgage, he let part of the land to a cropper, the crop raised by the latter was owned by the tenant, subject to the cropper's lien given by Code 1907, § 4743, which was superior to the lien of the tenant's mortgage as to the cropper's part of the crop. *Maybank v. Lumpkin*, 189 Ala. 559, 66 So. 584, cited in note in L. R. A. 1917C, 14.

Liens for Supplies for Making Crops. — Lien given one tenant, farming on shares, on crop of cotenant by Code 1907, for supplies furnished in making crop, is superior to that of the mortgage of the cotenant given for the same purpose. *Lauderdale v. Flippo & Son* (Ala.), 75 So. 323.

Validity of Mortgage — Subsequently Acquired Interest. — Where a mortgage on future crops need not describe the land, it is necessary, in order to create a spe-

cific lien on such crops, that as against third persons who subsequently acquire a specific interest therein, the mortgagor shall have a definite present interest in the land, as distinguished from a mere possible or expectant future interest in the land. *Gilliland Mercantile Co. v. Pond Bros.*, 189 Ala. 542, 66 So. 480, cited in notes in L. R. A. 1917C, 15, 33.

Lien for Repairs. — A recorded prior chattel mortgage is superior to a lien for automobile repairs given by the express terms of Code 1907, § 4785, although the repairs were authorized by the owner then and at the time of suit in lawful possession of the car, where it does not appear that the mortgagee has expressly or impliedly authorized the repairs. *Walden Auto Co. v. Mixon*, 196 Ala. 346, 71 So. 694.

§ 71 (2) Priorities between Mortgages.

Land Mortgage and Crop Mortgage. — Where a real estate mortgage embraced the crops to be grown on the land, it takes priority over a subsequent crop mortgage executed by the mortgagor and his tenant, who cultivated the property. *Wilson v. Draper*, 9 Ala. App. 585, 63 So. 779.

Tenant's Mortgages on Succession Crops. — Where a tenant under a lease for years executed a mortgage on the crops for the year 1910, and every year thereafter until the debt was paid, which mortgage was duly recorded, a subsequent mortgage executed on the crops of 1911 was subordinate to the first mortgage. *Whaley v. Bright*, 189 Ala. 134, 66 So. 644.

Cropper's Mortgage and Mortgage by Landlord. — Where a cropper, entitled to one-half of the crop raised, having a prior lien to the value of his half, under Code 1907, § 4743, with one of the owners of the land mortgaged the crop to T. to secure advances, and the owners of the land thereafter mortgaged the same crop to a bank, T.'s mortgage constituted a prior lien, and he was entitled to have the proceeds of the crop first applied to its payment. *Courtney v. State*, 10 Ala. App. 141, 65 So. 433.

Legal Title and Equitable Title. — Under a chattel mortgage the legal title to

a cotton crop was superior to an equitable title under a prior mortgage, and the holder of the legal title was entitled to recover in detinue. *Houston Nat. Bank v. Edmonson & Co.* (Ala.), 75 So. 568.

That the mortgagor of a cotton crop gave a second mortgage to claimant after the execution of a mortgage to plaintiff's assignor, did not convert claimant's prior equitable mortgage into a prior legal mortgage. *Houston Nat. Bank v. Edmonson & Co.* (Ala.), 75 So. 568.

§ 71 (3) Priority between Mortgage and Landlord's Lien.

Code 1907, § 4753, authorizing reasonable satisfaction for use and occupation of land in certain instances, does not give vendor of land, who obtained notes providing for lien for rent on default of installments on purchase price lien prior to that of the chattel mortgagee of crop raised on land. *Herzfeld v. Hayne* (Ala.), 76 So. 973.

A landlord's lien for unpaid rent would be superior to a crop mortgage executed by the tenant and would not be affected by a decree foreclosing such mortgage, so that the landlord should not be joined in such suit. *West v. Henry*, 185 Ala. 168, 64 So. 75.

§ 76. Priority of Record.

In trover by a chattel mortgage, where defendant claimed under a chattel mortgage executed March 19th and recorded May 2d, and plaintiff under one dated March 22d and recorded April 3d, plaintiff was entitled to recover unless when he received his mortgage and parted with the consideration therefor he was chargeable with notice of defendant's mortgage. *Smith v. Davenport & Co.*, 12 Ala. App. 456, 68 So. 545.

Where a chattel mortgagor gave plaintiff a mortgage on February 8, 1909, which was not recorded until February 16, 1909, and the same mortgagor gave defendant a mortgage on February 11, 1909, which was recorded February 12, 1909, and defendant took his mortgage without knowledge or notice of plaintiff's mortgage, defendant's mortgage was superior to plaintiff's. *Neeley v. Reynolds*, 196 Ala. 581, 72 So. 124.

§ 77. Notice Affecting Priority.

§ 79. — Actual Notice.

A count of equity will protect and enforce the lien of a chattel mortgage on crops against any purchaser with notice. *Houston Nat. Bank v. Edmonson & Co.* (Ala.), 75 So. 568.

A mortgage of crops in futuro by a tenant in possession under a lease for the current and the following year is good as against parties having notice thereof. *Littleton v. Abernathy*, 195 Ala. 65, 70 So. 282, cited in note in *L. R. A.* 1917C, 16.

Contract rights of a daughter in crops raised on land rented by her father held subordinate to the father's crop mortgage if the daughter had notice of the mortgage at the time of contracting. *Kilgore v. Jones* (Ala. App.), 73 So. 832.

In detinue to recover mules, both parties claiming as mortgagees of the same mortgagor, where the issue was whether or not defendant had actual notice of plaintiff's unrecorded mortgage when he took his own, the refusal of an instruction embodying a correct statement of the law on the point, strictly applicable to the issues and facts, was reversible error. *Neeley v. Reynolds*, 196 Ala. 581, 72 So. 124.

§ 82. — Record of Mortgage as Notice.

Recording of a chattel mortgage in the county of mortgagor's residence operates as notice to all persons of its contents and of the lien or title of the mortgagee thereunder. *Kilgore v. Jones* (Ala. App.), 73 So. 832.

Under Code 1907, §§ 3373, 3376, touching the notice worked by the recording of mortgages, and providing that if before the record lien on mortgaged personalty is satisfied the property is removed to another county, the mortgage must be recorded within three months in the new county, a chattel mortgage, recorded in the county of the mortgagor's residence, where the property was situated at the time of execution, operated as constructive notice of the lien of the mortgagee while the chattel remained in such county, and for three months after its removal into another county. *Argo*

v. Sylacauga Mercantile Co., 12 Ala. App. 442, 68 So. 534.

Mortgages on Same Crops.—Whatever rights mortgagee acquired through subsequent mortgage on crops were subordinate to rights of prior mortgagees acquired through previously executed and recorded mortgage, the registration of which afforded constructive notice to the subsequent mortgagee of its existence. *Metcalf v. Clemmons-Powers & Co.* (Ala.), 76 So. 9.

Duty to Notify Subsequent Mortgagee.—There was no obligation on prior mortgagees of crop to notify subsequent mortgagee of their claim, notice of which was imputed to him by registration laws. *Metcalf v. Clemmons-Powers & Co.* (Ala.), 76 So. 9.

A mistake in the middle initial of the mortgagor of a truly recorded chattel mortgage will, under the statutes, avert any imputation of constructive notice to a subsequent purchaser or mortgagee. *Ozark City Bank v. Planters, etc., Bank*, 197 Ala. 427, 73 So. 72.

A bona fide purchaser of offspring of mortgaged female animal after natural separation from its mother is not charged with constructive notice of registration of mortgage upon the dam, but takes free from such incumbrance. *McCarver v. Griffin*, 194 Ala. 634, 69 So. 920.

§ 83. Failure to File or Record Mortgage.

§ 84. — Effect in General.

Under Code 1907, § 3386, providing that conveyances of personal property to secure debts or to provide indemnity are inoperative against purchasers without notice until recorded, a purchaser who has parted with value before notice is entitled to the protection of a bona fide purchaser for value and without notice; but an innocent purchaser on a credit, giving only a nonnegotiable promise to pay, and who, before payment, has notice of facts sufficient to put him on inquiry, is not entitled to the protection of a bona fide purchaser. *Donahoo Horse, etc., Co. v. Durick*, 193 Ala. 456, 69 So. 545.

§ 85. — Subsequent Bona Fide Purchasers or Mortgagees.

Under Code 1907, § 3386, providing

that conveyances of personal property to secure debts are inoperative against purchasers without notice until recorded, one who parts with something of value for the thing purchased, although he does not pay, or become irrevocably bound to pay, the whole agreed price before notice of the lien, is a "bona fide purchaser" for value, and to the extent that he has parted with something of value, incurred some new obligation, relinquished some security, or done some act on the faith of the purchase, which can not be retracted, and which would leave him in a worse position if his purchase should be set aside, and he is entitled to protection. *Donahoo Horse, etc., Co. v. Durick*, 193 Ala. 456, 69 So. 545.

Presumption of Ownership from Possession.—In the absence of any circumstance reflecting upon the lawfulness of the possession of a horse by a mortgagor, a purchaser has the right to rely on the prima facie presumption of ownership resulting from such possession. *Donahoo Horse, etc., Co. v. Durick*, 193 Ala. 456, 69 So. 545.

§ 87. Actions to Determine and Establish Rights.

Burden of Proof.—*Galliland v. Williams*, 181 Ala. 173, 61 So. 291. See the title CHATTEL MORTGAGES, § 87, vol. 3, p. 82.

Presumption of Notice from Record.—*Galliland v. Williams*, 181 Ala. 173, 61 So. 291. See the title CHATTEL MORTGAGES, § 87, vol. 3, p. 82.

Admissibility of Evidence.—On an issue as to whether a cropping contract existed between a tenant and his son, so as to relieve the son's alleged portion of the crop from the tenant's mortgage, evidence that the son was a minor was admissible. *Maybank v. Lumpkin*, 189 Ala. 559, 66 So. 584.

A tenant of farm land, while holding over after the expiration of his lease with consent of the executors of the owner, executed a mortgage on the crop to be grown the following year. Thereafter the tenant contracted to purchase the land, and gave a mortgage upon it and the crop to be grown, for the purchase money. There was evidence that while

holding over with consent of the executors and before he contracted to purchase, the tenant prepared the land for cultivation. Held, that such evidence was admissible to show that at such time the tenant had an interest in the land, so that the crop mortgage first executed by him would be a specific lien on the crops grown. *Shotts v. Cooper* (Ala.), 74 So. 353.

In a contest as to the priority of chattel mortgages, the fact that the record of plaintiff's mortgage showed the mortgagor to be "Sammie" Prewitt, when in fact his name was "Soonie" Prewitt, did not render the record inadmissible; it being open to the jury to infer that the variance was a mere clerical error, and there being evidence that defendant had actual notice of the mortgage when it acquired its subsequent mortgage. *Anders Mercantile Co. v. Rice Bros.*, 187 Ala. 468, 65 So. 388.

Sufficiency of Evidence.—In trover, evidence held to warrant finding of implied, if not express, contract on part of executors to allow tenant to hold over for another year, and so to give validity to crop mortgage which was, prior to other mortgages on the land and crop, executed by tenant who thereafter contracted to purchase land. *Shotts v. Cooper* (Ala.), 74 So. 353.

In detinue by the mortgagee of a mare for a colt born during the life of the incumbrance, which plaintiff had bought from the mortgagor after separation from the mother, evidence held to charge defendant with knowledge that the colt was subject to the mortgage on the dam. *McCarver v. Griffin*, 194 Ala. 634, 69 So. 920.

Questions for Jury.—*McAdams & Co. v. Smith*, 8 Ala. App. 515, 62 So. 1000. See the title CHATTEL MORTGAGES § 87, vol. 3, p. 83.

It is a question for the jury in spite of apparently conflicting testimony of the mortgagor of crops whether he had at the time of the execution of the mortgage a present interest in the land on which they were to be raised. *Littleton v. Abernathy*, 195 Ala. 65, 70 So. 282.

Where, under the evidence in an action against a mortgagee for conversion

of plaintiff's interest in the mortgaged crop, the question whether plaintiff knew of the mortgage at the time of contracting was for the jury, it was error to refuse instructions submitting the mortgage and plaintiff's knowledge thereof to the consideration of the jury. *Hairslip v. Brannum* (Ala.), 73 So. 464.

IV. RIGHTS AND LIABILITIES OF PARTIES.

§ 88. Possession or Control of Property.

§ 89. — Before Default in General.

Unless the mortgagor reserves the right to the possession of the mortgaged property until default, the effect of a chattel mortgage is to at once vest in the mortgagee the title to, and right to immediate possession of, such property. *Bank v. Freeman* (Ala.), 75 So. 325; *Horton v. Hovater*, 11 Ala. App. 413, 66 So. 939.

§ 90. — Provisions of Mortgage.

The authority to seize the property given by a mortgage stipulation was not extinguished by a subsequent extension note, expressly stating it did not release the mortgage; such note showing it was a mere supplementary assurance. *Bank v. Freeman* (Ala.), 75 So. 325.

§ 91. — After Default.

Right of Mortgagee to Possession. — *Black v. Slocumb Mule Co.*, 8 Ala. App. 440, 62 So. 308. See the title CHATTEL MORTGAGES, § 91, vol. 3, p. 84.

Remedies of Mortgagor.—Where there was a valid mortgage conveying title and right to possession to mortgagee, the mortgagor had given possession to the mortgagee, and law day had passed which gave mortgagee the right to sell, the mortgagor, having neither title, possession, nor right to immediate possession, could not maintain trespass, trover, or detinue against the mortgagee. *Lineville Nat. Bank v. Weaver* (Ala. App.), 78 So. 461.

§ 92. Use and Disposition of Property or Proceeds.

§ 93. — By Mortgagor.

Under Code 1907, § 4091, subds. 2, 3, limiting the interest of a mortgagor of

personalty subject to execution sale to the equity of redemption and to a right to the possession, a mortgagee of a mule, under the provisions of the mortgage, had no right of possession prior to the law day of the mortgage, and hence could not recover from an execution purchaser of the equity of redemption the reasonable rental value of the mule between the date of the levy and the mortgage law day. *Horton v. Hovater*, 11 Ala. App. 413, 66 So. 939.

§ 94½. — By Mortgagee or Trustee after Default.

Where there was valid mortgage conveying title and right to possession to mortgagee, mortgagor had given possession to the mortgagee, and law day had passed which gave the mortgagee right to sell, the mortgagor, if the mortgagee sold the property without authority, could recover, in action for money had and received, difference between what it sold for and amount owing on the mortgage debt. *Lineville Nat. Bank v. Weaver* (Ala. App.), 78 So. 461.

§ 95. Conversion of or Injury to Property.

§ 96. — By Mortgagee or Trustee.

Persons Liable.—*Snead v. Scott*, 182 Ala. 97, 62 So. 36. See the title CHATTEL MORTGAGES, § 96, vol. 3, p. 86.

Where a third person in possession of a chattel mortgage took possession of the chattels against the protest of the mortgagor, who had paid the mortgage, and delivered the same to the mortgagee, who sold the property, the mortgagee was estopped from denying the agency of the third person, and the mortgagee and the third person were jointly liable for converting the property. *McDougal v. Alston*, 190 Ala. 78, 66 So. 683, cited in note in *L. R. A.* 1915E, 197.

§ 97. — By Third Persons.

Right of Action. — Though a chattel mortgagee or transferee has only an equity where mortgaged chattel is delivered to either, held, that he has such a title as will support trespass or trover, or detinue against a third person. *Baker, etc., Co. v. American Agri. Chemical Co.* (Ala.), 77 So. 866.

Liability for Conversion. — Where the proceeds of that part of cotton which defendant directed the grower to sell and bring to him went in satisfaction of a landlord's lien superior to plaintiff's mortgage, defendant is not liable for a conversion. *Dixie Fertilizer Co. v. Teasley*, 14 Ala. App. 283, 69 So. 988.

In trover for conversion of a mortgaged chattel, where the conversion was worked by a purchase, and the defendant merely loaned the money to effect it, acquiring no interest in the chattel, he was not liable. *Argo v. Sylacauga Mercantile Co.*, 12 Ala. App. 442, 68 So. 534.

S., to secure an indebtedness to W., delivered to him a mortgage covering his entire crop of cotton for a year, and thereafter delivered to W., in part payment of the indebtedness, after maturity of the mortgage, three bales of cotton covered by it. The mortgage was recorded, and a second mortgagee had notice of its existence when he took his mortgage, which stated that there was no incumbrance except the mortgage to W.. W., after delivery of the cotton to him by S., sold and delivered to defendant for the market value of the cotton, which defendant paid in full. Held, that defendant was not liable to the second mortgagee for damages for wrongfully taking the cotton. *Home Supply Co. v. Almon* (Ala. App.), 76 So. 473.

§ 98. Actions for Possession of Property.

§ 99. — Between Parties to Mortgage.

§ 99 (1) In General.

Right of Action.—*Black v. Slocumb Mule Co.*, 8 Ala. App. 440, 62 So. 303. See the title CHATTEL MORTGAGES, § 99 (1), vol. 3, p. 87.

Remedies. — A chattel mortgagee has three several remedies against the mortgagor: An action at law for the debt; an action to recover possession; and a foreclosure of the mortgage, and sale of the property. *Ex parte Logan*, 185 Ala. 525, 64 So. 570, denying certiorari *Logan v. Smith Bros. & Co.*, 9 Ala. App. 459, 63 So. 766.

§ 99 (2) Defense.

Breach of Warranty. — Under Code 1907, § 3791, providing what may be

pleaded when detinue is brought by a mortgagee or a vendor in a contract of conditional sale, in action of detinue, plaintiff claiming under a chattel mortgage executed by defendant, had the right to plead breach of warranty made by plaintiff as to the soundness of the property, the price of which constituted the consideration of the mortgage relied on by plaintiff. *Hood v. Jenkins* (Ala. App.), 75 So. 871.

Rescission of Contract. — Under Code 1907, § 3791, providing what may be pleaded in detinue by a mortgagee or vendor, in detinue for recovery of mare sold to defendant, the defense of rescission of contract of purchase, for price of which the mortgage on which suit was founded was executed, was available to defendant. *Dean v. Brown* (Ala.), 78 So. 966.

§ 99 (4) Pleading.

In detinue a plea that plaintiff claimed the property under a mortgage, and that defendant alleged that plaintiff, through its agent, fraudulently procured defendant's signature thereto, in that the agent falsely told defendant at the time he signed the mortgage that it did not cover the property sued for, that defendant relied on such representation, and, wholly relying thereon, signed the mortgage without knowing that it contained or conveyed the property sued for, was not demurrable. *Hoobler v. International Harvester Co.*, 185 Ala. 533, 64 So. 567.

A plea in detinue alleging that plaintiff claimed under a mortgage which defendant had been induced by plaintiff's agent to sign under specified circumstances, but which failed to deny that defendant knew he was signing a mortgage, and did not allege that plaintiff's agent made any false or fraudulent representations as to the contents thereof, was insufficient, since defendant would be presumed to know the full import and effect of the mortgage. *Hoobler v. International Harvester Co.*, 185 Ala. 533, 64 So. 567.

§ 99 (5) Evidence.

In detinue by mortgagee against mortgagor to recover mules sold by plaintiff

to defendant, the latter pleading breach of warranty, evidence as to value of property involved held to sustain verdict for plaintiff. *Hood v. Jenkins* (Ala. App.), 75 So. 871.

Under Code, §§ 3789, 3791, touching detinue by a mortgagee or vendor, and § 4899, providing that payment of a mortgage debt divests the title passing by the mortgage, in detinue by a chattel mortgagee, where there was no objection to the issues raised by the plea of the general issue with leave to give in evidence other matters which would be a good defense, defendant mortgagor could prove that the mortgage debt was not due, as well as prove payment as a complete defense, and put in issue the amount due on the debt, and prove a set-off or counterclaim, while proof of tender of an installment of the mortgage debt, payable by installments, made after suit brought, was admissible as tending to show a reduction of the amount due on the debt. *Wertheimer Bag Co. v. Hill*, 14 Ala. App. 623, 71 So. 618.

§ 99 (6) Questions for Jury.

In detinue by a mortgagee against his mortgagor, where defendant pleaded breach of warranty by plaintiff as to the soundness of the property, the purchase price of which constituted the consideration of the mortgage, the defense, if sustained, reduced the amount of the mortgage debt by the difference between the agreed price of the property and the real value at time of sale. *Hood v. Jenkins* (Ala. App.), 75 So. 871.

§ 99 (7) Instructions.

In detinue by a chattel mortgagee to recover the chattels, where defendant pleaded payment of the mortgage, it was proper to give a charge stating the provision of Code 1907, § 4899, that payment of a mortgage debt divests the title passing by the mortgage. *Hampton v. Tant* (Ala. App.), 73 So. 825.

In detinue to recover chattels claimed by plaintiff under a mortgage, evidence held sufficient to warrant submitting to the jury the question whether receipts given by plaintiff represented payments on the mortgage debt. *Hampton v. Tant* (Ala. App.), 73 So. 825.

§ 100. — Against Third Persons.

Right of Action. — Though a chattel mortgage or transferee has only an equity where mortgaged chattel is delivered to either, held, that he has such a title as will support detinue against a third person. *Baker, etc., Co. v. American Agri. Chemical Co. (Ala.)*, 77 So. 866.

Horse dealers, whose predecessors had purchased animals from defendant, gave defendant a chattel mortgage on a horse later acquired by plaintiff. At the same time they mortgaged other animals to defendant. On breach of condition, defendant took the horse from plaintiff. Held, that in an action to recover the horse, evidence that defendant had authorized plaintiff's predecessors to sell mortgaged animals was improperly admitted, notwithstanding defendant put in evidence the second mortgage. *Steagall—Cheairs Fertilizer Co. v. Kennedy*, 192 Ala. 548, 68 So. 862.

§ 101. — Between Mortgagees.

Though a mortgage, unless it is duly registered, may be declared void by statute, notice is equivalent to registration, and a subsequent incumbrancer or purchaser with notice can not avoid the lien of the unrecorded mortgage. *Neeley v. Reynolds*, 196 Ala. 581, 72 So. 124.

§ 102. Actions for Damages.**§ 103. — Between Parties to Mortgage.**

Right of Action. — After condition broken, a chattel mortgagee can not maintain trover. *Harmon v. Dothan Nat. Bank*, 186 Ala. 360, 64 So. 621.

Burden of Proof.—A chattel mortgagor suing for the wrongful taking of the mortgaged chattels on the theory that the debt had been paid, has the burden of proving payment. *McDougal v. Alston*, 190 Ala. 78, 66 So. 683.

Sufficiency of Evidence. — *Snead v. Scott*, 182 Ala. 97, 62 So. 36. See the title CHATTEL MORTGAGES, § 103, vol. 3, p. 92.

§ 104. — Against Third Persons.**§ 104 (1) In General.**

Right of Action.—As to all the world except the mortgagee, the mortgagor holds the legal title upon which, as

against a third person, he can maintain either trespass or trover. *Butler Cotton Oil Co. v. Campbell & Son (Ala. App.)*, 78 So. 643.

B. cultivated M.'s land under an agreement for a division of the crops making them tenants in common thereof. B. gave plaintiff a mortgage on his interest in the crops to be raised, and, pursuant thereto, turned over to plaintiff a bale of cotton by depositing it in a warehouse. M., before the maturity of the mortgage by a detinue proceeding, to which plaintiff was not a party, obtained possession of the cotton, sold it, and applied B.'s interest on a debt for which he had no lien. Held, that while ordinarily a mortgagee can not recover in trover for a conversion prior to the maturity of his mortgage, plaintiff by the delivery of the cotton to him acquired title to B.'s interest therein, and hence had such a title and right to possession as would support trover. *Johnson v. McFry*, 14 Ala. App. 170, 68 So. 716.

Where plaintiff's mortgage was not due, and it was not then entitled to possession of cotton, it can not maintain an action for its conversion. *Dixie Fertilizer Co. v. Teasley*, 14 Ala. App. 283, 69 So. 988.

A second mortgagee of chattels has a mere lien, as against a prior mortgagee, which will not support an action of trover against the prior mortgagee and those holding under him. *Butler Cotton Oil Co. v. Campbell & Son (Ala. App.)*, 78 So. 643.

Same—Joint Action for Killing of Horse.—The mortgagor and mortgagee of a past-due mortgage of a horse, which was left in the mortgagor's possession, may jointly maintain trespass for the killing of the horse by a railroad train, under an allegation that the horse was their property, since those having separate interests in a chattel may join to recover for an injury thereto, and, if the mortgagor is only a bailee for the mortgagee, he has a right of action for injuries to his interest given by him by Code 1907, § 2464. *Southern R. Co. v. Chamblless*, 10 Ala. App. 326, 65 So. 417, cited in note in Ann. Cas. 1917D, 554.

Liability for Conversion.—When any person converts, after gathering, crops which were mortgaged before planting, he is liable, if he has actual or constructive notice of the lien, in an action for destruction of the lien, or in detinue for the specific product, or in trover for conversion. *Pinckard v. Cassels*, 195 Ala. 353, 70 So. 153.

§ 104 (5) Evidence.

Burden of Proof.—In action for preventing enforcement of equitable mortgage on crops, plaintiff must show that the crops converted by defendant were grown on land in which mortgagor had an interest when the mortgage was given. *Benson Hdw. Co. v. Wilder Mercantile Co.*, 197 Ala. 703, 73 So. 4.

In detinue and trover by a chattel mortgagor against a purchaser from the chattel mortgagee who set up no claim to the property, except under the foreclosure of such mortgage, such purchaser had the burden of proving the mortgagor's consent that the mortgage should stand as security for claims or debts not mentioned therein and for the payment of which the mortgage was foreclosed, and hence an instruction that the burden was on defendant to prove the correctness of items not authorized by the mortgage was proper. *Hodges v. Kyle*, 9 Ala. App. 449, 63 So. 761.

Sufficiency of Evidence.—In trover by subsequent mortgagees, whose mortgage was given in 1914, for the conversion of that year's cotton, against mortgagees whose mortgage was executed in 1913, evidence held to show that at the time defendant's crop mortgage was given the mortgagor had no contract or lease entitling him to possession of the land, and hence the earlier mortgage passed no title. *Pinckard v. Cassels*, 195 Ala. 353, 70 So. 153, cited in notes in L. R. A. 1917C, 15, 16.

In an action for penalty for failure to satisfy a mortgage, evidence held to present a question for the jury as to whether payment of the debt to the firm in question satisfied a mortgage; there remaining an indebtedness to one of the firm. *Denton Bros. v. Foster*, 195 Ala. 53, 70 So. 152.

§ 104 (6) Damages.

Where, in trover for conversion, plaintiff's title is based on a chattel mortgage, the measure of damages is the mortgage debt and interest not to exceed the value of the property. *Jones v. White*, 189 Ala. 622, 66 So. 605.

§ 105. — Between Mortgagees.

Burden of Proof.—Where plaintiff in an action for the conversion of a bale of cotton, and the seed out of same, relied on a mortgage covering the mortgagor's "entire crops, cotton and produce, and all rents accruing to us for * * * each * * * year in this county in which we now reside, until paid," the burden was on the plaintiff, by reason of the uncertainty of such description, to prove not only that the cotton and seed described in the complaint were raised by the mortgagor in the county, but that it was raised on lands in which the mortgagor had a present interest when he gave the mortgage. *Smith v. Davenport & Co.*, 12 Ala. App. 456, 68 So. 545.

Sufficiency.—In an action for damages for destroying a lien on a certain crop, evidence held to sustain a finding that, at the time of the execution of plaintiff's mortgage, the mortgagor had a possessory interest in the land, authorizing him to execute the mortgage on the crop to be grown. *Anders Mercantile Co. v. Rice Bros.*, 187 Ala. 468, 65 So. 388, cited in note in L. R. A. 1917C, 14.

V. RIGHTS AND REMEDIES OF CREDITORS.

§ 107. Retention of Possession by Mortgagor.

§ 110. — Reservation of Possession, Power of Sale, or Use.

Sale by Mortgagor in Usual Course of Trade.—A mortgage taken on a stock of goods with an understanding that the mortgagor is to continue in business in charge of the goods, necessarily disposing of them from time to time, is fraudulent and void as to present and subsequent creditors of the mortgagor. *Gray, etc., Hdw. Co. v. Guthrie (Ala.)*, 75 So. 318; *Farmers' State Bank v. Kirkland (Ala.)*, 75 So. 894.

§ 115. Failure to File or Record Mortgage.

§ 117. — Creditors Entitled to Protection.

Code 1907, § 3386, providing that chattel mortgages, not recorded as directed by law, shall be inoperative against creditors and purchasers without notice, applies only to subsequent and not existing creditors. *Hill v. Rentz* (Ala.), 78 So. 881.

§ 119. Actions to Determine and Establish Rights.

Direction of Verdict.—In trover for a mule mortgaged by N. to plaintiff, taken by defendant on execution against N. and W., when there was evidence supporting defendant's contention that the mule belonged to W. and that mortgage was void as against creditors, affirmative charge for plaintiff should not have been given. *Chenault v. Stewart* (Ala.), 73 So. 501.

Burden of Proof.—Plaintiff, in attachment against mules as property of his debtor, had the burden of proving that property was liable to process, and that he was a subsequent creditor within the protection of the recording statutes, Code 1907, § 3386. *Hill v. Rentz* (Ala.), 78 So. 881.

Sufficiency of Evidence.—In a suit to foreclose a mortgage on stock of goods, attacked as fraudulent, evidence held to show that the mortgaged property was intended by both parties to be used in the mortgagor's business. *Gray, etc., Hdw. Co. v. Guthrie* (Ala.), 75 So. 318.

VI. ASSIGNMENT OF MORTGAGE OR DEBT.

§ 120. Requisites and Validity in General.

Though a written assignment of a crop mortgage was insufficient to carry the legal title, yet where the mortgage and a note secured thereby was delivered to the assignee he took an equitable title. *Roy v. Greil* (Ala. App.), 77 So. 64.

§ 123. Rights and Liabilities of Parties.

§ 125. — Property Mortgaged.

Transfer of Legal Title.—The transfer by indorsement or assignment of a note

and the chattel mortgage securing it, though the transfer is for collateral security only, prima facie passes to the transferee the legal title to the mortgaged chattels. *Baker, etc., Co. v. American Agri. Chemical Co.* (Ala.), 77 So. 866.

Redelivery of Mortgages for Collection.

—Plaintiff sold fertilizer to a merchant who sold it to farmers and took from them notes and mortgages on their crops and other personality as security, and by a prearrangement transferred the mortgages to plaintiff as collateral security. Subsequently plaintiff redelivered the notes and mortgages to the merchant under an agreement whereby it appointed the merchant its trustee to collect the notes and mortgages for it. Held, that when the merchant received cotton from the several mortgagors for sale and credit on their accounts, his possession was the possession of plaintiff. *Baker, etc., Co. v. American Agri. Chemical Co.* (Ala.), 77 So. 866.

On default in payment of the mortgage debt, the transferee of a chattel mortgage may exercise all the rights of the mortgagee, including the right to take and hold possession of the chattels. *Baker, etc., Co. v. American Agri. Chemical Co.* (Ala.), 77 So. 866.

§ 128. Actions by or against Assignees.

Right of Action by Assignee.—An assignee of a chattel mortgage succeeded to all the mortgagee's rights against the mortgagors, including the right to bring detinue for the property. *Stevens v. Romano*, 10 Ala. App. 601, 65 So. 713.

Same — Repurchase of Mortgage by Mortgagee.

—Where one took a rent note and crop mortgage, and transferred them to another, and after they fell due and the crop had been sold purchased them back, he can not recover for conversion of the crop by mortgagors, purchaser and another, where he does not sue as assignee. *Gilbreath v. Copeland* (Ala. App.), 77 So. 58.

Same—Validity of Assignment.—Assignment of a mortgage on mules signed by the "A. C. S. Company," the mortgagee, by "J. W. C.," without evidence to show whether the mortgagee was a corporation or a partnership, and without

proof of authority of J. W. C. to assign the mortgage, is insufficient to support detinue by the assignee to recover the mules. *Columbus Grocery Co. v. Prince*, 197 Ala. 624, 73 So. 333.

Same—Transfer by Delivery Merely.—Transfer of mortgage by delivery merely, without written assignment, does not pass legal title, so as to authorize action at law in the transferee's name for the property. *Sanders v. Rogers* (Ala. App.), 77 So. 69.

Same—Equitable Assignee.—An equitable assignee of a chattel mortgage may sue in case for the destruction of the mortgage lien. *Lowery v. Haley*, 12 Ala. App. 448, 68 So. 539.

Action by Equitable Assignee.—Where a chattel mortgagee under the terms of the mortgage has legal title to the property, and is entitled to immediate possession, his equitable assignee can bring trover in the name of the mortgagee for the conversion thereof. *Lowery v. Haley*, 12 Ala. App. 448, 68 So. 539.

A transfer of a chattel mortgage before maturity by delivery and indorsement of it and the note, which was a part thereof, as collateral security for a loan not yet due, vests in the transferee only the equitable title, and he can not sue in his own name in trover for the conversion of the property. *Lowery v. Haley*, 12 Ala. App. 448, 68 So. 539.

VII. REMOVAL OR TRANSFER OF PROPERTY BY MORTGAGOR.

(A) RIGHTS AND LIABILITIES OF PARTIES.

§ 130. Consent of Mortgagee to Sale.

Mortgagee of perishable chattels, refusing consent, necessary under Code 1907, § 7423, for their sale, an implied contract that he shall buy them is raised. *Gulfport Fertilizer Co. v. Jones* (Ala. App.), 73 So. 145.

Mortgagor of perishable chattels, to avail himself of implied contract of the mortgagee, refusing necessary consent for their sale, to buy them, must acquit himself of fault or negligence. *Gulfport Fertilizer Co. v. Jones* (Ala. App.), 73 So. 145.

§ 131. Rights and Liabilities of Purchaser or Transferee.

§ 132. — As to Mortgagee in General.

Removal from County—Sale and Purchase.—*Hutto v. Garner*, 7 Ala. App. 412, 61 So. 477. See the title CHATTEL MORTGAGES, § 132, vol. 3, p. 109.

Sale of Mules to Neighboring Residents.—Proof by the assignee of a chattel mortgagee that the purchaser of the mortgaged mules had sold them again, but that they were sold to persons living nearby who openly kept them on their premises, is not sufficient to support a recovery for destruction of the lien of the mortgage, since to support such recovery, it must appear that the property has, in some way, been put beyond the reach of the mortgagee, not merely that it has been converted. *Lowery v. Haley*, 12 Ala. App. 448, 68 So. 539.

Purchase with Notice.—One who, with notice, purchases from a purchase-money mortgagor part of the mortgaged property in payment of his pre-existing debt is liable for the value of the property to the mortgagee; such a transaction not being authorized by the right given by the mortgage to the mortgagor to swap or exchange the mortgaged property. *Bright v. Mack*, 197 Ala. 214, 72 So. 433.

A partnership which received personality from a member thereof with notice of an outstanding mortgage took subject to the mortgage. *Gossett v. Morrow*, 187 Ala. 387, 65 So. 826.

Delivery of Crop to Mortgagee.—Where an unplanted crop comes into existence and is delivered to mortgagee, his legal title is complete, and he may maintain detinue, etc., against any one disturbing his possession, and if before delivery the mortgagor or his assignee, with knowledge of the mortgage lien, receive and dispose of it, both will be liable to mortgagee for its value. *Houston Nat. Bank v. Edmonson & Co.* (Ala.), 75 So. 568.

A provision in a chattel mortgage allowing mortgagors to swap or exchange the mortgaged property, the property secured in exchange to stand in place of exchanged property, does not render the mortgage void as to purchasers of the

property not bona fide purchasers. *Bright v. Mack*, 197 Ala. 214, 72 So. 433.

Mortgagor of Crop Renting Land to Son.—One who had mortgaged a crop to be raised by himself or family could not, as against the mortgagee, emancipate his minor son, at the same time retaining him in the family, and rent to him part of the premises, so as to give the son a title superior to that of the mortgagee to the crop raised by the son. *Hughes, etc., Supply Co. v. Bussey*, 14 Ala. App. 388, 70 So. 997.

Conversion.—Where defendant purchased a mortgaged chattel through an agent, or acquired any interest in the chattel by paying to the seller the purchase money, such defendant was liable for conversion, irrespective of whether he took physical possession, it not being essential to a conversion that the converter should have had complete manucaption of the property, any intermeddling with or dominion exercised over the property of another, by a defendant alone or in connection with another, and amounting to a denial of the owner's right, being a conversion. *Argo v. Sylacauga Mercantile Co.*, 12 Ala. App. 442, 68 So. 534.

Plaintiff, the mortgagee, under a duly recorded mortgage of crops, and who had held mortgages on the mortgagor's crops for about eight years, during which the mortgagor had habitually sold his cotton when and to whom he saw fit, without consulting the plaintiff, but had paid the proceeds to the mortgagee, who had never authorized the sale of the bale of cotton in suit, or received its proceeds, and to whom the mortgagor was indebted for a balance, was not estopped from suing the purchaser for conversion. *Carroll Mercantile Co. v. Folmar*, 14 Ala. App. 378, 70 So. 985.

Evidence.—In detinue for a mule by subsequent purchasers from the mortgagor against the mortgagee, the mortgage was admissible in evidence. *Dunaway v. Stickney*, 13 Ala. App. 645, 69 So. 232.

Question for Jury.—In detinue for a mule by subsequent purchasers from the mortgagor against the mortgagee, the question of the identity of the mule purchased with that covered by the mort-

gage was for the jury. *Dunaway v. Stickney*, 13 Ala. App. 645, 69 So. 232.

§ 134. Actions by Mortgagee against Mortgagor.

Defendants.—Where a mortgage on crops is recorded in the county in which the crops were grown, and the mortgagor converts the property by selling it, a joint action in trover may be brought against the mortgagor and the purchaser; the latter having constructive notice by the mortgage, and hence not a bona fide purchaser. *Lefkovitz v. Lester*, 11 Ala. App. 504, 66 So. 894.

Direction of Verdict.—In a joint action of trover against a mortgagor and purchaser for conversion of crops, in which it was claimed that the mortgagor sold the crops and paid the proceeds on a debt covered by the landlord's lien, which had priority to the mortgage, an affirmative charge held properly refused, where the evidence tended to establish that the proceeds were paid on a debt not covered by the lien. *Lefkovitz v. Lester*, 11 Ala. App. 504, 66 So. 894.

§ 135. Actions by Mortgagee against Purchaser or Transferee.

See ante, "Actions by Mortgagee against Mortgagor," § 134.

§ 135 (1) In General.

Right of Action.—Where a chattel mortgage gave the mortgagor the right to property until the law day of the mortgage, but provided that such right should be forfeited if he should, at any time before that day, sell the property, the mortgagee could bring trover against the purchaser of the property without waiting for the law day of the mortgage. *Lowery v. Haley*, 12 Ala. App. 448, 68 So. 539.

Where a second chattel mortgage was executed directly to a firm, while the first mortgage, covering the same property, was executed to a partner, the partners had such interest, by reason of the second mortgage, as enabled them to sue for conversion of the mortgaged property, without connecting the second mortgage with the first. *Baker v. Lauderdale*, 14 Ala. App. 224, 69 So. 299.

Defendants.—Where a mortgage on

growing cotton was duly recorded, and the mortgagor, or his tenant with his consent, sold the cotton to a buyer, who immediately sold it to a third person, who shipped it out of the county, the mortgagee, suing for conversion and for the destruction of his lien, could join as defendants the buyer and the third person. *Baker v. Lauderdale*, 14 Ala. App. 224, 69 So. 299.

§ 135 (2) Pleading.

Defenses.—In detinue by the mortgagee of a horse, a plea that defendant gave the mortgagor a horse in exchange, and took possession of the other horse, and became the bona fide owner thereof, and afterwards paid the balance of the purchase price, and that he had no notice of plaintiff's claim thereto, and knew of no facts sufficient to put him on inquiry, sufficiently negatived defendant's notice of the existence of plaintiff's mortgage at the time he parted with value in his dealing with the mortgagor. *Donahoo Horse, etc., Co. v. Durick*, 193 Ala. 456, 69 So. 545.

In a suit by a second mortgagee against a purchaser for the conversion of chattels embraced in the mortgage, such purchaser, in order to successfully plead a prior mortgage as a defense, must connect himself with the prior mortgage. *Butler Cotton Oil Co. v. Campbell & Son* (Ala. App.), 78 So. 643.

§ 135 (3) Evidence.

Burden of Proof.—To defeat the operation of an assignment by the mortgagee of a cotton crop the burden was on claimant to show its own possession under mortgagor's prior sale to it under claim of right, with a repudiation of mortgagee's right, brought to the knowledge of the prior mortgagee. *Houston Nat. Bank v. Edmonson & Co.* (Ala.), 75 So. 568.

Defendant, claiming to be a bona fide purchaser, must make satisfactory proof of purchase and payment, whereupon plaintiff must prove that before payment defendant had actual or constructive notice of facts sufficient to put him upon inquiry as to the chattel mortgage lien asserted or facts sufficient to put him on inquiry, which, if followed up, would have

shown the lien. *Donahoo Horse, etc., Co. v. Durick*, 193 Ala. 456, 69 So. 545.

Admissibility.—In trover for the conversion of a mortgaged chattel, the exclusion of evidence tending to show the satisfaction of the mortgage debt was improper since the satisfaction of the debt would have destroyed plaintiff's title under the mortgage. *Argo v. Sylacauga Mercantile Co.*, 12 Ala. App. 442, 68 So. 534.

In trover for the conversion of a mortgaged chattel, the mortgage was properly admitted in evidence. *Argo v. Sylacauga Mercantile Co.*, 12 Ala. App. 442, 68 So. 534.

In action for destroying a chattel mortgage lien on cotton, it was error not to exclude the question as to who, when the mortgage was executed and delivered to plaintiff, held the legal title to the land on which cotton was to be grown, such inquiry not being material. *Kilgore v. Jones* (Ala. App.), 73 So. 832.

In a mortgagee's suit in detinue against a third person for horse and mules, where plaintiff relied on its mortgage, neither execution of which nor that its consideration was past due and unpaid was controverted, the court properly excluded evidence by defendant as to a conversation between mortgagor's wife and plaintiff's agent when the property was carried to defendant. *Dothan Grocery Co. v. American Agri. Chemical Co.* (Ala.), 75 So. 334.

Sufficiency of Evidence.—In a mortgagee's action in trover against a purchaser of a bale of cotton alleged to be covered by a mortgage on "the entire crop of cotton * * * raised or to be raised" by the mortgagor during the year, plaintiff made out a prima facie case by offering in evidence the mortgage and proving that the bale was raised during the year covered by the mortgage on lands in that county in the mortgagor's possession when the mortgage was executed, under a lease which continued until after the cotton was raised. *Hughes, etc., Supply Co. v. Bussey*, 14 Ala. App. 388, 70 So. 997, cited in note in L. R. A. 1917C, 12.

Evidence in a mortgagee's action in trover for conversion of a bale of cotton

held insufficient to overcome the prima facie case made out by plaintiff where the terms of the sublease relied on by defendant were not shown, and it did not appear but that the legal title to crops raised by the sublessee was in the mortgagor under Code 1907, § 4743. *Hughes, etc., Supply Co. v. Bussey*, 14 Ala. App. 388, 70 So. 997.

Same—Question for Jury.—In trover for the conversion of a mortgaged chattel, the identity of the chattel in controversy and that covered by the mortgage was for the jury under the evidence. *Argo v. Sylacauga Mercantile Co.*, 12 Ala. App. 442, 68 So. 534.

In an action to recover a mule, evidence held sufficient to take to the jury the questions whether the plaintiff's mortgage covered the mule, and whether defendant had notice, either actually or constructively, of that fact when he purchased it. *Lindsey & Co. v. Steenson*, 192 Ala. 169, 68 So. 332.

In an action for the conversion of a mortgaged chattel, evidence held sufficient to take to the jury the question whether the furnishing of money by the defendant to his tenant to purchase the chattel was a mere loan or was such as to vest a proprietary interest in the chattel in the defendant. *Argo v. Sylacauga Mercantile Co.*, 12 Ala. App. 442, 68 So. 534.

Same—Direction of Verdict. — In a mortgagee's suit in detinue for the recovery of a horse and mules, where there was evidence for plaintiff to show that mortgagor was in possession, claiming the property, at execution of mortgage, and defendant offered proof that such was not the case, defendant was not entitled to the affirmative charge requested. *Dothan Grocery Co. v. American Agri. Chemical Co. (Ala.)*, 75 So. 334.

§ 135 (5) Trial.

In an action to foreclose chattel mortgage on crops, the court properly imposed a personal judgment against purchasers of the mortgaged crops, where they had disposed of such crops. *Butler & Co. v. Henry & Co. (Ala.)*, 78 So. 912.

(B) CRIMINAL RESPONSIBILITY.

§ 136. Offenses.

Defendant, having joined with his cropper in executing a mortgage on the crop to T. to secure advances, joined with his cotenant in executing a subsequent mortgage on the same crop to a bank. After the crops were sold, the proceeds were paid to the bank in satisfaction of its claim; but the evidence was in conflict as to whether such payment was made by defendant or by his cotenant. Held, that the fact that the application of the proceeds was made by defendant's to a prosecution for disposing of the property with intent to defraud T., in violation of Code 1907, § 7342, provided defendant aided and abetted his cotenant with such intent. *Courtney v. State*, 10 Ala. App. 141, 65 So. 433.

§ 136½. Preliminary Proceedings in Prosecution.

An affidavit and warrant charging the offense of "buying mortgaged property" can be reasonably interpreted as charging a violation of Code 1907, § 7342, which prohibits "removing, selling or buying property to which others have claim," and is sufficient in a court of a justice of the peace. *Nolen v. Jones (Ala.)*, 76 So. 935.

§ 138. Evidence.

Burden of Proof.—To sustain a conviction of sale of mortgaged property, the state must prove beyond a reasonable doubt a sale of personal property upon which defendant had given a mortgage, which was unsatisfied in whole or in part at time of sale, and that the sale was made without consent of the lawful holder of the mortgage lien. *Wiley v. State (Ala. App.)*, 75 So. 641.

Admissibility. — In a prosecution for sale of mortgaged property, evidence of any claim alleged mortgagee had to property other than the mortgage was irrelevant. *Wiley v. State (Ala. App.)*, 75 So. 641.

Defendant, having joined his cropper in a mortgage on the crop to T. to secure advances, joined his cotenant in executing another mortgage on the crop to a bank. The proceeds of the crop were

thereafter paid to the bank; but the evidence was in dispute as to whether they were so paid by defendant or his cotenant. Held, that evidence that defendant and his cotenant executed the mortgage to the bank, and that the latter applied to such mortgage the proceeds of the crops removed, was not admissible as bearing on defendant's intent to defraud T., since, if the cotenant, and not defendant, sold the property and applied the proceeds, defendant would not be guilty, unless he aided and abetted in such act with the fraudulent intent to defraud T., irrespective of the creditor to whom the tenant paid the proceeds, and, if he did aid and abet the cotenant with the intent to defraud T., he was guilty, although the cotenant paid the proceeds to the bank on its mortgage which was subsequent to T.'s lien. *Courtney v. State*, 10 Ala. App. 141, 65 So. 433.

Sufficiency.—In a prosecution for sale of mortgaged property, evidence held insufficient to sustain a conviction. *Wiley v. State* (Ala. App.), 75 So. 641.

Defendant and his cotenant having contracted with H. to make a crop on their land on shares, defendant and H. joined in a mortgage on the crop to T. to secure advances. Thereafter defendant and his cotenant executed another mortgage on the crop to a bank, and, when the crops were sold, paid the proceeds to the bank. Held, that such facts were sufficient to sustain an inference that defendant, in disposing of the property, intended to hinder, delay, and defraud T., who, to defendant's knowledge, had the prior lien on the crop, in violation of Code 1907, § 7342, making the sale of the crop with intent to defraud a lienholder a crime; there being no evidence of any attempt on defendant's part to satisfy T.'s lien either before or within a reasonable time after the property had been removed and sold. *Courtney v. State*, 10 Ala. App. 141, 65 So. 433.

§ 139. Trial and Review.

Where evidence afforded inference that property was defendant's when chattel mortgage was given and that the mortgage was a lien thereon, that ques-

tion and whether he unlawfully sold the property were for the jury. *McCullough v. State* (Ala. App.), 74 So. 755.

In a prosecution for selling cotton seed subject to an unsatisfied mortgage lien, the charges, "I charge you, gentlemen of the jury, that the want of more evidence in favor of the innocence of the defendant than there is in favor of his guilt may not preclude a reasonable doubt of his guilt," and, "I charge you, gentlemen of the jury, that the want of more evidence in favor of the innocence of the defendant than there is in favor of his guilt may not preclude a reasonable doubt of his guilt, but such doubt may arise when there is no probability of his innocence arising under the testimony," were properly refused, as involved, confusing, and argumentative. *Wilson v. State*, 14 Ala. App. 87, 71 So. 971.

VIII. PAYMENT OR PERFORMANCE OF CONDITION, RELEASE, AND SATISFACTION.

§ 140. Payment of Debt.

Where a mortgagee took from the wife of the deceased mortgagor an animal in part payment of the debt and surrendered to her the mortgage and other property secured thereby, the trade was valid and binding on her, though the mortgagee, because of the mortgagor's death, could not prove that the animal was described in the mortgage by description inserted after the execution and recording of the mortgage pursuant to agreement with the mortgagor. *Shotts v. Scott*, 192 Ala. 173, 68 So. 325.

B. executed a mortgage on a horse to plaintiff, who failed to record it. Defendants executed a mortgage to a bank, in which B. joined as a surety, and included the horse. Plaintiff sold the horse upon default and applied the proceeds on the mortgage debt, and upon learning of the rights of the bank purchased its mortgage. Held, that while if the money paid to the bank had belonged to defendants, the principal mortgagors, the payment would have discharged the indebtedness, and a transfer of the mortgage would have been ineffectual, since

the proceeds of the sale of the horse belonged to the surety and not to the principal mortgagors, the mortgage was not discharged. *Stevens v. Romano*, 10 Ala. App. 601, 65 So. 713.

§ 141. Tender.

§ 143. — After Default.

Under Code 1907, § 5334, providing that a plea of tender of money or a thing in action must be accompanied by delivery to the clerk of the court, in detinue by a chattel mortgagee, the mortgagor must keep good his tender of an installment of the mortgage debt by delivering the money to the clerk of the court. *Wertheimer Bag Co. v. Hill*, 14 Ala. App. 623, 71 So. 618.

§ 143½. Conveyance or Disposition of Property Mortgagee.

A mortgagor executed to the mortgagee a conveyance of the land on which the mortgage was past due. Thereafter the mortgagor rented the lands, and the mortgagee made advances to him as landlord. The mortgagor sublet a portion of the premises, and after the crops were matured the mortgagee purchased them, paying \$25 in cash, and discharging the indebtedness for rent and advances. Held, that under Code 1907, § 4899, declaring that the payment of a mortgage debt divests the title passing by the mortgage, the title of the mortgagee to the crops in excess of the mortgage debt was divested, and a crop mortgagee became entitled to it. *Head v. Knox & Co.*, 14 Ala. App. 221, 69 So. 257.

Where other creditors are interested, or, in the absence of agreement to the contrary, if a mortgagee holds two mortgages on properties of the same mortgagor, and the latter delivers to him property covered by both mortgages, the reasonable market value of the property, or the proceeds of sale under the mortgage, must be applied as provided in the instrument first conveying, and if the property seized or sold is conveyed by only one mortgage, the property or its proceeds must be applied by the mortgagee to the debt evidenced by the mortgage that constitutes a lien on the prop-

erty. *Manchuria S. S. Co. v. Donald & Co. (Ala.)*, 77 So. 12.

§ 144. Giving New Security.

Where a chattel mortgagee agreed to accept a real estate mortgage given by a purchaser of the real estate in satisfaction of the chattel mortgage, and the real estate mortgage was actually delivered to the chattel mortgagee, the chattel mortgage was extinguished. *McDougal v. Alston*, 190 Ala. 78, 66 So. 683.

In detinue, where the title to the property depended on whether a chattel mortgage had been accepted in satisfaction of a previous mortgage, or as further security, the question was of fact for the jury, depending on the intention of the parties. *Graves v. Leach*, 192 Ala. 164, 68 So. 297.

§ 144½. Resort to or Release of Other Security or Remedy.

Where a crop mortgagee seized and sold two bales of cotton belonging to the surety, applying the proceeds to the satisfaction of the mortgage debt, and delivering to the surety the surplus, the debt was discharged, and the mortgagee could not thereafter recover on the mortgage, notwithstanding, in an action by the surety for conversion of his property, the surety recovered a default judgment. *Nelson v. Holcomb*, 187 Ala. 119, 65 So. 773.

§ 147. Penalties for Failure to Release or Enter Satisfaction.

Application of Statute.—Code 1907, § 4898, penalizing failure to enter satisfaction of chattel mortgages, does not apply to a mortgage validly foreclosed, but only to one paid or satisfied before its foreclosure, whether by judicial decree, or under power of sale. *Case Threshing Mach. Co. v. McGuire (Ala.)*, 77 So. 729.

Compliance with Statute.—Mailing by chattel mortgagee to mortgagor written acknowledgment of full payment and release, with authorization of probate judge to enter the satisfaction on the record, and letter stating it would be necessary for mortgagor to send satisfaction to judge, was not compliance with Code 1907, § 4898, penalizing failure of mortgagee to enter satisfaction. *Case Thresh-*

ing Mach. Co. v. McGuire (Ala.), 77 So. 729.

A petition seeking the penalty for failure to discharge a chattel mortgage on payment, though it fails to allege the amount of the mortgage, but otherwise identifies it, sets forth a cause of action. Denton Bros. v. Foster, 195 Ala. 53, 70 So. 152.

Estoppel. — Where chattel mortgagee on demand to satisfy mortgage merely mailed satisfaction to mortgagor, the latter was not estopped, by his silence after its receipt, to deny sufficiency of such action under Code 1907, § 4898. Case Threshing Mach. Co. v. McGuire (Ala.), 77 So. 729.

§ 148. Entry of Satisfaction of Record.

Written demand to enter satisfaction of chattel mortgage may be made to agent in another state of a corporation mortgagee, since it could be made upon mortgagee wherever found. Case Threshing Mach. Co. v. McGuire (Ala.), 77 So. 729.

IX. FORECLOSURE.

§ 151. Right to Foreclose in General.

A chattel mortgagee has three several remedies against the mortgagor: An action at law for the debt; an action to recover possession; and a foreclosure of the mortgage, and sale of the property. Ex parte Logan, 185 Ala. 525, 64 So. 570, denying certiorari Logan v. Smith Bros. & Co., 9 Ala. App. 459, 63 So. 766.

§ 152. Exercise of Power of Sale.

§ 162. — Manner and Conduct of Sale.

Presence of Property.—The law contemplates that in sale of personal property under mortgage the property should be present. Bowdoin v. Bedsole (Ala.), 75 So. 167.

The failure of chattel mortgagee to produce the property at foreclosure sale can be expressly waived by the mortgagor or impliedly so by withholding the possession of the property, or it may be that the production is not practicable or possible. (Bowdoin v. Bedsole (Ala.), 75 So. 167.

Where the mortgagee reduced to possession before foreclosure sale some of the mortgaged property, the sale would

not be vitiated as to the remainder of the property because of its nonproduction at the sale, where part of it was retained by the mortgagor and part, consisting of an ungathered crop, could not be reduced to possession at the time, and produced for inspection. Bowdoin v. Bedsole (Ala.), 75 So. 167.

Gross inadequacy of price paid by the purchaser at foreclosure sale will not of itself, even in a court of equity, invalidate a sale. Harmon v. Dothan Nat. Bank, 186 Ala. 360, 64 So. 621.

§ 163. — Title and Rights of Purchaser.

Superior Title.—Where plaintiff, upon paying the debt secured by the prior mortgage, requested its transfer to her, but simply received its surrender as a discharged instrument, it being surrendered to her, marked "Paid by Lizzie Key," she did not succeed to the mortgagee's rights thereunder so as to vest her with title superior to that of defendant under his purchase from the subsequent mortgagee, since her request for the transfer of the prior mortgage did not per se operate as a legal transfer thereof to her. Cain v. Key, 195 Ala. 105, 70 So. 845.

Irregularities.—In an action of detinue and trover against the purchaser of a chattel from the mortgagee after foreclosure, in determining the question of legal title it was immaterial whether P.'s foreclosure of the husband's mortgage was regular or not, since, if the husband had title to the property superior to plaintiff's title when he made the mortgage, the title vested in P. upon default under the mortgage, and not upon the foreclosure proceedings. Cain v. Key, 195 Ala. 105, 70 So. 845.

Rights Acquired through Payment of Prior Unrecorded Mortgage.—In an action of detinue and trover against the purchaser of a chattel from the mortgagee after foreclosure, plaintiff could not assert superior title under a prior mortgage given by the husband to one G., the surrender of which she had obtained by paying the debt secured, where the prior mortgage was not recorded at the time P.'s mortgage was executed, and for which P. gave value without actual

notice of the prior mortgage. *Cain v. Key*, 195 Ala. 105, 70 So. 845.

§ 165. — Proceeds and Surplus.

Remedy of Mortgagor.—While a mortgagee who has exercised a power to sell at private sale is chargeable in equity upon a bill for accounting and redemption with the reasonable value of the property sold, regardless of the price actually received, the mortgagor can not sue at law to charge the mortgagee with the reasonable value of the property sold, his remedy being in equity exclusively. *Harmon v. Dothan Nat. Bank*, 186 Ala. 360, 64 So. 621.

Estoppel to Complain of Application.—Where mortgagor, under an unrecorded mortgage, joined as surety in another mortgage and included the mortgaged property, held, that the principal mortgagors in the other mortgage could not complain of the application upon the unrecorded mortgage of the proceeds of a sale of the surety's property. *Stevens v. Romano*, 10 Ala. App. 601, 65 So. 713.

§ 167. Actions to Foreclose.

§ 168. — Nature and Form.

A bill to foreclose equitable chattel mortgage, so as to subject proceeds of a sale of such property to payment of debt secured, held properly filed. *Tucker v. Pilcher* (Ala.), 75 So. 171.

§ 171. — Parties.

Where chattel mortgagee, seeking to foreclose mortgage assigned as collateral, intervened in suit brought by mortgagor to restrain foreclosure by subsequent assignee, who held nominal title only, having purchased with money furnished by another, intervener held not entitled to relief until real owner was made a party. *Blake v. Anniston City Nat. Bank*, 197 Ala. 611, 73 So. 114.

Where bill seeking foreclosure of equitable mortgage on personal property also seeks personal decree against mortgagor in event of insufficiency of proceeds of sale of property to satisfy mortgage indebtedness the mortgagor was a proper party to suit. *Tucker v. Pilcher* (Ala.), 75 So. 171.

In an action to foreclose chattel mort-

gage on crops that had been sold by mortgagor, the parties to whom crops were sold were properly made parties to the action. *Butler & Co. v. Henry & Co.* (Ala.), 78 So. 912.

In a suit to foreclose an equitable chattel mortgage, the original debtor or mortgagor is not a necessary party, where he has parted with all title to the mortgaged property, and where no deficiency judgment is sought against his assignee. *Hamilton v. Clancey*, 196 Ala. 194, 72 So. 15.

§ 172. — Pleading.

Allegations of a complaint, in a suit to foreclose a chattel mortgage given for advances, that a defendant had actual knowledge of complainant's advances to her husband and also enjoyed them, and that the crops mortgaged were raised by mortgagee on land owned by him and such defendant jointly, did not show such interest by her in the mortgaged property as to make her a proper party. *West v. Henry*, 185 Ala. 168, 64 So. 75.

§ 175. — Injunction and Receiver.

Grounds for Appointment of Receiver.

—*Wright v. Wright*, 180 Ala. 343, 60 So. 931. See the title CHATTEL MORTGAGES, § 175, vol. 3, p. 127.

Right to Object to Appointment of Receiver.—Where a chattel mortgagee had a prior equitable lien on a tenant's crops which was prior to the lien of a subsequent mortgagee and greater in amount than the value of the crops, the subsequent mortgagee could not object to an order appointing a receiver and dismissing a cross-bill seeking to enforce such subsequent lien. *Whaley v. Bright*, 189 Ala. 134, 66 So. 644.

§ 180. — Proceeds and Surplus.

Burden of Proving Overpayment.—

Snead v. Scott, 182 Ala. 97, 62 So. 36. See the title CHATTEL MORTGAGES, § 180, vol. 3, p. 128.

§ 182. Wrongful Foreclosure.

Fraud, unfairness, and negligence in the foreclosure of a chattel mortgage under a power of sale will not support trover, for, the legal title being in the mortgagee, there can be no conversion.

and the mortgagor's only remedy is by bill in equity. *Harmon v. Dothan Nat. Bank*, 186 Ala. 360, 64 So. 621.

Where a mortgagee in possession after default sells mortgaged chattels at an unauthorized private sale for an amount in excess of the mortgage debt, the mortgagor may, in an action at law, recover the excess; but such action can be maintained only when there is an excess. *Harmon v. Dothan Nat. Bank*, 186 Ala. 360, 64 So. 621.

Where a mortgage embracing personal property was foreclosed under a power of sale, the mortgagor can not maintain an action at law on the theory that the foreclosure is void for fraud where the mortgagee followed the power of sale, noncompliance with the power of sale being the only fraud cognizable in an action at law. *Harmon v. Dothan Nat. Bank*, 186 Ala. 360, 64 So. 621.

X. REDEMPTION.

§ 183. Right to Redeem in General.

Every mortgagor has in the mortgaged

property, before foreclosure at least, an equity of redemption, existing independent of the terms of the contract as an incident of all mortgages. *Horton v. Hovater*, 11 Ala. App. 413, 66 So. 939.

§ 184. Persons Entitled to Redeem.

Under Code 1907, § 4091, subds. 2, 3, declaring that, when any interest less than the absolute title is levied upon and sold, the purchaser is subrogated to all the rights of the defendant and subject to all his disabilities, a sale of the entire interest of a mortgagor in personal property under a mortgage reserving to him the right of possession carried not only the equity of redemption but such right of possession; but, where only the equity of redemption is levied upon and sold, the purchaser acquires only such equity, although the sale be made before the law day of the mortgage and the mortgage provides for the mortgagor's retention of possession. *Horton v. Hovater*, 11 Ala. App. 413, 66 So. 939.

Checks.

See ante, BANKS AND BANKING; BILLS AND NOTES; post, FORGERY.

Children.

See post, GUARDIAN AND WARD; INFANTS; PARENT AND CHILD.

Circumstantial Evidence.

See post, CRIMINAL LAW; EVIDENCE.

Cities.

See post, MUNICIPAL CORPORATIONS.

Citizens.

See the title CITIZENS, vol. 3, p. 133, and references there given.

Civil Rights.

See the title CIVIL RIGHTS, vol. 3, p. 135, and references there given.

Class Legislation.

See post, CONSTITUTIONAL LAW.

CLERKS OF COURTS.

- § ½. Nature of Office.
- § ½a. Creation and Abolition of Office.
- § 3. Deputies and Assistants.
- § 3½. Terms of Office, Vacancies and Holding Over.
- § 5. Compensation and Fees of Clerks of State Courts.
- § 6. — Rights in General.
- § 7. — Statutory Provisions.
- § 8. — Writs, Process and Notices.

Cross References.

See the title CLERKS OF COURTS, vol. 3, p. 136, and references there given.

§ ½. Nature of Office.

Where two counties are embraced in one chancery division, register is the county officer of both counties, in view of character of primary services to be rendered in each. *Osborn v. Henry* (Ala.), 76 So. 119.

Register of Jefferson County. — In act of February 18, 1895 (Acts 1894-95, p. 884) to facilitate the transaction of business in the chancery court of Jefferson county, the reference "to the register of chancery court of Jefferson county" was a legislative designation of that official as a county officer. *Osborn v. Henry* (Ala.), 76 So. 119.

§ ½a. Creation and Abolition of Office.

Gen. Acts 1915, p. 865, § 9, subd. 3, providing that clerk of circuit court shall be ex officio clerk of county court, applies only to counties having population of more than 26,000 and less than 26,100 inhabitants; all other counties, not otherwise excepted, being governed by code provisions as to clerical duties and functions of county court. *Thomas v. State* (Ala.), 77 So. 35.

Even, if Gen. Acts 1915, p. 865, § 9, subd. 3, to the effect that clerks of circuit courts in certain cases shall be ex officio clerks of the county courts, is void, because not embraced within the title of the act as required by Const. 1901, § 45, it would not invalidate the whole act or invalidate it in so far as it repeals Loc. Acts 1898-99, p. 1507. *Thomas v. State* (Ala.), 77 So. 35.

Repeal of Statute—Conecuh County. — Loc. Acts 1898-99, p. 1507, providing that

clerk of circuit court of Conecuh county shall also be clerk of county court, is repealed by Gen. Acts 1915, p. 862, and therefore Code 1907, § 6698, making judges of county courts clerks of their respective court, is applicable to Conecuh county. *Thomas v. State* (Ala.), 77 So. 35.

Hale County.—Under Code 1907, § 6698, probate judge of Hale county is clerk of county court of which he is also judge; provision of Acts 1915, p. 865, § 9, subsec. 3, which makes clerk of circuit court ex officio clerk of county court, being limited to counties having more than 26,000 and less than 26,100 inhabitants. *State v. Torbert* (Ala.), 77 So. 37.

Marengo County.—The clerk of the circuit court of Marengo county is not the clerk of the county court under any local law or otherwise. *State v. Hasty* 184 Ala. 121, 63 So. 559.

§ 3. Deputies and Assistants.

Appointment. — The inferior criminal court of Mobile county, established by diction of justices of the peace in criminal and quasi criminal cases. The act establishing it did not abolish the office of justices of the peace, nor disturb their jurisdiction, but on the day of its approval there was also approved an act depriving justices of the peace of criminal jurisdiction within the city limits of Mobile. On April 15, 1911, an act (Acts 1911, p. 274), was passed to establish an inferior civil court in lieu of justices of the peace for all precincts lying within or partly within the city of Mobile. Acts

1915, p. 825, § 1, abolished the office of justices of the peace of precincts lying within or partly within cities having more than 35,000 population, and conferred the jurisdiction of justices on the inferior courts or courts of common pleas created in lieu of justices of the peace, and provided for the appointment and compensation of the clerks and assistant clerks of such courts. Held, that the inferior criminal court of Mobile county was not of the class of courts created in lieu of justices of the peace, as prescribed by § 1 of the act, so that there was no authority for the appointment of a deputy clerk for such criminal court by the clerk of the court with consent of the judge under § 5. *State v. Stone*, 197 Ala. 662, 73 So. 330.

§ 3½. Terms of Office, Vacancies and Holding Over.

Under Laws 1909 (Sp. Sess.) p. 339, establishing the Marengo law and equity court, of which § 6 provides that the clerk of the circuit court shall be ex officio clerk of the law and equity court, amended by an act approved March 17, 1915 (Loc. Laws 1915, p. 62), appointing the then clerk of the circuit court clerk of the law and equity court until the next regular election and until his successor be elected and qualified, and an act passed February 11, 1915 (Loc. Laws 1915, p. 20), detaching Marengo county from the First judicial circuit, it being the duty of the court in construing legislative enactments with doubtful meaning to carry out the legislative intent, if possible, at the time of the approval of the amendatory act, the person occupying the position of circuit clerk was still ex officio clerk of the law and equity court. *Dawson v. State*, 196 Ala. 593, 71 So. 722.

§ 5. Compensation and Fees of Clerks of State Courts.

§ 6. — Rights in General.

The act establishing the Walker county law and equity court by § 3 (Acts 1901, p. 107) provides that the clerk of the circuit court of said county shall be ex officio clerk of the said Walker county law and equity court on the law side of the docket, and shall have all the powers

and be liable to perform all the duties, and be subject to all the penalties, as in like cases in the circuit court and county court, and be entitled to the same fees as in like cases in the circuit and county courts, now or hereafter allowed by law, and that said courts shall adopt a seal for the law side of the court. Acts 1907, pp. 583-585, provides ex officio fees for the clerks of the county courts; and Acts Sp. Sess. 1907, pp. 201-202, amending the last-mentioned act, provided "that the provisions of said act shall include clerks of all courts having concurrent jurisdiction with the circuit courts." Held, that the act of 1907 did not entitle the clerk of the circuit court of Walker county to ex officio fees for services rendered by him in the law and equity court of Walker county. *Long v. O'Rear*, 186 Ala. 558, 65 So. 59.

§ 7. — Statutory Provisions.

Clerk of Chancery — Constitutional Provisions.—Const. 1901, § 163, provides that registers shall receive as compensation for their services only such fees and commissions as may be specifically prescribed by law, which fee shall be uniform throughout the state. Const. 1901, § 96, also provides for uniformity of compensation of public officers throughout the state in the way of costs, charges of courts, fees, commissions and allowances. Const. 1901, § 166, provides that registers in chancery may be removed from office by the chancellors, the cause to be entered at length upon the minutes of the court. Acts 1911, p. 47, submitted to voters an amendment to the constitution, authorizing the legislature from time to time, by general or local laws, to fix, regulate, and alter the costs, charges of courts, fees, commissions, allowances, or salaries to be charged or received by any county officer of Jefferson county, including the method or basis of their compensation, which amendment was adopted by the qualified voters of the state. Loc. Acts 1915, p. 374, fixed the compensation of sundry officers of Jefferson county, including the register in chancery, and provided a complete change of basis of compensation for this officer by substituting an annual salary

in lieu of all other compensation, fees, or emoluments. Acts 1915, p. 279, consolidated the chancery court with the circuit court. Gen. Acts 1915, pp. 809, 811, provides for the appointment of a register of the circuit court of each county. Held, that Acts 1915, p. 374, fixing the compensation of the register in chancery of Jefferson county, applied to the clerk of the circuit court of Jefferson county, and entitled such clerk to the annual salary provided, and, in view of the amendment submitted in Gen. Acts 1911, p. 47, Const. 1901, §§ 163, 196, had no application. *Osborn v. Henry* (Ala.), 76 So. 119.

Repeal of Statute—Shelby County. — Loc. Laws 1900-01, p. 2024, fixing the compensation to be paid the clerks of circuit courts, including the clerk of Shelby county, was impliedly repealed by Laws 1907, p. 583 (Code 1907, § 3715), manifesting a general legislative intent to establish a uniform system throughout the state of fixing the ex officio fees of the clerks of the circuit courts in the several counties, though it contained no general repealing clause, nor any express language repealing the local act, since the

general law revised the whole subject-matter of the former and established a new system. *Isbell v. Shelby County*, 10 Ala. App. 639, 65 So. 706.

Jefferson County.—In view of amendment of constitution constituting exception from its provisions as to uniformity of compensation for county officers and allowing legislature to prescribe that officials of Jefferson county shall be paid salaries rather than fees, etc., general provisions in judiciary act relating to compensation of registers of circuit court throughout state has no application to such officials in Jefferson county. *Osborn v. Henry* (Ala.), 76 So. 119.

§ 8. — Writs, Process and Notices.

Under Code 1907, §§ 7881, 7883, providing that, once subpoenaed, witnesses shall attend subsequent terms upon the day fixed for the trial until the case is disposed of, a clerk of a court is not entitled to recover from the county fees for resubpoenaing, after each continuance, witnesses called by the state in a criminal prosecution. *O'Rear v. Long*, 186 Ala. 597, 65 So. 134.

Cloud on Title.

See post, QUIETING TITLE.

Clubs.

See the title CLUBS, vol. 3, p. 146, and references there given.

Codicil.

See post, WILLS.

Colleges and Universities.

See the title COLLEGES AND UNIVERSITIES, vol. 3, p. 147, and references there given.

COLLISION.

IV. Suits for Damages.

(B) Parties, Preliminary Proceedings, and Pleading.

§ 9½. Issues, Proof and Variance.

(C) Evidence.

§ 10. Admissibility.

Cross References.

See the title COLLISION, vol. 3, p. 149, and references there given.

IV. SUITS FOR DAMAGES.

(B) PARTIES, PRELIMINARY PROCEEDINGS, AND PLEADING.

§ 9½. Issues, Proof and Variance.

A plea in an action for damages to a yacht negligently run into by a steamboat is not sustained by evidence that plaintiff's agent in charge of the yacht requested the operator of the steamboat to have the steamboat move a barge lying between the steamboat and railroad cars on a track inclining toward the water, and that plaintiff was responsible for negligent execution of the request, and the evidence was not available to defendant. *American Oak Leather Co. v. Atwood*, 191 Ala. 450, 67 So. 663.

(C) EVIDENCE.

§ 10. Admissibility.

Evidence as to Damages—Value.—In an action for damages to a yacht negligently run into by a steamboat, evidence of the value of the yacht before and after the accident was competent on the measure of damages. *American Oak Leather Co. v. Atwood*, 191 Ala. 450, 67 So. 663.

Repairs.—Where, in an action for damages to a yacht negligently run into by a steamboat, plaintiff did not testify what repairs had cost him, nor what they were reasonably worth, but stated the value of the yacht before and after the accident, a question asked him as to what repairs were necessary was not incompetent, and did not call for inadmissible evidence. *American Oak Leather Co. v. Atwood*, 191 Ala. 450, 67 So. 663.

Color of Title.

See ante, ADVERSE POSSESSION.

COMMERCE.

I. Power to Regulate in General.

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IV. Interstate Commerce Commission.

- § 42. Authority and Functions in General.

Cross References.

See the title COMMERCE, vol. 3, p. 152, and references there given.

I. POWER TO REGULATE IN GENERAL.

- § 1. Constitutional Grant of Power to Congress.

- § 2. — In General.

The power of Congress to regulate in-

terstate commerce includes the power to define what shall be interstate commerce, and may distinguish between things deleterious and things beneficial or innocuous, and deny absolutely or conditionally entrance into interstate commerce of things which are deleterious;

and the Webb-Kenyon Law (Act March 1, 1913, c. 90, 37 Stat. 699 [U. S. Comp. St. 1913, § 8739]), divesting intoxicating liquors of their interstate character with reference to interstate commerce, is within the power of Congress to enact. *Southern Exp. Co. v. Whittle*, 194 Ala. 406, 69 So. 652.

§ 2½. — Commerce Among the States.

The Webb law (Act March 1, 1913, c. 90, 37 Stat. 699) prohibiting the transportation of liquors from one state into another state to be received, kept, or used in violation of the law of the latter state does not prohibit the transportation of intoxicating liquors from one state into another, except where the liquors are to be received, possessed, or kept, or in some way used as prohibited by the laws of the latter state, and from liquors so imported it merely withdraws their interstate character and their immunity from state regulation, and so construed is a valid exercise by Congress of power to regulate interstate commerce. *Southern Exp. Co. v. State*, 188 Ala. 454, 66 So. 115, cited in notes in L. R. A. 1916C, 299, 300, 301, 303, 307, 308, 309.

§ 3½. — Exclusive or Concurrent Powers of Congress and the States.

Congressional intent to supersede by federal act exercise by state of police powers as to matters not covered by federal legislation is not to be inferred from mere fact that Congress has seen fit to circumscribe and occupy a limited field. *Louisville, etc., R. Co. v. State* (Ala. App.), 76 So. 505.

To supersede state enactment on the same subject, an act of Congress, fairly interpreted, must actually conflict with state law. *Louisville, etc., R. Co. v. State* (Ala. App.), 76 So. 505.

When State Law Must Yield.—In determining whether a federal statute has superseded a state enactment, the entire scope and purpose of the federal statute must be considered, and that which needs to be implied within its statutory scope and intent is of no less force than that which is expressed in the act; and the federal statute, when so considered, will be frustrated in its chosen field of

operation, and its provisions refused their natural effect, the state law must yield to the superior authority of the federal law within the sphere of its delegated and assumed authority. *Louisville, etc., R. Co. v. State* (Ala. App.), 76 So. 505.

Condemnation of Railroads' Right of Way by Telegraph Company.—*Western Union Tel. Co. v. South, etc., R. Co.*, 184 Ala. 66, 62 So. 788. See the title COMMERCE, § 3½, vol. 3, p. 153.

The Locomotive Headlight Law (Acts 1915, p. 257) has no application to engines engaged in interstate commerce; the federal Safe Locomotive Boilers Act Feb. 17, 1911 (Act Cong. Feb. 17, 1911, c. 103, 36 Stat. 913), as amended by Act March 4, 1915, c. 169, 38 Stat. 1192 (U. S. Comp. St. 1916, §§ 8639a-8639d), having excluded the states from the right to legislate on the matter of interstate locomotive equipment, though the final federal rules on the subject of headlights on interstate locomotives were not promulgated by the Interstate Commerce Commission until after a railroad charged with violating the Locomotive Headlight Law of the state committed the offense. *Louisville, etc., R. Co. v. State* (Ala. App.), 76 So. 505.

Application of Commerce Act to Telegraph Companies.—Act June 18, 1910, § 7, making Interstate Commerce Act apply to telegraph and telephone companies, places telegraph companies within the operation of such act to complete exclusion of state laws. *Western Union Tel. Co. v. Smith* (Ala.), 75 So. 393; *Western Union Tel. Co. v. Hawkins* (Ala.), 73 So. 973.

Validity of Conditions in Telegraph Message.—Since under Act Cong. June 18, 1910, § 1, conditions in a telegraph message are valid until contrary is declared by Interstate Commerce Commission, demurrers to special pleas of defendant in action for damages for failure to deliver message setting up conditions in message should be overruled. *Western Union Tel. Co. v. Hawkins* (Ala.), 73 So. 973.

Any condition in a message limiting liability of company is valid, in absence of any declaration to the contrary by In-

terstate Commerce Commission, and can not be interfered with by states. *Western Union Tel. Co. v. Hawkins* (Ala.), 73 So. 973.

Conditions in an interstate telegraph message limiting company's liability are valid until Interstate Commerce Commission otherwise declares and can not be interfered with by the state. *Western Union Tel. Co. v. Smith* (Ala.), 75 So. 393.

Traffic in Intoxicating Liquors. — The inherent limitations on the territorial operation of state laws can not protect an interstate carrier in accepting outside the state intoxicating liquors for transportation into Alabama in violation of the statute of Alabama, since the Webb-Kenyon Act March 1, 1913, c. 90, 37 Stat. 699 (U. S. Comp. St. 1916, § 8739), has appropriated the rule of the state law to define a national prohibition against the unlawful entry of certain liquors in interstate commerce. *State v. Southern Exp. Co.* (Ala.), 75 So. 343.

Transportation of Goods and Persons in General.—The amendment of June 29, 1906, to Interstate Commerce Act withdrew from the states entire subject of the regulation of interstate carriage of freight and passengers and vested it exclusively in Interstate Commerce Commission. *Western Union Tel. Co. v. Hawkins* (Ala.), 73 So. 973; *Western Union Tel. Co. v. Smith* (Ala.), 75 So. 393.

The rule that a contract for interstate shipment of goods is governed by the law of the place where the contract is made has no application, where subject-matter of contract is one of national cognizance, and Congress has enacted laws for its complete regulation. *Deavors v. Southern Exp. Co.* (Ala.), 76 So. 288.

The Federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, § 8657]) supersedes state statutes and governs cases of injuries to employees while engaged in interstate commerce. *Ex parte Atlantic*, etc., R. Co., 190 Ala. 132, 67 So. 256, reversing judgment *Atlantic*, etc., R. Co. *v. Jones*, 9 Ala. App. 499, 63 So. 693.

Where plaintiff had been injured while

engaged in interstate commerce, and his complaint sought a recovery under Code 1907, § 3910 (the State Employers' Liability Act), it was reversible error for the court to refuse a general charge requested by defendant as to recovery on that count, since the Federal Employers' Liability Act of April 22, 1908 (35 Stat. 65, c. 149 [U. S. Comp. St. 1913, §§ 8657-8665]), has superseded all state statutes as to the liability of employers to their employees engaged in interstate commerce. *Atlantic*, etc., R. Co. *v. Jones*, 12 Ala. App. 419, 67 So. 632, cited in note in *L. R. A.* 1915C, 50.

§ 6. Powers Remaining in the States.

Traffic in Intoxicating Liquors.—The Webb-Kenyon Law divests intoxicating liquors of their character with reference to interstate commerce in the cases contemplated and described in the act, and in such cases intoxicating liquors can only be regarded, when transported from one state into another, as if the Federal Constitution had not contained the commerce clause, and, so construed, the act is not invalid, as delegating federal authority to the states. *Southern Exp. Co. v. Whittle*, 194 Ala. 406, 69 So. 652.

Under the Webb Law (Act March 1, 1913, c. 90, 37 Stat. 699), prohibiting the transportation of intoxicating liquors from one state to another, for unlawful use in the latter state, and the Carmichael bill (Acts Sp. Sess. 1909, p. 8) and the Fuller bill (Acts Sp. Sess. 1909, p. 63), prohibiting the sale or keeping for sale of intoxicating liquors, etc., an interstate carrier is not prohibited from bringing into the state intoxicating liquors, except only such as are intended for unlawful use in the state, and a carrier in possession of liquors for delivery to a person who intends to use the same in violation of law, or a carrier delivering in the state liquor to a person in the state intending to use the same illegally, violates the state law, unless it has no knowledge of the unlawful purpose. *Southern Exp. Co. v. State*, 188 Ala. 454, 66 So. 115.

The anti-advertising liquor law of February 10, 1915, prohibiting the sale

of newspapers and magazines containing liquor advertisements, does not, when applied to a newspaper published out of the state, and containing an advertisement of liquor manufactured out of the state and to be shipped into the state to individuals, ordering it, violate Const. U. S. art. 1, § 8, vesting in Congress the exclusive power to regulate interstate commerce, since the states have the right to prohibit sales of intoxicating liquors and incidentally the right to prohibit solicitations for such sales, whether by agent or advertisement. *State v. DeLaye*, 193 Ala. 500, 68 So. 993, overruling *Moog v. State*, 145 Ala. 75, 41 So. 166.

II. SUBJECTS OF REGULATION.

§ 6½. Property Subject of Commerce in General.

The possession of two quarts of whisky by an interstate passenger carried for his private use, and not in excess of what is reasonably necessary for his personal use and comfort while on the journey, is protected by the commerce clause of the constitution as possession of personal baggage. *Howard v. State* (Ala. App.), 73 So. 559.

§ 6½ (a) Means and Instrumentalities in General.

A dead engine, which was being hauled by an interstate train from one state to another, is an instrumentality of interstate commerce, being one of the instrumentalities ordinarily used by the railroad company in carrying on its business; the fact that it was not then fit for use not changing its character. *Atlantic, etc., R. Co. v. Jones*, 9 Ala. App. 499, 63 So. 693.

§ 8. Railroads.

Application of Employers' Liability Act.—In actions under Federal Employers' Liability Act; the carrier, to be liable, must have been actually engaged in interstate commerce, and its injured employee must have been rendering services facilitating such commerce. *Louisville, etc., R. Co. v. Blankenship* (Ala.), 74 So. 960.

Whether a railroad employee was injured while engaged in interstate commerce is determined by whether the

work or act in which he was then engaged was a part of the interstate commerce in which the carrier was engaged. *Western Railway v. Mays*, 197 Ala. 367, 72 So. 641.

The Federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1916, §§ 8657-8665]) is only available to the employees it prescribes and defines, namely, those in the employment of interstate carriers who at the time of the injury are engaged in work or service immediately related and directly contributory to interstate commerce. *Mathews v. Alabama, etc., R. Co.* (Ala.), 76 So. 17.

The purpose to devote in future an agency capable of use in interstate commerce to that service will not bring it within the operation of the Federal Employers' Liability Act, though the physical preparation of the agency for immediate use in such commerce may suffice. *Louisville, etc., R. Co. v. Carter*, 195 Ala. 382, 70 So. 655.

Same—Coaling Engines.—An employee coaling engines on interstate railroad and serving interstate and intrastate trains is engaged in interstate commerce within Federal Employers' Liability Act. *Southern R. Co. v. Peters*, 194 Ala. 94, 69 So. 611.

Same—Caretaker of Dead Engine.—A servant of a railroad company, who was acting as a watchman or caretaker of a dead engine, which was being hauled by an interstate train from one state to another, is engaged in interstate commerce within the purview of the Federal Employers' Liability Act. *Atlantic, etc., R. Co. v. Jones*, 9 Ala. App. 499, 63 So. 693.

Same—Brakeman Unloading Train.—A brakeman, injured unloading a barrel from an interstate train shipped from a foreign state, was injured in interstate commerce. *Western Railway v. Mays*, 197 Ala. 367, 72 So. 641.

Same — Conductor Noting Cars for Trains.—Where a railroad was engaged in interstate traffic, and the division of its road upon which a switch engine conductor was employed extending through several states, and at the time of an in-

jury to the conductor caused by the switch engine he was noting cars to be made up into trains for through traffic, at a time when no local freights were handled, such conductor was engaged in "interstate commerce." *Southern R. Co. v. Fisher* (Ala.), 74 So. 580.

Same—Lull in Making up Interstate Trains.—Where plaintiff was engaged as a railroad fireman in a crew making up interstate trains, and was injured during a temporary lull in the work, he was engaged in "interstate commerce" when injured, and his case is properly brought within the federal Liability Act (Act Cong. April 22, 1908, c. 149, 35 Stat. [65 U. S. Comp. St. 1913, §§ 8657-8665]). *Alabama, etc., R. Co. v. Skotzy*, 196 Ala. 25, 71 So. 335.

Same—Clearing Ditches Along Tracks.—In action under the Federal Employers' Liability Act for injury sustained while clearing ditches along defendant railroad's tracks, plaintiff's testimony that there was no other way of draining surface water from tracks is competent to establish that his work was necessary to safe interstate transportation. *Louisville, etc., R. Co. v. Blankenship* (Ala.), 74 So. 960.

Same—Repairing Work Train Engine.—A railroad employee injured while assisting in repairing a locomotive which was being used or to be used wholly within the State of Alabama in drawing a work train engaged in repairing the railroad company's interstate track was not within the Federal Employers' Liability Act, and was entitled to sue under the state statute, since the federal act is only applicable to those in the employment of interstate carriers who at the time of the injury are engaged in work immediately related and directly contributory to interstate commerce, and, while such relation exists when his service is in or about the maintenance or repair of agencies already devoted to or immediately capable of facilitating some essential feature of interstate commerce, the engine in question was not an instrumentality of such commerce nor an immediately or directly applied means to the maintenance or repair of any in-

dispensable feature of interstate transportation, but was only brought into a secondary relation to an interstate instrumentality. *Louisville, etc., R. Co. v. Carter*, 195 Ala. 382, 70 So. 655.

Same—Repairing Car.—A car repairer injured while working on a car, used the previous week in interstate commerce, but having "drifted" for a week, and not again used except in intrastate commerce for several weeks after the injury, could not recover of the master, under the Federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1916, §§ 8657-8665]). *Loveless v. Louisville, etc., R. Co.* (Ala.), 75 So. 7.

Same—Member of Posse after Train Robbers.—Person employed by railroad as member of posse to apprehend bandits who had robbed interstate train was not engaged in interstate commerce so as to fix liability on road for his death under the Federal Employers' Liability Act. *Alabama, etc., R. Co. v. Bonner* (Ala.), 75 So. 986.

§ 10. Transportation of Goods.

Liquor Intended for Violation of State Law.—Where an interstate consignment of liquor is intended by any person interested in same to be a means of violating valid state laws governing liquors described in Webb-Kenyon Act, it does not become an article of lawful interstate commerce in the transportation of which the carrier will be protected. *State v. Southern Exp. Co.* (Ala.), 75 So. 343.

The Webb-Kenyon Law prohibits the entry in interstate commerce of intoxicating liquors for a purpose made unlawful under valid state statutes, and any valid exercise of the police power of the states is not a regulation of interstate commerce. *Southern Exp. Co. v. Whittle*, 194 Ala. 406, 69 So. 652.

The seizure under temperance acts of intoxicating liquors consigned to defendant at Columbus, Ga., and removed by him to this state and stored temporarily until he could remove them to Florida under contract to "immediately ship said whisky from Columbus, Ga., to Jacksonville, Fla.," was not a seizure of property in interstate transit, and was proper, and such property was not protected by

the laws of interstate commerce against the operation of the Alabama liquor laws. *Theatrical Club v. State* (Ala.), 74 So. 969.

Duty to Inspect Liquors in Forbidden Receptacles.—If a carrier would avert the consequences of contributing to a violation of Gen. Acts 1915, p. 555, § 5, by transporting and delivering liquors in forbidden receptacles, it must inspect the tenders of such shipments as are labeled in accordance with Pen. Code U. S. § 240 (Acts March 4, 1909, c. 321, 35 Stat. 1137 [U. S. Comp. St. 1916, § 10410]), since, if a package tendered for shipment in another state violates the laws of Alabama when brought therein because of the use of containers of forbidden capacities, the package is "forbidden commerce" within the Webb-Kenyon Act, and the carrier can not claim the protection accorded interstate commerce. *State v. Southern Exp. Co.* (Ala.), 75 So. 343.

Transportation of Liquors by Automobile.—Transportation of liquors through this state from one state to another by automobile over public highways, instead of by rail or boat, is "interstate shipment" if there be no break or disconnection therein by removal from the vehicle or by disposing or attempting to dispose thereof in the state. *Moragne v. State* (Ala.), 78 So. 450.

Intent to Export to Foreign Country.—Where plaintiff, a foreign corporation, bought lumber from defendant, to be delivered in care of a vessel at Mobile and there inspected and paid for at a specified price per M. the fact that plaintiff purchased the lumber for export and intended to load it on the vessel and continue its transportation to a foreign country did not render the transaction between plaintiff and defendant one in interstate commerce, so as to remove the transaction from the application of a state law providing that foreign corporations shall not do business within the state without complying with its laws. *Brunner v. Mobile-Gulfport Lumber Co.*, 188 Ala. 248, 66 So. 438, cited in note in L. R. A. 1917D, 1191.

Negligence in Carrying or Delivering Corpse.—Plaintiff sued defendant carrier

to recover damages for negligence in the carrying or delivering of the corpse of her brother consigned to her in Alabama and shipped from Kansas. Defendant had no agent at the place of delivery, and the coffin containing the corpse was placed on a truck and wheeled under a shelter or shed, but got wet from rain blowing in or breaking through the top thereof. Held, that the damages sustained were the consequences of the breach of the contract for an interstate shipment governed by the federal laws, and therefore plaintiff, having failed to show any damages other than mental anguish, could not recover. *Deavors v. Southern Exp. Co.* (Ala.), 76 So. 288.

§ 11. Sale of Goods.

Sold by Agent in Original Packages.—Where a foreign corporation shipped goods to its agent, and the agent sold them in the original packages, the transaction was an interstate one. *Padgett v. Gulfport Fertilizer Co.*, 11 Ala. App. 366, 66 So. 866, cited in notes in L. R. A. 1916F, 351.

Sold in State in Agent's Own Name.—Foreign corporation which shipped potatoes on consignment to factor in state, who sold them in his own name, deducted expenses and commission from proceeds, remitting balance to the corporation, which had no place of business in state, was engaged in interstate commerce, and not "in business within state," so as to bar its action for the balance in absence of compliance with state laws as to doing business in state. *Tyson v. Jennings Produce Co.* (Ala. App.), 77 So. 986.

Where an order for a machine was given to the soliciting agent of a foreign corporation and sent to the corporation, and the machine was constructed out of the state and shipped to the buyer in the state and there unpacked and parts put together by the agent, who then gave instructions as to its operation and accepted notes for the purchase price, the transaction was interstate commerce and not "doing business" within the state by the foreign corporation. *Citizens' Nat. Bank v. Buckheit*, 14 Ala. App. 511, 71 So. 82.

Sale of Lightning Rods on Order. —

In a suit to establish a lien on a barn, a bill alleging a sale of lightning rods by complainant to defendant on a written order made by defendant and directed to complainant at its place of business in Ohio, and that such order was to be filled by a shipment of the lightning rods from such place of business, and delivered to defendant under such written order at his home in Alabama, showed an interstate transaction, and was not demurrable for failure to aver a compliance with the laws of the state to qualify complainant, a foreign corporation, to do business in the state, though it further alleged that the lightning rods were placed on defendant's barn on the day of the delivery, and were to be paid for when so placed, and that they became an improvement or repair upon the barn; this averment being evidently for the purpose of establishing a lien, and not to charge that the lightning rods were to be erected by the complainant under the terms of the contract of sale so as to become an inseparable obligation thereunder. *Foy Co. v. Haddock*, 191 Ala. 101, 67 So. 978.

Where an agent delivers lightning rods to persons who had previously ordered them from another agent, the rods being shipped from the manufacturer in another state, and not resold, but returned to the manufacturers when those who ordered them refused to take them, the agent is engaged in interstate commerce, and is not required to have a state license for selling and delivering lightning rods. *Wright v. State*, 8 Ala. App. 437, 63 So. 14, cited in notes in Ann. Cas. 1916B, 496, 497.

Same—Authority of Agent to Make Reductions in Price.—That an agent who delivers lightning rods, shipped in from another state to customers who had previously ordered them, sometimes made reductions from the contract price for the rods does not change the character of the transaction from being interstate commerce. *Wright v. State*, 8 Ala. App. 437, 63 So. 14.

§ 12. Traffic in Original Packages.

Where newspapers published out of the

state, which contain liquor advertisements, are received by a dealer within the state, the bundles broken, and the individual newspapers placed on sale, such papers are no longer "original packages," but are mingled with the general property of the state, and are subject to state regulation. *State v. DeLaye*, 193 Ala. 500, 68 So. 993, cited in notes in L. R. A. 1916B, 895, 896; L. R. A. 1917E, 701.

§ 12½. Occupations in General.

The lending of money by a foreign corporation does not constitute interstate commerce. *Padgett v. Gulfport Fertilizer Co.*, 11 Ala. App. 366, 66 So. 866.

§ 14. Foreign Corporations.

The provisions of the state statutes and constitution, regulating foreign corporations doing business in the state, relate only to intrastate business, as if extended to interstate business, they would violate the commerce clause of the Federal Constitution. *Fifth Ave. Library Soc. v. Rhodes*, 194 Ala. 670, 69 So. 918.

III. MEANS AND METHODS OF REGULATION.**§ 15. Nature and Scope in General.**

The condemnation under the state laws of a railroad crossing over a railroad which handles interstate commerce is not an interference with interstate commerce. *Mobile, etc., R. Co. v. Louisville, etc., R. Co.*, 192 Ala. 136, 68 So. 905.

§ 19. Regulation of Conduct of Business.**§ 19½. — In General.**

The constitutional and statutory requirements as to foreign corporations doing business in Alabama are not applicable to such foreign corporations while engaged in interstate commerce. *Hurst v. Fitz Water Wheel Co.*, 197 Ala. 10, 72 So. 314.

§ 20. — Railroads.

Whether or not an order of a state Railroad Commission for the stoppage of interstate trains is valid as not directly regulating interstate commerce is to be decided by considering the claims of both the interstate traffic and of the residents of the state through which the

road passes, and where the latter's wants have been adequately supplied under all the facts bearing on the subjects, an order granting further demands to the embarrassment of rapid interstate transit and of the road in competing with its rival is an unwarrantable interference with interstate commerce. *Railroad Comm. v. St. Louis, etc., R. Co.*, 195 Ala. 527, 70 So. 645.

By an order of the Alabama Railroad Commission complainant railroad was compelled to stop two of its solid through trains at four towns in Alabama ranging from 600 to 1,800 inhabitants which the company already served with three passenger trains daily each way. The trains affected by the order were exclusively interstate trains, and were run at their maximum speed consistent with safety in order to make through connections, the schedules for which complainant had no control over. The loss of time in making the stops ordered would compel complainant to lose its interstate connections, and complainant was shown for many years to have had sharp competition in such through traffic, which compelled it to give up many additional connections in order to make fast time and to meet competition. Held, that such order was an unreasonable restraint upon interstate traffic. *Railroad Comm. v. St. Louis, etc., R. Co.*, 195 Ala. 527, 70 So. 645.

§ 22. — Manufacture and Sale of Goods.

Police regulations imposed by the state on the sale of fertilizers are applicable to interstate transactions. *Padgett v. Gulfport Fertilizer Co.*, 11 Ala. App. 366, 66 So. 866.

§ 23. — Transportation of Property.

Intoxicating Liquors.—The legislature can prohibit the use of public streets or public roads for the transportation of intoxicating liquors, or other commodities dangerous to the public, or the use of which violates the state's public policy, unless such regulation unduly burdens interstate commerce, since the use of public streets and public roads within the state is subject to the police power. *Moragne v. State* (Ala. App.), 74 So. 862.

Acts 1915, p. 39, § 1, prohibiting the transportation into the state of intoxicating liquors intended to be received, possessed, sold, or used in violation of law, page 44, § 12, making it unlawful to possess intoxicating liquor in excess of certain quantities, and page 27, § 24, making it unlawful to transport such prohibited liquors for another along any public street or highway, are not invalid when applied to interstate transportation of intoxicating liquors over the highways of the state, in view of the Webb-Kenyon Act, prohibiting the interstate transportation of intoxicating liquors into a state for use in violation of the state laws. *Moragne v. State* (Ala. App.), 74 So. 862.

Same—Fuller Act.—The Fuller Bill (Acts Sp. Sess. 1909, p. 63) prohibits intrastate shipments of intoxicating liquors except for recognized legal purposes, but does not attempt to prohibit interstate shipments. *Southern Exp. Co. v. State*, 188 Ala. 454, 66 So. 115.

Same—Application of Statute to Interstate Shipment.—Acts 1915, p. 27, § 24, making it unlawful to transport prohibited intoxicating liquors for another when received at one "point, place or locality in this state," and prohibiting transportation on the highway of "any such liquor for another," does not apply to an interstate shipment. *Moragne v. State* (Ala.), 78 So. 450.

Same — Transportation through Alabama.—The prohibition statutes, if construed to prohibit transportation of intoxicating liquors in transit from Georgia to Florida through Alabama, would be unconstitutional. *Moragne v. State* (Ala.), 77 So. 322.

The state prohibition statutes, as extended by federal Webb-Kenyon Bill, are inapplicable to transportation of intoxicating liquors through Alabama in transit from Georgia to Florida. *Moragne v. State* (Ala.), 77 So. 322.

§ 24. Licenses and Privilege Taxes.

§ 25. — Mercantile Business in General.

Acts 1911, p. 466, § 9, which is for the protection of oysters, and imposes a tax upon all oysters canned, packed, shipped, or sold in and from the state, is not in-

valid as an interference with interstate commerce; for property brought, without the state ceases to be subject of interstate commerce upon reaching its distinction and coming to rest in the state, and is subject to state taxation even though disposed of in original packages. *Mangoldorf v. State*, 8 Ala. App. 302, 62 So. 373.

§ 27. — Commercial Agents.

An agent for the sale of pianos, representing only a principal having its place of business in another state, where orders taken by him, if approved and accepted, were filled by shipping the pianos to the purchasers, was engaged exclusively in interstate commerce, and was not required to take out a license under a municipal ordinance, requiring agents for the sale of pianos to take out such a license. *Ineichen v. Anniston*, 10 Ala. App. 605, 65 So. 710, cited in notes in Ann. Cas. 1916B, 496, 497; L. R. A. 1916E, 239.

Where, under contracts for the sale of pianos shipped to the purchasers from the seller's place of business in another state, the purchasers opened, examined, and tested them, and then declined to accept them, the filling of orders from other purchasers taken by the seller's agent, by having him deliver the pianos so rejected by the first purchasers, was an act of interstate commerce, and the agent was not required to take out a license under a municipal ordinance, requiring agents for the sale of pianos to take out a license, as the opening of the box in which the piano was shipped and the examination and testing thereof by the first purchaser did not destroy its character and identity as an original package, and thereby incorporate it into the general mass of the property of the state. *Ineichen v. Anniston*, 10 Ala. App. 605, 65 So. 710.

§ 28. — Canvassers and Solicitors.

Persons Engaged in Business of Selling Lightning Rods.—Ex parte State, 180 Ala. 529, 61 So. 901, cited in notes in Ann. Cas. 1916B, 496; L. R. A. 1916E, 239. See the title COMMERCE, § 28, vol. 3, p. 160.

Foreign Corporation Selling and Delivering through Agents.—*Miller v. State*, 7 Ala. App. 183, 62 So. 307, cited in notes in Ann. Cas. 1916B, 496; L. R. A. 1916E, 239. See the title COMMERCE, § 28, vol. 3, p. 160.

§ 31. — Corporate Franchises and Privileges.

Foreign Corporations Engaged in Transactions of Interstate Commerce Only.—*Ewart Lumber Co. v. American Cement Plaster Co.*, 9 Ala. App. 152, 62 So. 560, cited in note in Ann. Cas. 1916C, 1249. See the title COMMERCE, § 31, vol. 3, p. 161.

A mortgage to a foreign corporation in an interstate transaction is valid, though the corporation had not complied with the constitution or statutes governing the right of such corporations to do business in the state. *Padgett v. Gulfport Fertilizer Co.*, 11 Ala. App. 366, 66 So. 866.

§ 33. Taxation of Property.

§ 35½. — Corporate Capital and Securities.

Acts 1915, p. 397. § 16, imposing franchise tax on foreign corporations, based on capital actually employed within state, is not unconstitutional as unwarranted burden on interstate commerce. *Louisville, etc., R. Co. v. State (Ala.)*, 78 So. 93.

§ 36. Duties, Imposts, and Excises.

§ 36½. — Revenue Measures in General.

Act Oct. 1, 1903 (Code 1907, § 3573), authorizing associates to incorporate, is not violative of Const. U. S. art. 1, § 8, vesting Congress with power to lay and collect taxes, duties, impost, and providing that excises shall be uniform throughout the United States, or § 9 declaring that no capitation or other direct tax shall be laid, unless in proportion to the census, and that no tax or duty shall be laid on articles exported from any state. *Fairhope Single Tax Corp. v. Melville*, 193 Ala. 289, 69 So. 466.

§ 41. Creation of or Exemption from Civil Liabilities or Remedies.

Under Code 1907, § 3650, providing that the provisions relating to foreign corpo-

rations shall not apply to corporations doing only an interstate commerce business within the state, those provisions can not be construed to prevent such corporations from suing in the courts of the state without complying with the statutory requirement to enforce valid contracts. *Citizens Nat. Bank v. Buckheit*, 14 Ala. App. 511, 71 So. 82; *Tyson v. Jennings Produce Co.* (Ala. App.), 77 So. 986.

IV. INTERSTATE COMMERCE COMMISSION.

§ 42. Authority and Functions in General.

The powers vested in Interstate Commerce Commission by act of Congress can not be exercised in opposition to applicable valid laws subsequently enacted by Congress. *State v. Southern Exp. Co.* (Ala.), 75 So. 343.

Common Lands.

See the title COMMON LANDS, vol. 3, p. 165, and references there given.

COMMON LAW.

§ 4. Adoption and Repeal.

§ 5. — In General.

§ 7. Application and Operation.

Cross References.

See the title COMMON LAW, vol. 3, p. 165, and references there given.

§ 4. Adoption and Repeal.

§ 5. — In General.

Mississippi is a common-law state. *Corinth Bank, etc., Co. v. King*, 182 Ala. 403, 62 So. 704, cited in note in Ann. Cas. 1918A, 985.

§ 7. Application and Operation.

Statutory Remedies.—Where an action for the death of plaintiff's minor son

was brought under the Homicide Act (Code, § 2485), but was founded on defendant's common-law wrong in employing a minor at a dangerous work without the consent of the parent, the common-law principles govern. *Garrett v. Louisville, etc., R. Co.*, 196 Ala. 52, 71 So. 685, cited in note in Ann. Cas. 1918A, 983.

Community Property.

See post, HUSBAND AND WIFE.

Compensation.

See post, DAMAGES; OFFICERS.

As to compensation for use of money, see post, INTEREST.

Complaint.

As to complaints in criminal prosecution, see post, CRIMINAL LAW. As to complaints in civil action, see post, EQUITY; PLEADING.

Compositions with Creditors.

See the title COMPOSITIONS WITH CREDITORS, vol. 3, p. 171, and references there given.

Compounding Felony.

See the title COMPOUNDING FELONY, vol. 3, p. 172, and references there given.

COMPROMISE AND SETTLEMENT.

- § 1. Nature and Requisites.
- § 3. — Subject Matter.
- § 4. — Making and Form of Agreement.
- § 5. — Consideration.
 - § 5 (1) Unliquidated, Disputed, or Doubtful Claims in General.
 - § 5 (3) Invalid or Groundless Claims.
- § 9. Operation and Effect.
- § 12. — Conclusiveness.
- § 13. Impeachment or Setting Aside.
- § 16. Pleading.

Cross References.

See the title COMPROMISE AND SETTLEMENT, vol. 3, p. 173, and references there given.

§ 1. Nature and Requisites.

§ 3. Subject Matter.

Receipt for Second Prize—Satisfaction of Claim for First.—*Hertz v. Montgomery Journal Pub. Co.*, 9 Ala. App. 178, 62 So. 564. See the title COMPROMISE AND SETTLEMENT, § 3, vol. 3, p. 174.

§ 4. — Making and Form of Agreement.

Sum Less than Amount Due.—To constitute a settlement the sum less than the amount actually due must have been accepted in full for a disputed claim. *Alabama City, etc., R. Co. v. Gadsden*, 185 Ala. 263, 64 So. 91.

§ 5. — Consideration.

§ 5 (1) Unliquidated, Disputed, or Doubtful Claims in General.

Parol Contract of Settlement.—The mere existence of a controversy without a suit pending, is not sufficient consideration to support a parol settlement, unless there be reasonable ground for the controversy, but a compromise of matters in dispute between litigants, in the absence of fraud, is of itself sufficient consideration to uphold a parol contract of settlement. *Burleson v. Mays*, 189 Ala. 107, 66 So. 36.

Matters in Litigation — Valid Deed Considered Invalid by Parties.—Testator devised the land in controversy to his daughter, P., and other land to defendant, his other daughter. Prior to his death, however, he executed a deed con-

veying the land in controversy to defendant. After his death, she applied for probate of his will, filing the deed as an exhibit to the petition for probate. P. contested the probate on the ground of undue influence and want of capacity, pending which it was orally agreed between them that the contest and deed should be withdrawn, and that the will should be probated, and the parties take in accordance with its provisions. At the time of the compromise, the deed was not thought by either party to be valid except as a testamentary document, and the character of the estates which the sisters acquired under the will was also a subject of dispute. Held, that the settlement was based on an adequate consideration. *Burleson v. Mays*, 189 Ala. 107, 66 So. 36.

Claim Disputed — Payment of Less than Claimed. — *Western Railway v. Foshee*, 183 Ala. 182, 62 So. 500. See the title COMPROMISE AND SETTLEMENT, § 5 (1), vol. 3, p. 174.

Fraudulent Increase — Acceptance of Amount Admitted. — Where defendant who purchased a mule from complainant, giving a note and mortgage to secure the purchase price, wrote complainant a letter informing it that the amount had been fraudulently increased and inclosing a check for the amount he contended was the agreed price, stating that he would pay no more, complainant by accepting and cashing such check waived any right to claim an additional amount,

notwithstanding the rule that the payment of a less sum than the real debt will be no satisfaction of a larger sum where the claim is undisputed; there being a bona fide dispute in such case. *Brackin v. Owens Horse, etc., Co.*, 193 Ala. 579, 71 So. 97.

The existence of a mere controversy will not suffice to support a contract based upon the settlement of the controversy, unless based upon some consideration in the shape of something beneficial to one party or detrimental to the other. *Daniel v. Hughes*, 196 Ala. 368, 72 So. 23.

§ 5 (3) Invalid or Groundless Claims.

Claim Unsustainable at Law or in Equity.—A claim without legal merit, whether its legal validity is known or not, and absolutely and clearly unsustainable at law or in equity, constitutes no legal consideration for compromise and settlement. *Daniel v. Hughes*, 196 Ala. 368, 72 So. 23.

§ 9. Operation and Effect.

§ 12. — Conclusiveness.

Fraud, Accident or Mistake.—A settlement between parties sui juris is binding in the absence of fraud, accident, or mistake. *Burks v. Parker*, 192 Ala. 250, 68 So. 271.

§ 13. Impeachment or Setting Aside.

Attacked for Mistake.—Where a settlement between the parties was obtained by fraud, the entire settlement will be set aside; but, when it is attacked for mistake, it can be surcharged and falsified only to the extent of the mistake alleged and proved. *Burks v. Parker*, 192 Ala. 250, 68 So. 271.

§ 16. Pleading.

Condition Precedent to Relief.—*Hertz v. Montgomery Journal Pub. Co.*, 9 Ala. App. 178, 62 So. 564. See the title COMPROMISE AND SETTLEMENT, § 13, vol. 3, p. 178.

Replication — Fraud.—*Western Railway v. Foshee*, 183 Ala. 182, 62 So. 500. See the title COMPROMISE AND SETTLEMENT, § 16, vol. 3, p. 179.

Less Amount in Full of Larger Amount.—A plea of accord and satisfac-

tion, which alleges facts showing a payment of a less amount in full of a larger amount, is insufficient, where it fails to show that the amount was in dispute when the creditor accepted the lesser amount tendered in full. *Louisiana Lumber Co. v. Farrior Lumber Co.*, 9 Ala. App. 383, 63 So. 788.

Compromise and Part Payment.—Averments of a plea in assumpsit that the right of a trustee to have or recover anything from defendant on account of the agreement in suit was in doubt and dispute, for that then and there defendant was in good faith contending and asserting that his obligation to pay was conditional upon safe arrival of a steamship at ports, and it was then very doubtful whether the steamship would ever arrive at either of the ports, etc., were sufficient to bring the plea within the rule that, where claims are in dispute, compromise and part payment thereof are sufficient consideration to support discharge. *Martin v. Powell* (Ala.), 75 So. 358.

Sufficiency of Counts.—A count alleging plaintiff's claim against defendant for \$1,500 for the breach of an agreement and defendant's promise, in consideration of the settlement of the claim controversy to pay plaintiff \$900, which plaintiff accepted, but which defendant had failed to pay, and a count alleging the controversy regarding plaintiff's claim against defendant for a commission for selling land, whereby defendant was to pay \$900 at a certain place and plaintiff's price, and defendant's absence, were demurrable as not averring that defendant owed the plaintiff anything upon the matter out of which the controversy arose, or any fact showing that the controversy was supported by a valuable consideration. *Daniel v. Hughes*, 196 Ala. 368, 72 So. 23.

Lack of Consideration—General Issue.—Where the proof failed to show that the controversy afforded a basis of a valuable consideration for a settlement, such defense was available under the general issue. *Daniel v. Hughes*, 196 Ala. 368, 72 So. 23.

Concealed Weapons.

See post, WEAPONS.

Concealment.

See post, FRAUD; FRAUDULENT CONVEYANCES.

Conclusion.

As to conclusion of witness, see post, CRIMINAL LAW; EVIDENCE. As to formal conclusion of indictments or pleadings, see post, INDICTMENT AND INFORMATION; PLEADING.

Conclusiveness of Judgment.

See post, JUDGMENT.

Concurrent Jurisdiction.

See post, COURTS; CRIMINAL LAW.

Concurrent Negligence.

See ante, CARRIERS; post, MASTER AND SERVANT; NEGLIGENCE; RAILROADS; STREET RAILROADS.

Condemnation of Property.

See post, EMINENT DOMAIN.

Conditional Sales.

See post, SALES.

Conduct of Counsel.

See post, CRIMINAL LAW; TRIAL.

Confessions.

See post, CRIMINAL LAW.

Conflicting Grants.

See ante, ADVERSE POSSESSION; post, PUBLIC LANDS.

Conflicting Jurisdiction.

See post, COURTS.

CONFUSION OF GOODS.

II. Rights and Remedies of Persons Interested.

- § 2. Rights as to Property.
- § 3. — Owners in General.

Cross References.

See the title CONFUSION OF GOODS, vol. 3, p. 184, and references there given.

II. RIGHTS AND REMEDIES OF PERSONS INTERESTED.

- § 2. Rights as to Property.
- § 3. — Owners in General.

Where goods intermingled are of equal

value, and, as a quantity of corn in the shucks, are approximately homogeneous, the several owners thereof are entitled to their aliquot part of the whole. *Willard v. Cox*, 9 Ala. App. 439, 63 So. 781, cited in note in Ann. Cas. 1918A, 742.

Connecting Carriers.

See ante, CARRIERS.

CONSPIRACY.

I. Civil Liability.

- § ½. Nature and Elements in General.
- § 1. Persons Liable.
- § 1½. Conspiracy to Defraud.
- § 1½a. Conspiracy to Injure Property.
- § 2. Actions.
- § 2½. — Pleading.
- § 3. — Evidence.

II. Criminal Responsibility.

(A) Offenses.

- § 4. Nature and Elements of Criminal Conspiracy in General.
- § 5. — In General.
- § 6. — Overt Act.
- § 11. Persons Liable.

(B) Prosecution and Punishment.

- § 13. Indictment or Information.
- § 14. Evidence.
- § 15. — In General.
- § 16. — Admissibility in General.
- § 16½. — Sufficiency of Evidence.

Cross References.

See the title CONSPIRACY, vol. 3, p. 187, and references there given.

In addition, see ante, BURGLARY; post, CRIMINAL LAW; HOMICIDE.

As to liability of corporation for conspiracy, see post, CORPORATIONS.

I. CIVIL LIABILITY.

§ ½. Nature and Elements in General.

Damage Caused.—To render a conspirator liable for injuries caused thereby to plaintiff, the act under the conspiracy need not be the sole proximate cause of the injury, but must be at least a concurring proximate cause thereof. *National Park Bank v. Louisville, etc., R. Co. (Ala.), 74 So. 69.*

The gist of an action for a conspiracy is the damage and not the conspiracy, and the damage must have been the natural and proximate consequences of the act of the conspirators, and, until something has been accomplished in pursuance of the conspiracy, it is a mere unfulfilled intention of several persons to commit a wrong which is not actionable. *Louisville, etc., R. Co. v. National Park Bank, 188 Ala. 109, 65 So. 1003.*

Where an excursion planned by plaintiff was called off by the railroad company because not enough persons assembled to go, defendants who did nothing to prevent the assembling of the excursionists, are not liable because they conspired to prevent the excursion, and made misrepresentations to those that assembled. *Brooks v. Ingram, 186 Ala. 106, 65 So. 138, cited in note in L. R. A. 1915B, 1182.*

§ 1. Persons Liable.

Where a conspiracy is established, all conspirators are civilly liable for the act of any in pursuance of the original plan and for the common object, though not intended as a part of the original design. *National Park Bank v. Louisville, etc., R. Co. (Ala.), 74 So. 69.*

Only those participating in a conspiracy to its completion in acts which injure plaintiff are liable therefor, since the law always leaves a place of repentance to a conspirator. *National Park Bank v. Louisville, etc., R. Co. (Ala.), 74 So. 69.*

Acts of Co-Conspirators.—When by prearrangement or on the spur of the moment two or more persons enter upon a common enterprise or adventure, and a criminal offense is contemplated, each is a conspirator, and if the offense is carried out each is guilty of the offense committed, whether he did any overt act or not. *Newsom v. State (Ala. App.), 72*

So. 579, certiorari denied in Ex parte Newsom (Ala.), 73 So. 1001.

§ 1½. Conspiracy to Defraud.

Several Acts.—The fact that a railroad shipper conspired to issue spurious bills of lading upon which the railroad through its business associates procured the delivery at the point of destination of goods subsequently shipped on genuine bills, and on which plaintiff suffered no loss, does not make the carrier liable for loss caused by other spurious bills issued by the shipper on which no shipments were made, and of which it was not shown to have had knowledge, since the issuance of each false bill of lading was a separate criminal offense or cause of civil action. *National Park Bank v. Louisville, etc., R. Co. (Ala.), 74 So. 69.*

§ 1½a. Conspiracy to Injure Property.

Trade Unions — Organization.—Employees may rightfully organize themselves into associations for mutual protection and betterment and, having so organized, by confederated action may withdraw from or decline to enter the service of a particular employer, but in such self-protection they may not use threats, intimidation, or violence against or on employers or on their employees or strangers to induce them to leave or not enter the service of the employer. *Härdie-Tynes Mfg. Co. v. Cruise, 189 Ala. 66, 66 So. 657.*

Same—Strikes—Picketing.—Code 1907, § 6394, provides that any two or more persons who conspire to prevent any person, firm, or corporation from carrying on any lawful business within the state or to interfere with the same shall be guilty of a misdemeanor. Section 6395 declares that any person or persons who go near to or loiter about the premises or place of business of another engaged in lawful business to influence others not to have business dealings with such person, firm, or corporation, or to picket his or its works or place of business to interfere with or injure any lawful business or enterprise, shall be guilty of a misdemeanor. Section 6856 provides that any person who by force or threats of violence to person or property prevents or seeks to prevent another from doing work or furnishing materials, or from

contracting to do work or furnish materials for or to any person engaged in any lawful business or who disturbs or interferes with, or prevents, or in any manner attempts to prevent, the peaceable exercise of any lawful industry, must on conviction be fined, etc. Held, that such sections prohibit picketing by members of a labor union, and even peaceable persuasion of persons not to become employees of one transacting a lawful business or to induce employees to quit the service of such person, where the intention and effect of such acts is to prevent the operation of a lawful business or enterprise and to interfere with the operation thereof. *Hardie-Tynes Mfg. Co. v. Cruise*, 189 Ala. 66, 66 So. 657.

§ 2. Actions.

§ 2½. — Pleading.

Allegation of Conspiracy.—In a civil suit as well as in a criminal prosecution, the conspiracy must be sufficiently charged; it can not be aided by averments of acts done by one or more of the conspirators in furtherance of the plot. *National Park Bank v. Louisville, etc.*, R. Co. (Ala.), 74 So. 69.

Allegation of Acts Done in Pursuance of Conspiracy.—A complaint for conspiracy must allege the acts done in pursuance of the conspiracy to plaintiff's injury definitely and accurately, so that if the facts are admitted the court can draw the legal conclusion therefrom. *National Park Bank v. Louisville, etc.*, R. Co. (Ala.), 74 So. 69.

Conclusions.—Averments in a count for conspiracy that the proximate cause of plaintiff's loss was the continuance in business of one of the conspirators, and the fraudulent conduct of such business, were conclusions of the pleader. *National Park Bank v. Louisville, etc.*, R. Co. (Ala.), 74 So. 69.

Authority of Agent.—In an action against a railroad for conspiracy to defraud by the issuance of false bills of lading, allegation that defendant's agent through the influence of defendant's relation with connecting carriers agreed to have those carriers deliver cotton shipped on genuine bills of lading on surrender of the spurious bills of lading thereto-

fore issued, does not allege any acts within the scope of his employment, for which the railroad is liable, since such deliveries by connecting carriers were not within the scope of defendant's business. *National Park Bank v. Louisville, etc.*, R. Co. (Ala.), 74 So. 69.

A count for conspiracy, which alleges that the duties of the agent were to supervise the carrier's foreign shipments, to issue or cause to be issued by his subordinates bills of lading therefor, to procure deliveries of cotton under bills of lading issued by it, or purporting to be issued by it, and to adjust complaints, inquiries, and difficulties arising between the consignees of the cotton and the holders of bills of lading, does not show that the delivery of cotton by connecting carriers, nor the authorizing of the issuance of bills of lading by third parties without the receipt of the property, was within the scope of the agent's employment. *National Park Bank v. Louisville, etc.*, R. Co. (Ala.), 74 So. 69.

Insolvency of Conspirator.—An allegation in a count for conspiracy that the shipper's insolvency would have been discovered prior to the issuance of false bills of lading which caused plaintiff's loss except for the carrier's acts, held not to show liability on the part of the carrier. *National Park Bank v. Louisville, etc.*, R. Co. (Ala.), 74 So. 69.

Course of Business.—In a complaint for conspiracy between a railroad company and a shipper, a count which alleged that it had become a course of conduct or business between the conspirators for the shipper to issue false bills of lading, and for the railroad thereafter to cause cotton shipped on genuine bills to be delivered on the false bills, and that in consequence the public engaged in the cotton trade were induced to believe that the shipper was legitimately engaged in the sale of cotton on a large scale, and to give him credit on future false bills of lading, does not show a liability on the part of the carrier for loss sustained by the issuance of subsequent spurious bills of lading on which no cotton was delivered, and which were issued without the carrier's authority. *National Park Bank v. Louisville, etc.*, R. Co. (Ala.), 74 So. 69.

§ 3. — Evidence.

Admissibility.—Where plaintiff claimed defendants by their conspiracy prevented him from running an excursion train to a point near their property, and defendants claimed that not enough people assembled to justify the excursion, evidence that there were other excursions run on that same day is admissible. *Brooks v. Ingram*, 186 Ala. 106, 65 So. 138.

Sufficiency.—In an action by a mother for restoration of notes assigned to her son, and used by him to secure his own debt to his codefendant, evidence held insufficient to show a conspiracy between defendants to induce the assignment, or that they made false representations for the purpose of inducing such assignment. *Henderson v. Gilliland*, 187 Ala. 268, 65 So. 793.

II. CRIMINAL RESPONSIBILITY.

(A) OFFENSES.

§ 4. Nature and Elements of Criminal Conspiracy in General.

§ 5. — In General.

While the offense defined by Code 1907, § 7388, includes assault and battery, there must also be a conspiracy between two or more persons to inflict the abuse with intent to force a confession, to obtain disclosure, or to obtain a promise to leave vicinity. *Love v. State* (Ala. App.), 75 So. 189.

§ 6. — Overt Act.

Necessity for Overt Act.—*Smith v. State*, 8 Ala. App. 187, 62 So. 575. See the title CONSPIRACY, § 6, vol. 3, p. 188.

§ 11. Persons Liable.

Acts of Co-Conspirators.—Where two or more persons enter into a conspiracy to accomplish some unlawful act, any act done by any one of them in pursuance of the original conspiracy is, in contemplation of law, the act of all. *Crawley v. State* (Ala. App.), 73 So. 222.

Where two or more conspire to commit an unlawful act each is criminally responsible for the acts of his co-conspirators committed in the prosecution of the common design, so that where an unknown person was prima facie guilty un-

der the statute of having prohibited liquors in his possession for sale, persons entering into such common design were guilty of the offense, whether an overt act was done by them or not. *Crawley v. State* (Ala. App.), 73 So. 222.

Acts Previously Done.—When one enters a conspiracy to do an unlawful act, he becomes a party to every act which has been previously done by his co-conspirators in furtherance of a common design. *Eaton v. State*, 8 Ala. App. 136, 63 So. 41.

Intent to Commit Particular Crime.—To establish a conspiracy, it is not necessary that there be a prearrangement to do the particular wrongful act committed, but where defendant with others entered into an arrangement to unlawfully with force and arms open up a disputed section of a road, and a killing was the proximate result of this unlawful adventure, it was sufficient as showing a conspiracy to commit the homicide. *Eaton v. State*, 8 Ala. App. 136, 63 So. 41.

(B) PROSECUTION AND PUNISHMENT.

§ 13. Indictment or Information.

In a criminal prosecution, the conspiracy must be sufficiently charged; it can not be aided by averments of acts done by one or more of the conspirators in furtherance of the plot. *National Park Bank v. Louisville, etc., R. Co.* (Ala.), 74 So. 69.

§ 14. Evidence.

§ 15. — In General.

Presumption.—The existence of a conspiracy may be inferred from all the attendant circumstances accompanying and immediately following the doing of the act. *Bailey v. State*, 11 Ala. App. 8, 65 So. 422; *Eaton v. State*, 8 Ala. App. 136, 63 So. 41; *Brindley v. State*, 193 Ala. 43, 69 So. 536.

Under Code 1907, § 7388, prohibiting abuse, etc., of any person to force a confession or consent to leave the neighborhood, etc., the intent may be inferred from facts attending assault. *Love v. State* (Ala. App.), 75 So. 189.

§ 16. — Admissibility in General.

In prosecution under Code 1907, §

7388, prohibiting abuse, etc., of any person to force a confession or secure promise to leave the vicinity, accused may show that assaulted party actually committed offense for which he was whipped, as tending to show that assault was intended only as a punishment and not to force a confession. *Love v. State* (Ala. App.), 75 So. 189.

Circumstances.—*Smith v. State*, 8 Ala. App. 187, 62 So. 575. See the title CONSPIRACY, § 16, vol. 3, p. 190.

§ 16½. — Sufficiency of Evidence.

A conspiracy need not be established by positive testimony as it may be in-

ferred from circumstances. *Brewer v. State* (Ala. App.), 74 So. 764; *Brindley v. State*, 193 Ala. 43, 69 So. 536; *Eaton v. State*, 8 Ala. App. 136, 63 So. 41; *Bailey v. State*, 11 Ala. App. 8, 65 So. 422.

To show a conspiracy, the evidence need not show the existence of the conspiracy, any definite length of time prior to the doing of the unlawful act. *Eaton v. State*, 8 Ala. App. 136, 63 So. 41; *Bailey v. State*, 11 Ala. App. 8, 65 So. 422.

In a prosecution for conspiracy a prearrangement to do the specified wrong need not be shown. *Brewer v. State* (Ala. App.), 74 So. 764.

CONSTITUTIONAL LAW.

I. Establishment and Amendment of Constitutions.

- § ½. Nature and Authority in General.
- § 2. Amendment and Revision of State Constitutions.
- § 4. — Legislative Powers and Proceedings.
- § 6. — Submission to Popular Vote.

II. Construction, Operation and Enforcement of Constitutional Provisions.

- § 7. General Rules of Construction.
- § 8. — Applicability in General.
- § 9. — Intent and Policy.
- § 10. — Meaning of Language.
- § 12. — Matters Extrinsic to Instrument in General.
- § 14. — Relation to Form or Other Constitutions or Statutes.
- § 15. — Contemporaneous Construction.
- § 16. — Subsequent Legislative or Executive Construction.
- § 18. Grant or Limitation of Powers.
- § 19. — State Constitutions.
- § 21. Self-Executing Provisions.
- § 22. — In General.
- § 26. Duty of Legislature to Obey Constitutional Mandate.
- § 27. Validity of Statutory Provisions.
- § 28. — Constitutionality in General.
- § 30. Persons Entitled to Raise Constitutional Questions.
- § 31. — In General.
- § 33. Determination of Constitutional Questions.
- § 34. — Judicial Authority and Duty in General.
- § 35. — Necessity of Determination.
- § 35 (1) In General.
- § 35 (2) Form and Sufficiency of Objection or Allegation.

- § 36. — Scope of Inquiry in General.
- § 37. — Presumptions and Construction in Favor of Constitutionality.

III. Distribution of Governmental Powers and Functions.

(A) Legislative Powers and Delegation Thereof.

- § 38. Nature and Scope in General.
- § 39. Encroachment on Judiciary.
- § 40. — In General.
- § 43. — Remedies and Procedure.
- § 43½. — Establishment, Organization, and Jurisdiction of Courts.
- § 45. Delegation of Powers.
- § 46. — In General.
- § 48. — To Executive.
- § 49. — To Local Authorities.
 - § 49 (1) In General.
 - § 49 (2) To Municipalities and Municipal Officers in General.
 - § 49 (3) To County Boards and Officers.
- § 50. — To Corporations or Individuals.
- § 51. — Local Option and Submission to Popular Vote.
- § 52½. Political Questions.

(B) Judicial Powers and Functions.

- § 53. Encroachment on Legislature.
 - § 53 (1) In General.
 - § 53 (2) Inquiry into Motive, Policy, Wisdom, or Justice of Legislation.
- § 54½. Delegation of Powers by Judiciary.

(C) Executive Powers and Functions.

- § 56. Encroachment on Judiciary.
- § 57. — In General.

V. Personal, Civil, and Political Rights.

- § 60. Constitutional Guaranties in General.
- § 61. Personal Liberty and Security.
- § 62. Religious Liberty and Freedom of Conscience.
- § 64. Right to Acquire, Hold, and Dispose of Property.

VI. Vested Rights.

- § 67. Constitutional Guaranties in General.
- § 72. Public Offices.
- § 75. Remedies.

VII. Obligation of Contracts.

(B) Contracts of States and Municipalities.

- § 89½. Corporate Rights and Privileges in General.
- § 91. Right to Use Streets.

(C) Contracts of Individuals and Private Corporations.

- § 99. Nature of Contracts Protected in General.

- § 102. Impairment of Obligation in General.
- § 105. Usury Laws.
- § 106½. Preference of Creditors.
- § 110. Change of Remedies.
- § 114. Redemption Laws.

VIII. Retrospective and Ex Post Facto Laws.

- § 117. Constitutional Prohibitions in General.
- § 126. Nature of Ex Post Facto Laws.

IX. Privileges or Immunities, and Class Legislation.

- § 132. Grants of Special Privileges or Immunities.
- § 133. Privileges and Immunities of Citizens of the United States.
- § 135. Class Legislation.

X. Equal Protection of Laws.

- § 136. Constitutional Guaranties in General.
- § 137½. Nature of Discriminations Prohibited in General.
- § 137½a. Control over Governmental Agencies in General.
- § 138. Discrimination by Reason of Race, Color, or Condition.
- § 139½. — Public Conveyances.
- § 142. Taxation of Property.
- § 142½. Licenses and License Taxes.
- § 142½a. Regulation of Keeping and Use of Animals.
- § 143. Occupation and Employment in General.
- § 144½. Regulation of Trade or Business in General.
- § 144½a. Creation or Discharge of Liability in General.
- § 147. Civil Remedies and Proceedings.
- § 148. Criminal Prosecutions.

XI. Due Process of Law.

- § 149. Constitutional Guaranties in General.
- § 151. Criminal Prosecutions.
- § 153. — Indictment or Information.
- § 154. — Rules of Evidence.
- § 157½. Contempt Proceedings.
- § 161. Taxation of Property.
- § 162. — Assessment and Collection.
- § 164. License Taxes.
- § 164½. Local Improvements.
- § 165. — Assessment and Special Taxes.
- § 166½. Fence and Stock Laws.
- § 167. Regulation of Trade or Business in General.
- § 168. Regulation of Railroads and Other Carriers.
- § 170. Creation or Discharge of Liability in General.
- § 174. Civil Remedies and Proceedings.
- § 175. — Actions in General.
- § 178. — Parties and Process or Notice.

- § 179. — Rules of Evidence.
- § 179½. Administrative Proceedings.
- § 179½a. Confiscation.

Cross References.

See the title CONSTITUTIONAL LAW, vol. 3, p. 191, and references there given. In addition, see ante, BANKS AND BANKING; post, LICENSES; OFFICERS.

I. ESTABLISHMENT AND AMENDMENT OF CONSTITUTIONS.

§ ½. Nature and Authority in General.

A constitution is a charter of government, deriving its whole authority from the governed. *Fairhope Single Tax Corp. v. Melville*, 193 Ala. 289, 69 So. 466.

§ 2. Amendment and Revision of State Constitutions.

§ 4. — Legislative Powers and Proceedings.

Application of Restrictions to Amendment of Bills.—The mere fact that under Const. § 287, as to constitutional amendments, such proposals may be submitted through bills or acts of the legislature, does not impose upon the amendments of the constitution the restrictions with respect to the amendment of bills contained in Const. §§ 61, 64. *Jones v. McDade* (Ala.), 75 So. 988.

Readings of Amendments. — Under Const. § 284, the requirement of three readings in each house of proposed amendment to the constitution does not exact six readings of the proposed amendment in haec verba in both houses. *Jones v. McDade* (Ala.), 75 So. 988.

Same—Substitute Draft of Amendment.—A proposed constitutional amendment, the first draft of which was withdrawn and substitute passed, the draft and the substitute having been read the required number of times, was validly passed; substitution being in fact a form of amendment. *Jones v. McDade* (Ala.), 75 So. 988.

Same—House Journals.—Under Const. art. 284-287, inclusive, as to amendment of constitution by legislative proposal, it is not essential that the House Journals affirmatively show that required three readings of the proposed amendments

were made. *Jones v. McDade* (Ala.), 75 So. 988.

Same—Presumptions.—Since Const. § 284, as to proposed constitutional amendments, does not require the journals to show affirmatively that the readings were given the bill, it would be presumed in the absence of recital that the necessary readings were given. *Jones v. McDade* (Ala.), 75 So. 988.

§ 6. — Submission to Popular Vote.

Notice to Voters.—It is to be conclusively presumed that every voter received the benefit of the notice through the publication in extenso of a proposed constitutional amendment. *Jones v. McDade* (Ala.), 75 So. 988.

Test Validity of Ballot.—Whether a ballot on a proposed constitutional amendment is valid is determined by compliance with Const. § 285, and not with the directions of the act proposing the amendment. *Jones v. McDade* (Ala.), 75 So. 988.

Contents of Ballot. — Requirement of Const. § 285, that a ballot on a constitutional amendment contain substance or subject matter of proposed amendment so printed that nature thereof shall be clearly indicated does not demand that contents of ballot inform voters of entire contents of the amendment of which they are presumed to have had due notice through advertisements. *Jones v. McDade* (Ala.), 75 So. 988.

The word "nature" in Const. § 285, requiring ballot on constitutional amendment proposed by legislature to contain substance of amendment so as to indicate its nature, means kind, species, character, or sort. *Jones v. McDade* (Ala.), 75 So. 988.

Where a constitutional amendment was proposed to put the judge of probate, the sheriff, the tax collector, and tax assessor

of Montgomery county on certain salaries, and to make certain allowances with respect thereto, and to require the fees incident to these offices to be covered into the county treasury, and to authorize the legislature by general or local law to thereafter from time to time fix, regulate, and alter the amount of the salaries and allowances named in the amendment, including the method and basis of their compensation, and to fix, regulate, and alter the amount of compensation received by all other county officers of Montgomery county, its submission on a ballot in the words, "Shall the Constitution of Alabama be amended so that the judge of probate, sheriff, tax assessor and tax collector of Montgomery county will be placed on salary and required to cover the fees collected by them into the treasury of Montgomery county?" was sufficient, although no reference was made to the alteration of salaries. *Jones v. McDade* (Ala.), 75 So. 988.

Number of Votes Necessary.—Const. 1901, § 284, which supplanted Const. 1875, art. 17, § 1, provides that, if it shall appear a majority of the qualified voters who voted at election upon proposed amendments voted in favor of the same, such amendments shall become part of the constitution. Code 1907, § 1, declarative of the general rule, provides that singular and plural forms are interchangeable. A number of amendments were submitted at the same election. Held, that a constitutional amendment was adopted where a majority of the votes cast concerning it were in favor of adoption, though such majority did not constitute a majority of the highest number of votes cast on other amendments. *Harris v. Walker* (Ala.), 74 So. 40.

As Const. 1901, § 285, providing for the form of the ballot for the submission of constitutional amendments, and that no amendment shall be adopted unless it receive the affirmative vote of a majority of all the qualified voters who vote at such election, must be construed with reference to the prior section, a constitutional amendment submitted at a general election which receives a majority of the votes cast on the question of its

adoption is adopted, though such majority did not constitute a majority of the votes cast at the general election. *Harris v. Walker* (Ala.), 74 So. 40.

II. CONSTRUCTION, OPERATION AND ENFORCEMENT OF CONSTITUTIONAL PROVISIONS.

§ 7. General Rules of Construction.

§ 8. — Applicability in General.

Compared with Technical Construction of Statutes.—*Realty Inv. Co. v. Mobile*, 181 Ala. 184, 61 So. 248. See the title CONSTITUTIONAL LAW, § 8, vol. 3, p. 199.

§ 9. — Intent and Policy.

Constitutions should be construed so as to carry out the intention of the law-makers. *Railroad Comm. v. Alabama, etc., R. Co.*, 185 Ala. 354, 64 So. 13.

Nature and Objects Rather than Form Considered.—*State v. Birmingham, etc., R. Co.*, 182 Ala. 475, 62 So. 77. See the title CONSTITUTIONAL LAW, § 9, vol. 3, p. 199.

§ 10. — Meaning of Language.

If nothing appears to the contrary, words and phrases employed in constitutions should be interpreted as having the meaning public significance accorded to them when appropriated for expression. *Ex parte Pepper*, 185 Ala. 284, 64 So. 112, reversing judgment *American Cent. Ins. Co. v. Pepper*, 9 Ala. App. 191, 62 So. 397.

§ 12. — Matters Extrinsic to Instrument in General.

History of Adoption and Mischief to Be Remedied.—*State v. Birmingham, etc., R. Co.*, 182 Ala. 475, 62 So. 77. See the title CONSTITUTIONAL LAW, § 12, vol. 3, p. 201.

Debates of Constitutional Convention.—*Bozeman v. State*, 7 Ala. App. 151, 61 So. 604. See the title CONSTITUTIONAL LAW, § 12, vol. 3, p. 201.

Where the language of a constitution is clear and unambiguous, there is no room for construction, and the courts can not attempt to arrive at the intent by considering extrinsic matters such as the debates of the constitutional convention, or

substitutes or amendments for such provisions then proposed and rejected. *Ex parte Bozeman*, 183 Ala. 91, 63 So. 201, denying certiorari *Bozeman v. State*, 7 Ala. App. 151, 61 So. 604.

In construing constitution, debates in constitutional convention are persuasive, but not conclusive. *Louisville, etc., R. Co. v. State (Ala.)*, 78 So. 93.

§ 14. — Relation to Former or Other Constitutions or Statutes.

Presumption of Knowledge of Former Constitution.—*Ex parte Louisville, etc., R. Co.*, 176 Ala. 631, 58 So. 315. See the title CONSTITUTIONAL LAW, § 14, vol. 3, p. 201.

The reordainment or substantial reproduction of a provision of the organic law is an adoption of the settled construction which the judiciary has placed upon the law. *Ex parte Pepper*, 185 Ala. 284, 64 So. 112, reversing judgment *American Cent. Ins. Co. v. Pepper*, 9 Ala. App. 191, 62 So. 397.

Where a constitutional provision had been repeatedly construed by supreme court and is readopted in a later constitution, it is readopted with previous judicial construction, and the supreme court is bound thereby. *Ex parte Western Union Tel. Co. (Ala.)*, 76 So. 438.

Intention to Abolish Former System.—*State v. Birmingham, etc., R. Co.*, 182 Ala. 475, 62 So. 77. See the title CONSTITUTIONAL LAW, § 14, vol. 3, p. 201.

§ 15. — Contemporaneous Construction.

Doctrine of contemporaneous construction has no application to Const. 1901, § 216, providing for use of special tax for payment of interest and principal of bonds "heretofore issued," since its meaning is not doubtful. *Ward v. McDonald (Ala.)*, 77 So. 827.

§ 16. — Subsequent Legislative or Executive Construction.

Legislative Construction.—The general and long-accepted interpretation of the legislative bodies of a constitutional provision is available for correctly interpreting the organic law. *Jones v. McDade (Ala.)*, 75 So. 988.

Legislative construction of a constitutional provision, though not conclusive,

is properly influential when the provision is of doubtful meaning, and legislative interpretation has been acquiesced in, and acted upon without question for a considerable period. *Board v. Huey*, 195 Ala. 83, 70 So. 744.

New charter of Birmingham, Loc. Laws 1898-99, p. 1391, § 42, authorizing application of proceeds of special tax of one-half of 1 per cent. to bonds which may "hereafter" be issued as well as those "heretofore" issued, is in violation of Const. 1875, art. 11, and can not be considered a legislative construction of such article or of similar provisions of Const. 1901, § 216. *Ward v. McDonald (Ala.)*, 77 So. 827.

Construction by City Officers.—Construction of a statute constituting part of a city charter, by officers of the city which violates state constitution, will not be presumed to be adopted by placing of similar requirements in the new constitution. *Ward v. McDonald (Ala.)*, 77 So. 827.

§ 18. Grant or Limitation of Powers.

§ 19. — State Constitutions.

The legislature is all-powerful within the limits fixed by the constitution. *Hails v. State (Ala. App.)*, 75 So. 724.

Legislature as Possessor of State's Legislative Power.—*State v. Lane*, 181 Ala. 646, 62 So. 31. See the title CONSTITUTIONAL LAW, § 19, vol. 3, p. 203.

Subjection of Other Departments to Legislature.—*State v. Birmingham, etc., R. Co.*, 182 Ala. 475, 62 So. 77. See the title CONSTITUTIONAL LAW, § 19, vol. 3, p. 203.

§ 21. Self-Executing Provisions.

§ 22. — In General.

Where there is nothing to indicate that legislative action is necessary to render effective a constitutional amendment, such action is unnecessary, and hence an amendment eliminating a section from the constitution goes into effect without legislative action. *Harris v. Walker (Ala.)*, 74 So. 40.

Provisions Conferring Jurisdiction.—*Ex parte Louisville, etc., R. Co.*, 176 Ala. 631, 58 So. 315. See the title CONSTITUTIONAL LAW, § 14, vol. 3, p. 201.

TUTIONAL LAW, § 22, vol. 3, p. 203.

§ 26. Duty of Legislature to Obey Constitutional Mandate.

The legislature may provide statutes to give force, effect, and application to provisions of constitution, but it can not bend or alter such provisions that are self-executing. *Ex parte Western Union Tel. Co. (Ala.)*, 76 So. 438.

§ 27. Validity of Statutory Provisions.

§ 28. — Constitutionality in General.

Statutes can not be pronounced void because violative of the judicially conceived "spirit" of the constitution, or "contrary to first principles of common or natural right," or opposed to "public policy." *Fairhope Single Tax Corp. v. Melville*, 193 Ala. 289, 69 So. 466.

§ 30. Persons Entitled to Raise Constitutional Questions.

§ 31. — In General.

Statutes will be assumed to be valid until assailed by some one injuriously affected thereby. *State v. Montgomery*, 177 Ala. 212, 59 So. 294, cited in note in *Ann. Cas. 1915C*, 58.

County Revenue Board—Return of Illegal Taxes.—As a county is a subordinate division of state deriving its authority to levy and collect taxes from legislature, its revenue board can not invoke provisions of Const. U. S. Amend. 14, against methods prescribed by legislature for return of illegal taxes paid. *Board v. Southern Bell Tel., etc., Co. (Ala.)*, 76 So. 858.

Disinterested Party.—In General, a disinterested party can not plead the unconstitutionality of an act of the legislature, only those whose rights are invaded by a statute are entitled to question its validity. *Adams v. Central, etc., R. Co.*, 189 Ala. 665, 66 So. 628.

Same—Discrimination against Residents of Other States.—*Bozeman v. State*, 7 Ala. App. 151, 61 So. 604, cited in notes in *Ann. Cas. 1915C*, 58, 60.

Same—Purchaser at Foreclosure Sale.—*Cowley v. Shields*, 180 Ala. 48, 60 So. 267. See the title CONSTITUTIONAL LAW, § 31, vol. 3, p. 204.

§ 33. Determination of Constitutional Questions.

§ 34. — Judicial Authority and Duty in General.

The courts can only hold an act unconstitutional when it violates the express terms of the constitution or the necessary implication of such express provision, and then only after it is found not to be fairly susceptible of a construction which would avoid such violation. *Fairhope Single Tax Corp. v. Melville*, 193 Ala. 289, 69 So. 466.

§ 35. — Necessity of Determination.

§ 35 (1) In General.

Determination Must Be Indispensable.—*Imperial Cotton Seed Oil Co. v. Shanks*, 177 Ala. 522, 58 So. 390; *State v. Montgomery*, 177 Ala. 212, 59 So. 294. See the title CONSTITUTIONAL LAW, § 35 (1), vol. 3, p. 206.

An appellate court will not decide any constitutional question unless its decision thereupon is indispensable to a determination of the litigation before the court. *McDavid v. Bank*, 193 Ala. 341, 69 So. 452; *State v. Dillard*, 196 Ala. 539, 72 So. 56; *State v. Stone*, 197 Ala. 662, 73 So. 330.

The supreme court will never search for constitutional infirmities in statutes, but will consider only those questions raised and insisted upon. *State v. Prince (Ala.)*, 74 So. 939; *Dees v. State (Ala. App.)*, 75 So. 645.

Constitutionality of County Road Law.—Acts 1909 (Sp. Sess.) pp. 376-384, as to roads in Macon county, not being materially different from Code 1907, §§ 5777, 5779, 5808, as to roads in the state, and the first section of the local act providing that that act and the general laws not in conflict constitute the laws of Macon county, it will not be decided whether the local act is constitutional, since conviction of its violation could be had as well under the state as under the local laws, and courts will not listen to objections to constitutionality of the statute where the rights of the parties are not affected. *James v. State (Ala. App.)*, 72 So. 585, writ of certiorari denied in 73 So. 1000.

§ 35 (2) Form and Sufficiency of Objection or Allegation.

Demurrer to Plea Averring Unconstitutionality.—*Western Railway v. Foshee*, 183 Ala. 182, 62 So. 500. See the title CONSTITUTIONAL LAW, § 35 (2), vol. 3, p. 207.

§ 36. — Scope of Inquiry in General.

Constitution will be followed as written in matter of city bonds and taxation without regard to resulting inconvenience, leaving makers of the constitution to remedy its defects. *Ward v. McDonald* (Ala.), 77 So. 827.

§ 37. — Presumptions and Construction in Favor of Constitutionality.

Presumption of Validity of Statutes.—The presumption is that legislative enactments are constitutionally valid, until the contrary appears beyond a reasonable doubt. *Fairhope Single Tax Corp. v. Melville*, 193 Ala. 289, 69 So. 466.

Same—Sanction of Coordinate Department of Government.—*State v. Montgomery*, 177 Ala. 212, 59 So. 294. See the title CONSTITUTIONAL LAW, § 37, vol. 3, p. 207.

Same—Preservation of Public Health.—Statutes and ordinances dealing with and relating to the preservation of the public health by the installation and maintenance of sanitary systems of sewers and closets, together with provisions for their enforcement, will be indulged by the courts with the presumptions in their favor, as to their necessity, propriety, and validity, in the absence of showing that they are unreasonable, arbitrary, unduly oppressive, or inconsistent with the legislative policy of the state, and it must be made to appear to the courts that this police power has been manifestly transcended or abused, before they will be set aside or declared void; the special provisions and the extent of such ordinances being matters left in large measure to the discretion and judgment of the municipal authorities. *Spear v. Ward* (Ala.), 74 So. 27.

Same—Where Part of Statute Unconstitutional.—*State v. Board*, 180 Ala. 489, 61 So. 368. See the title CONSTITUTIONAL LAW, § 37, vol. 3, p. 208.

Burden of Proof.—*Lovejoy v. Montgomery*, 180 Ala. 473, 61 So. 597. See the title CONSTITUTIONAL LAW, § 37, vol. 3, p. 208.

Whenever the constitutionality of a statute is challenged, the objector assumes the burden of showing that it is invalid. *Railroad Comm. v. Alabama, etc., R. Co.*, 185 Ala. 354, 64 So. 13.

The general rule is that one who assails classification in a statute has the burden of showing that it does not rest on any reasonable basis, but is essentially arbitrary. *Denson v. Alabama Fuel, etc., Co.* (Ala.), 73 So. 525.

Invalidity Must Appear Beyond Reasonable Doubt.—*Imperial Cotton Seed Oil Co. v. Shanks*, 177 Ala. 522, 58 So. 390. See the title CONSTITUTIONAL LAW, § 37, vol. 3, p. 206.

A court should never declare a statute to be in conflict with the constitution unless convinced beyond reasonable doubt there is such conflict. *Ex parte Western Union Tel. Co.* (Ala.), 76 So. 438; *Hails v. State* (Ala. App.), 75 So. 724.

Construction in Favor of Constitutionality.—Statutes must, if reasonably possible, be so construed as to avoid invalidity. *Dancy v. Alabama Power Co.* (Ala.), 73 So. 901.

Constitutions are adopted for practical purposes and are entitled to reasonable and practical interpretations, and, when a statute meets the provisions of a constitution thus interpreted, its constitutionality should be upheld. *Ex parte Bozeman*, 183 Ala. 91, 63 So. 201.

Courts will not seize upon garbled expressions or strained definitions for the purpose of striking down a solemn legislative enactment; it being their duty to uphold the acts of the legislature unless plainly in transgression of organic law. *Smith v. Stiles*, 195 Ala. 107, 70 So. 905.

That construction of a city ordinance will be adopted which will uphold it as constitutional. *Mobile, etc., R. Co. v. Copeland & Son* (Ala. App.), 73 So. 131.

Same—Statute Susceptible of Two Constructions.—Where a statute is fairly susceptible of two interpretations, it should be given that under which it will be con-

stitutional. *Bidwell v. Johnson*, 191 Ala. 195, 67 So. 985.

Where a statute is reasonably susceptible of two constructions, the one must be given that will uphold rather than the one which would work destruction, although the one given may be less natural. *Wilkinson v. Stiles* (Ala.), 76 So. 45.

All Doubts Resolved in Favor of Constitutionality. — *State v. Birmingham*, etc., R. Co., 182 Ala. 475, 62 So. 77. See the title CONSTITUTIONAL LAW, § 37, vol. 3, p. 207.

When it is reasonably in doubt whether a statute is constitutional, the doubt should be resolved in favor of the constitutionality of the act. *Ex parte Bozeman*, 183 Ala. 91, 63 So. 201, denying certiorari *Bozeman v. State*, 7 Ala. App. 151, 61 So. 604; *Railroad Comm. v. Alabama*, etc., R. Co., 185 Ala. 354, 64 So. 13.

It is the duty of the court in construing a statute to resolve all reasonable doubt in favor of its constitutionality, regardless of results. *Smith v. Stiles*, 195 Ala. 107, 70 So. 905.

All reasonable doubts must be resolved in favor of legislative authority to pass and put into immediate effect laws passed by them. *Macon County v. Abercrombie*, 184 Ala. 283, 63 So. 985, reversing judgment 9 Ala. App. 147, 62 So. 449.

Same—Construction of Statute Defining Powers of Tax Commission.—*State Tax Comm. v. Bailey*, 179 Ala. 620, 60 So. 913. See the title CONSTITUTIONAL LAW, § 37, vol. 3, p. 208.

Repugnancy of State Constitutions to Federal Constitution. — Courts should hesitate to strike down organic law of the sovereign states as repugnant to federal constitution, especially when history of its adoption was that it was purposely worded so as to avoid injustice. *Louisville, etc., R. Co. v. State* (Ala.), 78 So. 93.

Constitutional Inhibition Read into Statute.—A statute need not enjoin obedience to the constitution, as the constitutional inhibition will be read into the statute and given effect. *Ex parte Birmingham* (Ala.), 74 So. 51.

III. DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.

(A) LEGISLATIVE POWERS AND DELEGATION THEREOF.

§ 38. Nature and Scope in General.

Statute Creating County Revenue Board.—Loc. Acts 1915, p. 293, creating a board of revenue for Conecuh county, and giving the board jurisdiction over county finances, such body supplanting the court of county commissioners, and declaring that when sitting the board shall be a court of record, is not invalid under Const. 1901, §§ 42, 43, dividing the powers of government into the legislative, executive, and judicial departments, and declaring that one department shall not exercise the powers of another. *Dunn v. Dean*, 196 Ala. 486, 71 So. 709.

Application to Municipal Governments.—*State v. Lane*, 181 Ala. 646, 62 So. 31, cited in notes in L. R. A. 1917A, 234, 238. See the title CONSTITUTIONAL LAW, § 38, vol. 3, p. 209.

§ 39. Encroachment on Judiciary.

§ 40. — In General.

Taxes and Assessments and Validation Thereof.—*State Tax Comm. v. Bailey*, 179 Ala. 620, 60 So. 913. See the title CONSTITUTIONAL LAW, § 40, vol. 3, p. 210.

§ 43. — Remedies and Procedure.

Code 1907, § 2846, amended by Acts 1915, p. 722, providing that no presumption in favor of the correctness of trial court's judgment shall be indulged in, does not change rule in passing on order granting or refusing new trial; as such statutes are an unwarranted invasion of judicial functions. *Samples v. State* (Ala. App.), 74 So. 758.

§ 43½. — Establishment, Organization, and Jurisdiction of Courts.

The provision of Acts 1911, p. 591, making the decision of the probate judge final as to sufficiency of a petition for an election relating to the commission form of government is within the powers of the legislature. *Troxell v. Moody* (Ala.), 75 So. 961.

§ 45. Delegation of Powers.**§ 46. — In General.**

Power to Make, Alter, or Suspend Law.—*State v. Montgomery*, 177 Ala. 212, 59 So. 294. See the title CONSTITUTIONAL LAW, § 46, vol. 3, p. 213.

Execution of Laws.—*Railroad Comm. v. Alabama, etc., R. Co.*, 182 Ala. 357, 62 So. 749. See the title CONSTITUTIONAL LAW, § 46, vol. 3, p. 213.

§ 48. — To Executive.

In General.—All laws are carried into execution by means of officers appointed for that purpose, some with more powers, others with less, but all must be clothed with powers for the effectual execution of the laws to be enforced. *Railroad Comm. v. Alabama, etc., R. Co.*, 185 Ala. 354, 64 So. 13.

Discretion as to Execution of Law.—*State v. Montgomery*, 177 Ala. 212, 59 So. 294. See the title CONSTITUTIONAL LAW, § 48, vol. 3, p. 213.

§ 49. — To Local Authorities.**§ 49 (1) In General.**

Public Service Commission—Validity of Transfer of Franchises.—Acts 1915, p. 268, conferring upon the Public Service Commission jurisdiction to determine whether a sale, conveyance, or lease of the property and franchises of a public utility is consistent with the interests of the public, was a proper delegation of the legislative power, since while the legislature can not delegate its power to make a law it can make a law to delegate a power to determine some fact or state of things upon which the law makes its own action depend. *Ex parte Birmingham (Ala.)*, 74 So. 51. 1912

To Railroad Commission.—*Railroad Comm. v. Alabama, etc., R. Co.*, 182 Ala. 357, 62 So. 749. See the title CONSTITUTIONAL LAW, § 49 (1), vol. 3, p. 214.

Same—Union Stations.—Code 1907, § 5545, authorizing the railroad commission to require any two or more railroad companies entering a town to erect a union station when necessary for the traveling public, is not an unwarranted delegation of legislative power; the com-

mission being an arm of the state which puts the law into effect when applicable. *Railroad Comm. v. Alabama, etc., R. Co.*, 185 Ala. 354, 64 So. 13.

Same—Rates.—Laws 1907, p. 711, authorizing the railroad commission to change rates for carriage of freight and passengers, is not repugnant to the constitution as an unauthorized delegation of legislative power. *Kimbrell v. Louisville, etc., R. Co.*, 191 Ala. 392, 67 So. 586.

Live Stock Sanitary Board.—Code 1907, §§ 757-770, establishing state live stock sanitary board, and empowering it to make regulations for the eradication of the cattle tick and of contagious diseases of live stock, and to establish quarantine districts, being a grant of authority to an arm of the state to prescribe rules under which the law can be effectively administered, is a constitutional delegation of the lawmaking power. *Ferguson v. Starkey*, 192 Ala. 471, 68 So. 348.

Violation of Rules of Governmental Agencies as to Crimes.—The legislature may confer authority on governmental agencies to make rules and regulations, the violation of which will support a criminal prosecution. *Curlee v. State (Ala. App.)*, 75 So. 268.

§ 49 (2) To Municipalities and Municipal Officers in General.

Compulsory Vaccination.—Code, § 1289, authorizing municipalities to provide a system of compulsory vaccination, is constitutional though its effect is to commit to municipalities a measure of discretion as to the circumstances under which the power thus delegated shall be made effective. *Herbert v. Board*, 197 Ala. 617, 73 So. 321.

§ 49 (3) To County Boards and Officers.

County Board—Fixing Salary.—Code 1907, § 1711, as amended by Act April 8, 1911 (Gen. Acts 1911, p. 326) § 2, prescribing the powers and duties of county superintendents of education and fixing their compensation at 4 per cent. on all moneys disbursed, but providing that, should the county board, by a majority vote, require his full time, they should fix his compensation on a salary basis.

does not delegate to the board legislative power. *McNiell v. Sparkman*, 184 Ala. 96, 63 So. 977, cited in note in L. R. A. 1916D, 923.

Courts of County Commissioners — Roads, Bridges and Fences.—The legislature can delegate to the courts of county commissioners the power to legislate in the matter of establishing, constructing, using, working, and maintaining the public roads, bridges, and fences, and Gen. Acts 1915, pp. 573-577, which does so, is valid. *Windham v. State* (Ala. App.), 77 So. 963.

Same — Violation of Regulations as Crimes.—The legislature can delegate to a court of county commissioners authority to make and promulgate rules and regulations, violation of which constitutes a crime. *State v. Strawbridge* (Ala. App.), 76 So. 479.

§ 50. — To Corporations or Individuals.

Separate Accommodations for White and Negro Passengers.—Code 1907, §§ 5487, 5488, 7684, requiring passenger trains to provide equal but separate accommodations for white and negro races, if construed to permit conductors to assign accommodations, would violate Const. 1901, § 21, prohibiting suspension of law except by legislature. *Mobile, etc., R. Co. v. Spenny*, 12 Ala. App. 375, 67 So. 740, certiorari denied in 192 Ala. 483, 68 So. 870.

§ 51. — Local Option and Submission to Popular Vote.

Whether Liquor May Be Sold.—*State v. Montgomery*, 177 Ala. 212, 59 So. 294. See the title CONSTITUTIONAL LAW, § 51, vol. 3, p. 216.

Same—Saloons or Dispensaries.—*State v. Montgomery*, 177 Ala. 212, 59 So. 294. See the title CONSTITUTIONAL LAW, § 51, vol. 3, p. 216.

Prohibiting Sale of Liquor in Town with No Marshal or Policeman Continuously Employed.—*State v. Montgomery*, 177 Ala. 212, 59 So. 294. See the title CONSTITUTIONAL LAW, § 51, vol. 3, p. 216.

§ 52½. Political Questions.

Taxation.—Matters of taxation being

strictly statutory, courts have no authority to correct supposed defects in legislative action so long as no principle of constitutional law is infringed. *Singer Sewing Mach. Co. v. Teasley* (Ala.), 73 So. 969.

(B) JUDICIAL POWERS AND FUNCTIONS.

§ 53. Encroachment on Legislature.

§ 53 (1) In General.

The inquiry whether the organic law has been validly and effectually amended is a judicial question. *Jones v. McDade* (Ala.), 75 So. 988.

§ 53 (2) Inquiry into Motive, Policy, Wisdom, or Justice of Legislation.

The wisdom of legislation is not a judicial question. *McGehee v. State* (Ala.), 74 So. 374.

The court will not consider the wisdom or policy of a valid statute, but will administer it as written. *Alabama Interstate Power Co. v. Mt. Vernon-Woodberry Cotton Duck Co.*, 186 Ala. 622, 65 So. 287.

The propriety and wisdom of the acts of the legislature, so long as they contravene no provision of the organic law, are questions exclusively for the legislative department, and the courts can not inquire concerning the motives or purposes of the legislature in order to find in its acts merits or demerits, except as they are disclosed on the face of the acts, or may be inferred from their operation, considered with reference to existing legislation and such other general conditions as every court must be presumed to know and understand. *State v. Thompson*, 193 Ala. 561, 69 So. 461.

Questions as to Policy of Statute.—*State v. Board*, 180 Ala. 489, 61 So. 368. See the title CONSTITUTIONAL LAW, § 53 (2), vol. 3, p. 217.

Motive in Enacting Statute.—*State v. Lane*, 181 Ala. 646, 62 So. 31. See the title CONSTITUTIONAL LAW, § 53 (2), vol. 3, p. 217.

Condemnation of Land Devoted to Public Use.—The legislature having, by Code 1907, § 3867, providing that property already devoted to public use shall

not be taken for a different character of use unless there is an actual necessity therefor, declared the public policy of the state regarding the condemnation of land already devoted to public use, courts can not, in determining the right of a telegraph company to condemn an easement along a railroad right of way, be influenced by considerations of the public interest. *Louisville, etc., R. Co. v. Western Union Tel. Co.*, 195 Ala. 124, 71 So. 118.

Garnishment.—The wisdom of Code 1886, §§ 2968, 2971, 2972 (Code 1907, §§ 4301, 4311), relating to the remedy by garnishment, can not be inquired into by the courts: *First Nat. Bank v. Dimmick*, 190 Ala. 359, 67 So. 309.

Regulating Keeping of Liquor by Clubs.—*Wallace v. State*, 8 Ala. App. 386, 62 So. 365. See the title CONSTITUTIONAL LAW, § 53 (2), vol. 3, p. 218.

Homestead Allotment—Notice to Next of Kin.—That the statute in question provides for no notice to next of kin in probate proceedings for homestead allotment is a matter to be addressed to legislature and not to courts. *Douglas v. Bishop (Ala.)*, 77 So. 752.

§ 54½. Delegation of Powers by Judiciary.

A fiat to the circuit clerk of a county, directing him to issue mandamus "or other remedial writ," requiring the judge of probate to certify his disqualification, was bad, in that it left the selection of the appropriate writ to the discretion of the clerk, as judicial authority could not be thus delegated. *McConnell v. Goodwin*, 189 Ala. 390, 66 So. 675.

(C) EXECUTIVE POWERS AND FUNCTIONS.

§ 56. Encroachment on Judiciary.

§ 57. — In General.

Abolishment of Court and Transfer of Pending Cases by Clerk.—*State v. Brock*, 180 Ala. 505, 61 So. 646. See the title CONSTITUTIONAL LAW, § 57, vol. 3, p. 219.

V. PERSONAL, CIVIL, AND POLITICAL RIGHTS.

§ 60. Constitutional Guaranties in General.

Const. 1901, § 1, guaranteeing the right

of life, liberty, and the pursuit of happiness, and § 35, declaring that the sole object and only legitimate end of government is to protect the citizen in the enjoyment of life, liberty, and property, and when the government assumes other functions it is usurpation, do not restrict the rightful exercise of the police power by the state; and the legislature may ascertain when the welfare of the people requires the exercise of the police power, as well as what are appropriate measures to that end, subject only to the right of the courts to see that the measures of police do not arbitrarily violate constitutional rights. *Southern Exp. Co. v. Whittle*, 194 Ala. 406, 69 So. 652.

Regulating Traffic in Liquor.—*Williams v. State*, 179 Ala. 50, 60 So. 903. See the title CONSTITUTIONAL LAW, § 60, vol. 3, p. 221.

§ 61. Personal Liberty and Security.

Municipal Ordinance Violating Liberty of Citizens.—*Board v. Orr*, 181 Ala. 308, 61 So. 920. See the title CONSTITUTIONAL LAW, § 61 (1), vol. 3, p. 221.

Strikers Picketing Works Made Misdemeanor.—Code 1907, § 6395, providing that any person who goes near to or loiters about the place of business of another to influence others not to do business with such person or to picket the works, etc., to interfere with and injure such person's lawful business or enterprise is guilty of a misdemeanor, though construed to prohibit peaceable picketing, is not in violation of the inalienable right to "life, liberty, and the pursuit of happiness" guaranteed by Const. 1901, art. 1, § 1; the term "liberty" as so used meaning liberty guaranteed by law and the social compact. *Hardie-Tynes Mfg. Co. v. Cruse*, 189 Ala. 66, 66 So. 657.

Involuntary Servitude — Misdemeanor in Obtaining Money from Employer.—The purpose of Acts 1911, p. 93, providing that any person who, with intent to defraud his employer, enters into a contract in writing for the performance of an act or service, and with like intent obtains from his employer money or other personal property, shall be guilty of a misdemeanor, is to punish those who obtain money or property by fraudulent

misrepresentation or false pretense, and it is not invalid as permitting involuntary servitude in violation of Const. U. S. Amend. 13, § 1. *Thomas v. State*, 13 Ala. App. 431, 69 So. 908.

Quantity of Liquors Limited.—Bonner Law (Act Feb. 8, 1915; Acts 1915, p. 44) § 12, making it unlawful for any person, firm, or corporation to receive, or accept delivery of, or to possess more than a specified quantity of intoxicating liquors within a specified period, is a valid exercise of the police power, and does not conflict with Const. 1901, §§ 1, 35, guaranteeing the rights of life, liberty, and the pursuit of happiness, and limiting the rightful functions of government. *Southern Exp. Co. v. Whittle*, 194 Ala. 406, 69 So. 652.

§ 62. Religious Liberty and Freedom of Conscience.

Complaint in a prosecution for practicing medicine without a license held not objectionable as violating the Constitution of the United States, and of the state, in denying accused the right to practice his religion. *Fealy v. Birmingham* (Ala. App.), 73 So. 296.

§ 64. Right to Acquire, Hold, and Dispose of Property.

Quantity of Liquors Limited.—Bonner Law (Act Feb. 8, 1915 [Acts 1915, p. 44]) § 12, making it unlawful for any person, firm, or corporation to receive, or accept delivery of, or to possess more than a specified quantity of intoxicating liquors within a specified period, is a valid exercise of the police power, and does not conflict with federal or state constitution, as interfering with the right to own and possess property. *Frazier v. State* (Ala. App.), 73 So. 764. See ante, "Personal Liberty and Security," § 61.

Neither office of county solicitor, nor rights, duties, or powers pertaining thereto, are property rights secured to incumbent by constitution. *State v. Black* (Ala.), 74 So. 387.

Ordinance Violating Rights of Citizens to Hold Property.—*Board v. Orr*, 181 Ala. 308, 61 So. 920. See the title CONSTITUTIONAL LAW, § 64, vol. 3, p. 224.

VI. VESTED RIGHTS.

§ 67. Constitutional Guaranties in General.

Statutory Rights Not Vested.—*Blake v. State*, 178 Ala. 407, 59 So. 623. See the title CONSTITUTIONAL LAW, § 67, vol. 3, p. 225.

Traffic in Liquors.—*Ex parte Woodward*, 181 Ala. 97, 61 So. 295. See the title CONSTITUTIONAL LAW, § 67, vol. 3, p. 225.

§ 72. Public Offices.

Abandonment of Commission Form of Government.—Acts 1915, p. 770, providing for the abandonment of the commission form of government in cities, after an election on the question and a return of the former aldermanic form of government, thereby abolishing the offices of the commissioners, where the result of the election is to abandon the commission form of government, was within the legislative power, as the commissioners, whose offices were created by the legislature, have no vested right to such offices, which may be abolished at the will of the legislature. *State v. Lanier*, 197 Ala. 1, 72 So. 320.

§ 75. Remedies.

Repeal of Statute Providing Remedy Pending Proceedings Thereunder.—*Scheuing v. State*, 177 Ala. 162, 59 So. 160. See the title CONSTITUTIONAL LAW, § 75, vol. 3, p. 227.

Venue.—No person or corporation has a vested right to a particular remedy, and venue in civil actions against foreign or domestic corporations belongs to remedy, and is no part of a right. *Southern R. Co. v. Goggins* (Ala.), 73 So. 958; *Southern R. Co. v. Jordan*, 192 Ala. 528, 68 So. 418.

Taking Away Existing Defense—Reformation of Conveyance.—Despite Const. § 95, declaring that the legislature shall have no power to take away any existing defense after suit is commenced, Act 1911, p. 199, which changes the old rule and allows a remote grantee to have reformation of a conveyance to a remote grantor which misdescribed the property, though the same mistake did not occur

in each successive deed, where the remote grantor and all subsequent ones intended to convey the land intended to be conveyed in the erroneous instrument, applies to all suits begun after its enactment, though the deed containing the misdescription was made many years before, for the old rule was merely one governing the remedy, and not the right. *Woodlawn Realty, etc., Co. v. Hawkins*, 186 Ala. 234, 65 So. 183.

Right to Contest Election. — *Scheuing v. State*, 177 Ala. 162, 59 So. 160. See the title CONSTITUTIONAL LAW, § 75, vol. 3, p. 227.

VII. OBLIGATION OF CONTRACTS.

(B) CONTRACTS OF STATES AND MUNICIPALITIES.

§ 89½. Corporate Rights and Privileges in General.

Acts 1911, p. 88, § 49, giving the superintendent of banks and the banking board exclusive jurisdiction over the liquidation of banks, does not impair the obligations of contracts within Const. 1901, § 23. *McDavid v. Bank*, 193 Ala. 341, 69 So. 452.

§ 91. Right to Use Streets.

Right to Enjoin Removal of Telephone Fixtures. — *New Decatur v. American Tel., etc., Co.*, 176 Ala. 492, 58 So. 613, cited in note in Ann. Cas. 1917E, 525. See the title CONSTITUTIONAL LAW, § 91, vol. 3, p. 234.

(C) CONTRACTS OF INDIVIDUALS AND PRIVATE CORPORATIONS.

§ 99. Nature of Contracts Protected in General.

The Anti-Advertising Liquor Law, prohibiting publication in the state of liquor advertisements, is not invalid, as working an impairment of contracts, even though publishers already had contracts for the publication of such advertisements; such contracts being also subject to the police power. *Advertiser Co. v. State*, 193 Ala. 418, 69 So. 501, cited in note in L. R. A. 1916B, 896.

§ 102. Impairment of Obligation in General.

Charging Liabilities of Insurance Companies.—*National Union v. Sherry*, 180

Ala. 627, 61 So. 944. See the title CONSTITUTIONAL LAW, § 102 (1), vol. 3, p. 237.

§ 105. Usury Laws.

Relieving Borrower from Paying More than Principal.—*Reynolds v. Lee*, 180 Ala. 76, 60 So. 101. See the title CONSTITUTIONAL LAW, § 105, vol. 3, p. 238.

§ 106½. Preference of Creditors.

In view of Const. U. S. art. 1, § 10, elimination of Const. 1901, § 250, giving priorities on insolvency of bank, held not to apply to bank already insolvent. *Harris v. Walker (Ala.)*, 74 So. 40.

§ 110. Change of Remedies.

Rule Applicable Only to Valid Contracts.—*Reynolds v. Lee*, 180 Ala. 76, 60 So. 101. See the title CONSTITUTIONAL LAW, § 110, vol. 3, p. 240.

§ 114. Redemption Laws.

Test as to Validity of Redemption Statute.—*Cowley v. Shields*, 180 Ala. 48, 60 So. 267, cited in note in Ann. Cas. 1915C, 61. See the title CONSTITUTIONAL LAW, § 114, vol. 3, p. 241.

VIII. RETROSPECTIVE AND EX POST FACTO LAWS.

§ 117. Constitutional Prohibitions in General.

Changing Defenses or Rights of Action after Suit Brought.—*Armstrong v. Sellers*, 182 Ala. 582, 62 So. 28. See the title CONSTITUTIONAL LAW, § 117, vol. 3, p. 243.

§ 126. Nature of Ex Post Facto Laws.

A statutory provision, amending an act creating a commission form of municipal government and regulating the selection and election of commissioners, which provides that no person shall be eligible to the office of city commissioner who shall have held such office for 3 consecutive years within the 4 years preceding the date of election, does not violate Const. § 22, nor Const. U. S. art. 1, § 10, relating to ex post facto laws; an "ex post facto law" being one which imposes a punishment for an act which was not punishable when it was committed, and

imposes additional punishment, or changes the rules of evidence by which less or different testimony is sufficient to convict. *State v. Teasley*, 194 Ala. 574, 69 So. 723.

IX. PRIVILEGES OR IMMUNITIES, AND CLASS LEGISLATION.

§ 132. Grants of Special Privileges or Immunities.

Approval by Public Service Commission under Acts 1915, p. 268, held not in violation of Const. § 22, forbidding any law making an exclusive grant of a special privilege. *Ex parte Birmingham* (Ala.), 74 So. 51.

§ 133. Privileges and Immunities of Citizens of the United States.

Regulating Liquor Traffic.—*Ex parte Woodward*, 181 Ala. 97, 61 So. 295. See the title CONSTITUTIONAL LAW, § 133 (2), vol. 3, p. 249.

The Bonner Law, § 12, regulating the delivery and possession of liquor is not in conflict with Const. U. S. Amend. 14, as abridging the privileges or immunities of citizens of the United States, or as depriving the citizen of life, liberty, or property without due process of law. *Southern Exp. Co. v. Whittle*, 194 Ala. 406, 69 So. 652.

Venue of Actions against Corporations.—Code 1907, § 6112, prescribing the venue of actions against corporations for personal injuries, held not to violate Const. U. S. Amend. 14, or Const. § 22, forbidding special privileges or immunities. *Hatcher v. Southern R. Co.*, 191 Ala. 634, 68 So. 55.

§ 135. Class Legislation.

Eminent Domain.—The legislature may create classes and enact legislation governing each class, provided the classification is not arbitrary, and a statute conferring the power of eminent domain is not invalid as creating an illegal discrimination between members of the same class, merely because it does not permit the condemnation of rights and property of cotton factories necessary for their operation, or private residences with outhouses, gardens and orchards within the curtilage of private residences.

Alabama Interstate Power Co. v. Mt. Vernon-Woodberry Cotton Duck Co., 186 Ala. 622, 65 So. 287.

Vehicle License Tax.—Loc. Acts 1915, p. 86, § 2, imposing a vehicle license tax, is not invalid as class legislation, since it applies to all vehicles alike; the classification being reasonable and proper. *Hudgens v. State* (Ala. App.), 72 So. 605.

Acts 1911, p. 700, regulating fraternal benefit societies, § 29 of which exempts from the operation thereof certain named lodges and associations of local lodges doing business within the state, which provide death or disability benefits not exceeding \$300 per member, provided that the exemption shall not apply to any domestic lodge which has more than 500 members, and provides for death or disability benefits, is not unconstitutional as an unjust discrimination, since the legislature has a wide discretion as to classification in such matters, and a classification of lodges for purposes of regulation by number of members or benefits is reasonable. *Proctor v. Huffman*, 193 Ala. 216, 68 So. 969.

X. EQUAL PROTECTION OF LAWS.

§ 136. Constitutional Guaranties in General.

Legitimate Classification and Discrimination between Classes.—*Board v. Orr*, 181 Ala. 308, 61 So. 920. See the title CONSTITUTIONAL LAW, § 136, vol. 3, p. 252.

§ 137½. Nature of Discriminations Prohibited in General.

The constitutional guaranty of equal protection of the law does not forbid the legislature from making a reasonable classification in the operation of the laws, based on some real and substantial distinctions bearing a reasonable and just relation to the things in respect to which the classification is imposed. *Birmingham-Tuscaloosa R., etc., Co. v. Carpenter*, 194 Ala. 141, 69 So. 626.

§ 137½a. Control over Governmental Agencies in General.

The provision of Acts 1915, p. 858, that a person elected coroner must be a practicing physician in good standing is not

unconstitutional as denying equal protection of law. *Board v. State* (Ala.), 74 So. 364.

§ 138. Discrimination by Reason of Race, Color, or Condition.

§ 139½. — Public Conveyances.

Separation of Races.—Code 1907, § 5487, providing that all railroads carrying passengers in the state, shall provide equal but separate accommodations for white and colored races by providing separate cars or by partitions securing separate accommodations; § 5488, authorizing and requiring the conductor of each passenger train to assign each passenger to the car or the division of the car designated for his race, and providing that if any passenger refuses to take the place assigned the conductor may refuse to carry him, and that for such refusal neither the conductor nor the carrier shall be liable in damages, and excepting passengers entering the state under transportation contracts made in another state; and § 7684, providing that any person who, in violation of the provisions for equal and separate accommodations for the white and negro races, rides or attempts to ride in a coach or partition designated for the other race must, on conviction, be fined not more than \$100—are a valid exercise of the police power to preserve peace and order and to prevent race contacts and collisions, and do not deny the equal protection of the laws. *Mobile, etc., R. Co. v. Spenny*, 12 Ala. App. 375, 67 So. 740.

Same — White Sheriff Traveling with Negro Prisoner.—Code 1907, §§ 5487, 5488, are not rendered violative of the equal protection of the law clause of the federal constitution by a construction exempting therefrom a white sheriff traveling with a negro prisoner. *Spenny v. Mobile, etc., R. Co.*, 192 Ala. 483, 68 So. 870.

§ 142. Taxation of Property.

Exempting Confederate Soldiers. — *McLendon v. State*, 179 Ala. 54, 60 So. 392. See the title CONSTITUTIONAL LAW, § 142, vol. 3, p. 254.

§ 142½. Licenses and License Taxes.

Operating Public Utilities.—Acts 1911, p. 188, § 36f, providing that the maximum amount of privilege or license tax which municipalities may collect of any persons or corporations operating electric light, gas, steam heating, or waterworks companies shall not exceed 2 per cent. of the gross receipts, provided that the amount paid by such a company as intangible property tax to such municipalities shall be allowed as a credit on and against the privilege or license tax of itself, or when considered in connection with other pertinent tax laws, is not violative of any provision of the Constitution of Alabama, or Const. U. S. Amend. 14, as attempting an arbitrary or unreasonable classification of persons or corporations for their subjection to license or privilege taxes by municipalities, thereby exonerating some to the disadvantage of others not exempted by the proviso of the section, since the state may classify appropriate objects of taxation, and a distinction may be taken and made effective in a statute that is grounded in substantial considerations suggestive of equity and natural justice, while even the bare fact of assessment of other property, as affording a basis for a distinction in taxation, has been approved. *Ex parte Birmingham*, 195 Ala. 60, 70 So. 184.

Insurance Companies.—Code 1907, § 2089, as amended by Act Aug. 31, 1909 (Laws 1909 [Sp. Sess.] p. 337), and Revenue Act March 31, 1911 (Laws 1911, p. 163) § 4, require insurance companies when filing the statement required by Code 1907, § 4556, to pay as a tax for doing business in the state certain percentages of the gross premiums received in the state. Section 4556 provides that foreign insurance companies shall not be authorized to do business in the state until they file a certified copy of their charter and a statement of their financial condition and business. Held, that the tax imposed by such statutes is neither a property nor a franchise tax, but is a privilege or license tax, and the statutes are not in violation of Const. U. S. Amend. 14. *Brown v. Pittsburgh, etc., Co.*, 10 Ala. App. 614, 65 So. 699.

§ 142½a. Regulation of Keeping and Use of Animals.

Keeping Animals in City.—Board *v.* Orr, 181 Ala. 308, 61 So. 920. See the title CONSTITUTIONAL LAW, § 143, vol. 3, p. 254.

§ 143. Occupation and Employment in General.

Regulating Keeping Animals in City.—Board *v.* Orr, 181 Ala. 308, 61 So. 920. See the title CONSTITUTIONAL LAW, § 143, vol. 3, p. 254.

§ 144½. Regulation of Trade or Business in General.

Liquidation of Banks.—Acts 1911, p. 88, § 49, giving the superintendent of banks and the banking board exclusive jurisdiction to liquidate a bank and a priority of the right of administration over an assignee selected by the bank itself, is not discriminatory within the equal protection clause of Federal Constitution. *McDavid v. Bank*, 193 Ala. 341, 69 So. 452.

Acts 1911, p. 88, § 49, giving the superintendent of banks and the banking board exclusive jurisdiction to liquidate a bank, is not invalidated by § 48, stipulating that the provisions of the act shall not apply to national banks. *McDavid v. Bank*, 193 Ala. 341, 69 So. 452.

§ 144½a. Creation or Discharge of Liability in General.

Imputed Negligence of Driver of Motorcar.—Automobile Act (Acts 1911, p. 649) § 34, providing that the contributory negligence of the person operating any motor vehicle shall be imputed to every occupant thereof, but not to passengers paying fare and riding in motor vehicles regularly used for public hire, is repugnant to the state and federal constitutions, because discriminating against persons riding in motor vehicles, and denying equal protection of the law to persons similarly situated. *Birmingham-Tuscaloosa R., etc., Co. v. Carpenter*, 194 Ala. 141, 69 So. 626; *Galloway v. Perkins* (Ala.), 73 So. 956.

§ 147. Civil Remedies and Proceedings.

Garnishment.—Code 1886, §§ 2968, 2971 (Code 1907, § 4301), providing that garnishment might issue in aid of a pending

suit at any time before judgment, and that process of garnishment might issue on a judgment on which execution might issue without bond or security, and § 2972 (Code 1907, § 4311), providing that a judgment creditor of a corporation, having execution returned "no property found," might sue out a garnishment to reach the unpaid subscription of any stockholder, made distinction and permissible classification of creditors, and are within the legislative power and valid. *First Nat. Bank v. Dimmick*, 190 Ala. 359, 67 So. 309.

Assignment of Causes of Action against Railroads.—Code 1907, § 5159, providing that claims against railroad companies for injuries to property may be assigned in writing, and each successive assignee thereof may sue thereon in his own name, is not violative of Const. U. S. art. 14, § 1, providing that no state shall make or enforce any law which shall deny to any person within its jurisdiction the equal protection of the laws, though using the language "railroad companies," only including corporations and associations of persons, but not including individuals, since the words "railroad companies" were intended to embrace all legal persons engaged in the transportation of persons or freight over railroads for hire. *Parnell v. Southern R. Co.* (Ala.), 74 So. 437.

Venue.—Equal protection, which is satisfied by any practice having the sanction of common-law usage, and having reference to substance and not form, does not require that the privilege of localizing actions shall be conferred alike on resident and nonresident defendants. *Jefferson County Sav. Bank v. Carland*, 195 Ala. 279, 71 So. 126.

§ 148. Criminal Prosecutions.

Fixing Weight of Evidence.—*Ex parte Woodward*, 181 Ala. 97, 61 So. 295. See the title CONSTITUTIONAL LAW, § 148, vol. 3, p. 256.

XI. DUE PROCESS OF LAW.

§ 149. Constitutional Guaranties in General.

While the due process clauses of the state and federal constitutions are de-

signed to preserve life, liberty, and property against the encroachments of mere arbitrary power, they are not intended to interfere with the power of the state by legislative enactment, without more, to impose, subject to judicial approval, such reasonable regulations as may be deemed essential to the general good of the community. *Edwards v. Bibb County Board*, 193 Ala. 554, 69 So. 449.

The due process clauses of the state and federal constitutions are not intended to interfere with the legislative power of the state to impose reasonable police regulations, subject to judicial approval. *Edwards v. Bibb County Board*, 193 Ala. 554, 69 So. 449.

The purpose of Const. 1901, §§ 6, 13, providing that in all criminal prosecutions accused has a right to be heard, and shall not be deprived of life, liberty, or property except by due process of law, and that all courts shall be open, and that every person, for an injury done him in his person or reputation, shall have a remedy by due process of law, and right and justice shall be administered without denial or delay, is to secure the citizen against arbitrary action of those in authority, and to place him under the protection of the law; "due process of the law" being held to be the equivalent of "the law of the land," and to mean a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights (citing 3 Words and Phrases, Due Process of Law). *State v. Bush*, 12 Ala. App. 309, 68 So. 492.

§ 151. Criminal Prosecutions.

See ante, "Constitutional Guaranties in General," § 149.

§ 153. — Indictment or Information.

The constitutional right of an accused to demand the nature and cause of his accusations is essential to the guaranty that no person shall be deprived of his liberty save by due process of law, nor be twice put in jeopardy for the same offense. *Cooper v. State* (Ala. App.), 74 So. 753.

§ 154. — Rules of Evidence.

Fixing Weight of Evidence in General.—Ex parte Woodward, 181 Ala. 97, 61 So. 295, cited in notes in L. R. A. 1915C, 719, 727, 729. See the title CONSTITUTIONAL LAW, § 154, vol. 3, p. 257.

Possession of Liquor.—Acts 1915, p. 33, § 32½, making possession of liquor prima facie evidence of guilt of violation of the prohibition statute, does not deprive defendant of due process of law, it being within the legislature's power to fix such rule of evidence. *Dees v. State* (Ala. App.), 75 So. 645.

Keeping Intoxicants in Certain Kinds of Buildings.—Ex parte Woodward, 181 Ala. 97, 61 So. 295. See the title CONSTITUTIONAL LAW, § 154, vol. 3, p. 257.

§ 157½. Contempt Proceedings.

Due process of law requires that the court which assumes to determine the rights of parties shall have jurisdiction to hear and determine on the merits, and a denial to defendants, charged with violating an injunction not within the jurisdiction of the court, of the right to file any motion, answer, or pleading in the cause in which the injunction was issued, until purged of an adjudged contempt therein, is a denial of due process of law guaranteed by the fourteenth amendment. *Board v. Merrill*, 193 Ala. 521, 68 So. 971.

§ 161. Taxation of Property.

§ 162. — Assessment and Collection.

Opportunity to Be Heard in Opposition to Assessment.—*State Tax Comm. v. Bailey*, 179 Ala. 620, 60 So. 913. See the title CONSTITUTIONAL LAW, § 162, vol. 3, p. 259.

§ 164. License Taxes.

Insurance Companies.—Code 1907, § 2089, as amended by Act Aug. 31, 1909 (Laws 1909 [Sp. Sess.] p. 337), and Revenue Act March 31, 1911 (Laws 1911, p. 163) § 4, require insurance companies when filing the statement required by Code 1907, § 4556, to pay as a tax for doing business in the state certain percentages of the gross premiums received in the state. Section 4556 provides that

foreign insurance companies shall not be authorized to do business in the state until they file a certified copy of their charter and a statement of their financial condition and business. Held, that the tax imposed by such statutes is neither a property nor a franchise tax, but is a privilege or license tax, and the statutes are not in violation of Const. U. S. Amend. 14. *Brown v. Pittsburgh, etc., Co.*, 10 Ala. App. 614, 65 So. 699.

Erroneous Payment of Taxes.—As only those certificates of the probate judge reciting erroneous payment of taxes and authorizing return to taxpayer which are authorized by statute are conclusive on the county board of revenue, the statute authorizing such certification is not in violation of Const. U. S. Amend. 14. *Board v. Southern Bell Tel., etc., Co. (Ala.)*, 76 So. 858.

§ 164½. Local Improvements.

§ 165. — Assessment and Special Taxes.

Notice and Opportunity for Hearing.—Publication of a notice of the contemplated levy of a special assessment for municipal improvements in a reasonable manner is a general public notice which the law presumes will reach the cognizance of the owner to be affected and constitutes due process of law. *Pierce v. Huntsville*, 185 Ala. 490, 64 So. 301.

Code 1907, § 1377, requiring notice by publication of an assessment for street improvements, § 1379, defining the contents of the notice, § 1378 prescribing a time for hearing objections to an assessment, § 1381, providing for the making of objections to an assessment, and § 1389, giving the right of appeal to the circuit court, meet the requirements of due process of law as to an assessment constituting a charge on the property assessed, for due process of law in matters of local assessments does not necessarily mean a judicial proceeding, with notice and hearing appropriate thereto, and in the case of special assessments and general taxes notice by publication, reasonably and properly given, satisfies the constitutional requirement. *Ex parte Gudenrath*, 194 Ala. 568, 69 So. 629.

Notice of assessment of benefits by publication in a newspaper under Code

1907, § 1377, held due process of law. *Huntsville v. Goodenrath*, 13 Ala. App. 579, 68 So. 676.

§ 166½. Fence and Stock Laws.

Code 1907, §§ 5881, 5882, conferring upon courts of county commissioners, or courts of like jurisdiction, authority to direct and supervise the holding of elections to establish stock law districts, and to declare the results of such elections, and providing that a proceeding to establish a stock law district shall be commenced by petition, are a valid exercise of the police power, and not a violation of the due process of law clause of the fourteenth amendment to the United States Constitution. *Edwards v. Bibb County Board*, 193 Ala. 554, 69 So. 449.

§ 167. Regulation of Trade or Business in General.

Intoxicating Liquors. — *Williams v. State*, 179 Ala. 50, 60 So. 903. See the title CONSTITUTIONAL LAW, § 167, vol. 3, p. 261.

The Bonner Law, § 12, regulating the delivery and possession of liquors, is not in conflict with Const. U. S. Amend. 14, as abridging the privileges or immunities of citizens of the United States, or as depriving the citizen of life, liberty, or property without due process of law. *Southern Exp. Co. v. Whittle*, 194 Ala. 406, 69 So. 652.

§ 168. Regulation of Railroads and Other Carriers.

Maintenance of Union Depots.—*Railroad Comm. v. Northern Alabama R. Co.*, 182 Ala. 357, 62 So. 749, cited in note in Ann. Cas. 1915C, 851. See the title CONSTITUTIONAL LAW, § 168, vol 3, p. 261.

§ 170. Creation or Discharge of Liability in General.

In adoption of ordinances municipal corporations must conform to constitutional limitations, and any ordinance that arbitrarily fixes liability on the citizens in prosecution of lawful business, in absence of contract, wrong, fraud, or neglect on his part, denies due process of law and is void. *Mobile, etc., R. Co. v. Copeland & Son (Ala. App.)*, 73 So. 131.

§ 174. Civil Remedies and Proceedings.**§ 175. — Actions in General.**

Due process, which is satisfied by any practice having the sanction of common-law usage, and having reference to substance and not form, does not require that the privilege of localizing actions shall be conferred alike on resident and nonresident defendants. *Jefferson County Sav. Bank v. Carland*, 195 Ala. 279, 71 So. 126.

§ 176. — Parties and Process or Notice.

"Due process of law" means notice, hearing according to that notice, and judgment entered in accordance to that notice and hearing. *Evans v. Evans* (Ala.), 76 So. 95.

Duty to Ascertain Names and Residences of Adverse Claimants.—Code 1907, § 3106, respecting publication and proceedings against defendants whose names are unknown, and § 5443, providing the action to quiet title, which statutes provide for constructive notice by publication, imposed the duty of diligent inquiry on complainant in suit to quiet title for the parties in adverse interest to be made respondents, and he was bound to exercise reasonable diligence to ascertain the names and residences of all such parties having or claiming an interest in the lands, and to make them parties respondent by perfecting service as required under the statutes and by due process of law. *Gill v. More* (Ala.), 76 So. 453.

Code 1907, § 3106, providing for perfecting service by publication against

nonresident defendants, such as those whose property rights in lands are being dealt with or sought to be concluded by judicial proceedings under § 5443, providing the action to quiet title, construed to impose on complainant in an action to quiet title the affirmative duty to make a bona fide and reasonably diligent inquiry to ascertain the names and residences of all persons claiming or owning an adverse interest, affords due process of law to nonresident defendants. *Gill v. More* (Ala.), 76 So. 453.

§ 179. — Rules of Evidence.

Rule of evidence, established by Acts 1915, p. 33, § 32½, making possession of liquor prima facie evidence of guilt, of violation of the prohibition statute, does not deprive defendant of due process of law; it being within the legislature's power to fix such rule of evidence. *Dees v. State* (Ala. App.), 75 So. 645.

§ 179½. Administrative Proceedings.

Act 1911, p. 59, § 10, providing for the turning over of the affairs of an insolvent bank to the banking superintendent, held not to work a deprivation of property without due process of law in contravention of Const. U. S. Amend. 14. *Montgomery, etc., Co. v. Walker*, 181 Ala. 368, 61 So. 951.

§ 179½a. Confiscation.

The temperance acts of 1915, restricting possession of intoxicating liquors lawfully acquired before enactment, are not unconstitutional for taking property without due process of law. *Edmunds v. State* (Ala.), 74 So. 965.

Construction.

As to construction of particular instruments, see the particular titles, such as **CONTRACTS; DEEDS; WILLS.**

Constructive Notice.

See post, **NOTICE.**

Constructive Possession.

See ante, **ADVERSE POSSESSION.**

Constructive Service.

See post, **PROCESS.**

CONTEMPT.

I. Acts or Conduct Constituting Contempt.

§ 1½. Preventing Attendance of Party or Witness.

II. Power to Punish, and Proceedings Therefor.

§ 23. Attachment or Other Process or Notice.

§ 23½. Pleading.

§ 24½. Interrogatories and Answers Thereto.

§ 25. Judgment or Order.

§ 27. Appeal or Error.

§ 28. Certiorari.

III. Punishment.

§ 34. Denial of Privileges as Litigant.

Cross References.

See the title CONTEMPT, vol. 3, p. 269, and references there given.

As to removal of children in violation of decree of court as contempt, see post, DIVORCE.

I. ACTS OR CONDUCT CONSTITUTING CONTEMPT.

§ 1½. Preventing Attendance of Party or Witness.

Court had power to punish for contempt relating to interference with witnesses under Code 1907, § 4630, independent of the inherent power of courts to punish for contempt. *Ex parte Bankhead* (Ala.), 75 So. 478.

II. POWER TO PUNISH, AND PROCEEDINGS THEREFOR.

§ 23. Attachment or Other Process or Notice.

In order to punish for a constructive contempt, defending party should have notice of nature of charge and be given opportunity to answer and this is generally done by rule to appear and show cause. *Ex parte Bankhead* (Ala.), 75 So. 478.

It is sufficient if rule to show cause in contempt proceedings informs defendant of nature of contempt, and it is not necessary to recite all the facts in absence of statutory requirements. *Ex parte Bankhead* (Ala.), 75 So. 478.

§ 23½. Pleading.

Conclusiveness of Denial. — In contempt proceeding, defendant's denial is

not conclusive of his innocence. *Ex parte Bankhead* (Ala.), 75 So. 478.

§ 24½. Interrogatories and Answers Thereto.

The practice of propounding interrogatories to accused in order that he may purge himself of contempt is not necessary under modern authorities. *Ex parte Bankhead* (Ala.), 75 So. 478.

§ 25. Judgment or Order.

Facts Constituting Contempt. — It is not necessary that a judgment in contempt proceedings state the facts constituting the contempt, though it is the better practice. *Ex parte Bankhead* (Ala.), 75 So. 478.

§ 27. Appeal or Error.

Incorporation by trial court of its decision in contempt proceedings against petitioner in its judgment in eminent domain proceedings did not authorize a review of the contempt proceedings on appeal from the judgment. *Alabama Power Co. v. Adams*, 191 Ala. 54, 67 So. 838.

Where, in condemnation proceedings, the owner during the trial instituted contempt proceedings against petitioner, and the court taxed the owner with costs on denying motion to punish for contempt, the remedy of the owner was by

certiorari, mandamus or other extraordinary writ pursued in a proceeding separate from the condemnation proceedings. *Alabama Power Co. v. Adams*, 191 Ala. 54, 67 So. 838.

§ 28. Certiorari.

When Denied.—Where record in contempt proceedings shows jurisdiction in trial court and no apparent error of law, certiorari will be denied as the supreme court will not review or revise trial court's conclusion and judgment upon

the facts under the writ. *Ex parte Bankhead* (Ala.), 75 So. 478.

Hearing on Certiorari.—The supreme court on certiorari can review the action of the chancellor on motion for contempt for violation of an injunction. *Board v. Merrill*, 193 Ala. 521, 68 So. 971.

III. PUNISHMENT.

§ 34. Denial of Privileges as Litigant.

Party in contempt will not be heard on anything pertaining to merits of cause. *Burns v. Shapley* (Ala. App.), 77 So. 447.

CONTINUANCE.

- § 1. Continuance by Operation of Law.
- § 3. Discretion of Court.
- § 9. Pendency of Proceedings for Discovery.
- § 16½. Time for Application.

Cross References.

See the title CONTINUANCE, vol. 3, p. 276, and references there given.

As to review of proceedings granting or refusing continuances, see ante, APPEAL AND ERROR. As to continuances in criminal cases, see post, CRIMINAL LAW. As to mandamus to control court's discretion in granting continuance, see post, MANDAMUS. As to continuance in action to enforce landlord's lien, see post, LANDLORD AND TENANT.

§ 1. Continuance by Operation of Law.

Court's failure to dispose of case during term operated as continuance, under general order of continuance. *Ex parte Dean* (Ala. App.), 77 So. 81.

§ 3. Discretion of Court.

See post, "Pendency of Proceedings for Discovery," § 9.

The granting or refusal of a continuance rests in the sound discretion of the trial court. *Pensacola, etc., Co. v. Brooks*, 14 Ala. App. 364, 70 So. 968; *Southern R. Co. v. Brown*, 192 Ala. 389, 68 So. 321. See ante, APPEAL AND ERROR.

§ 9. Pendency of Proceedings for Discovery.

Where trial was reached on thirtieth day after filing interrogatories, during all of which plaintiff had to answer interrogatories, court committed no error in overruling defendant's motion for a continuance on the ground that interrogatories were unanswered; it being within discretion of trial court, to require trial to proceed. *Parker v. Newman* (Ala.), 75 So. 479.

§ 16½. Time for Application.

A party surprised by the evidence of the opposing party should at once move for a continuance or postponement of the trial. *Stewart Veneer Co. v. Windham & Co.*, 12 Ala. App. 642, 68 So. 516.

Discretion of Court—Statute.—Under Code 1907, § 2961, providing when complaint must be filed and the time of trial in attachment suits, where an action was instituted by attachment July 7th, and complaint was filed November 13th, three days before the first day of the term or six days before the return of the attachment or the time when the complaint was required to be filed, while defendant could have made demand on plaintiff for a bill of particulars at any time after suing out of the attachment, refusal of the court to grant defendant's motion for continuance, made November 18th, after having demanded bill of particulars, under § 5236, November 14th, was not an abuse of discretion. *Berthold, etc., Lumber Co. v. Phalin Lumber Co.*, 196 Ala. 362, 71 So. 989.

CONTRACTS.

I. Requisites and Validity.

(A) Nature and Essentials in General.

- § 1. Nature and Grounds of Contractual Obligation.
- § 2. What Law Governs.
- § 3. Implied Contract.
- § 3½. Executed Contract.
- § 4. Certainty as to Subject Matter.
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- § 5. Mutuality of Obligation.

(B) Parties, Proposals, and Acceptance.

- § 6. Necessity of Assent.
- § 7. Offer and Acceptance in General.
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(C) Formal Requisites.

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(D) Consideration.

- § 26. Nature and Elements.
- § 26½. — In General.
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(E) Validity of Assent.

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- § 68. Effect of Invalidity.
- § 69. Evidence.
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 - § 73. Contravention of Law in General.
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Cross References.

See the title **CONTRACTS**, vol. 3, p. 282, and references there given.

In addition, see *ante*, **CANCELLATION OF INSTRUMENTS**; **CARRIERS**; **CHAMPERTY AND MAINTENANCE**; *post*, **COVENANTS**; **CUSTOMS AND USAGES**; **DAMAGES**; **EVIDENCE**; **FRAUDS**, **STATUTES OF**; **MASTER AND SERVANT**; **MUNICIPAL CORPORATIONS**; **TRUSTS**; **WORK AND LABOR**.

I. REQUISITES AND VALIDITY.

(A) NATURE AND ESSENTIALS IN GENERAL.

§ 1. Nature and Grounds of Contractual Obligation.

A "contract" is the thing upon which two or more people agree. *Southern R. Co. v. Huntsville Lumber Co.*, 191 Ala. 333, 67 So. 695.

§ 2. What Law Governs.

The general rule is that a contract is governed, as to its nature, obligation, validity, and interpretations, by the law of the place where made, unless the parties have in view some other law, or unless it is to be wholly performed in some other place, in which case such other law or the law of the place of performance governs. *New York Life Ins. Co. v. Scheuer* (Ala.), 73 So. 409; *Western Union Tel. Co. v. Favish*, 196 Ala. 4, 71 So. 183.

§ 3. Implied Contract.

Existence of Express Contract.—*Loyal v. Wolf*, 179 Ala. 505, 60 So. 298; *Alexander v. Alabama Western R. Co.*, 179 Ala. 480, 60 So. 295. See the title **CONTRACTS**, § 3, vol. 3, p. 291.

The existence of an express contract precludes the legal implication of an obligation by a third party with respect to the same subject-matter. *Robinson Lumber Co. v. Sager* (Ala.), 75 So. 309.

Implied Promise to Pay Subcontractor.—*Alexander v. Alabama Western R. Co.*, 179 Ala. 480, 60 So. 295. See the title **CONTRACTS**, § 3, vol. 3, p. 292.

Repairs to Drain—Effect of Ordinance.—If repairs to drain were made necessary by tortious conduct of plumbers who were benefited by tort, and street railroad made repairs to conform to statutory duty and protect itself, contract by

the plumbers to pay will be raised by implication of law. *Mobile, etc., R. Co. v. Copeland & Son* (Ala. App.), 73 So. 131.

Ordinance of municipality providing that settlement over drain should be repaired at expense of plumber or drain layer doing work held to make plumber or drain layer liable for negligence to penalty of revocation of license and cost of repairs, so that street railroad could not recover from plumbers who excavated cost of repairing street which settled. *Mobile, etc., R. Co. v. Copeland & Son* (Ala. App.), 73 So. 131.

§ 3½. Executed Contract.

A contract may be executed as to one of the parties, he having done everything necessary to be done by him according to its terms, while executory as to the other party. *Southern States Co. v. Long* (Ala. App.), 73 So. 148.

§ 4. Certainty as to Subject Matter.

§ 4 (1) In General.

A contract must describe the subject-matter with definiteness and certainty, and, while the application of the description may be aided aliunde, the description itself must be definite. *Sloss-Sheffield Steel, etc., Co. v. Payne*, 186 Ala. 341, 64 So. 617.

Necessity for Explaining or Defining Terms of Familiar Meaning.—Parties contracting in terms of familiar meaning in respect to a particular business, service, or relation to impose mutual obligations are not required to explain or define such terms in their contracts, since the presumption is that they contract with reference to such meaning, and the courts construing such contracts will consult the authorities in that particular business, etc. *Sloss-Sheffield Steel, etc., Co. v. Payne*, 186 Ala. 341, 64 So. 617.

§ 4 (2) Place and Time.

Contract Capable of Being Rendered Certain.—*Barney Coal Co. v. Davis*, 9 Ala. App. 235, 62 So. 985. See the title **CONTRACTS**, § 4 (2), vol. 3, p. 292.

§ 4 (3) Illustrative Cases.

Contract, leasing land for half the crops and binding the lessor to furnish supplies for the lessee and his family, is not void for uncertainty, being one commonly made in the community. *Limbaugh v. Boaz* (Ala. App.), 78 So. 421.

A contract whereby plaintiff was to "open * * * the Ida ore and Big Seam ore and quarry therefrom and furnish to defendant all of the outcrop of said Ida ore and six feet of the Big Seam ore thereof," and was employed "to get out for and furnish to defendant all of the outcrop ore contained in what is known as the Ida ore and six feet of the outcrop of the Big Seam ore in the property of defendant," was too indefinite and uncertain in respect to the subject-matter or area to be enforceable, since while the word "outcrop" is a term within the common parlance of mineral operations in this state, and in general comprehends the particular place and character of manifestation of mineral strata or vein, it of itself is not definitive of quantity or area in respect of the mineral, and used as a noun it describes that part of mineral strata that lies at or near the surface, but alone does not define or describe the point or line from the outer edge of the strata at which it can be said the outcrop ends; and the word "all" and the dependent terms "six feet of the Big Seam ore" and "six feet of the outcrop of the Big Seam ore" added nothing to the certainty of the quantity of ore to be mined and delivered, nor did the fact that plaintiff delivered and was paid for many tons of ore aid such uncertainty. *Sloss-Sheffield Steel, etc., Co. v. Payne*, 186 Ala. 341, 64 So. 617.

§ 5. Mutuality of Obligation.

Contracts must be obligatory upon both parties so that each may have an action upon it. *McGowin Lumber, etc., Co. v. Camp Lumber Co.*, 192 Ala. 35, 68 So. 263.

Contract Unilateral in Form.—*Georgia Fruit Exch. v. Turnipseed*, 9 Ala. App. 123, 62 So. 542. See the title **CONTRACTS**, § 5 (1), vol. 3, p. 294.

Contract for Pullman Accommodations.

—Where plaintiff purchased railroad tickets, reserving Pullman accommodations from a given point and purchasing accommodations to that point, his embarkation in reliance on the reservation was sufficient to make the contract mutual. *Pullman Co. v. Meyer*, 195 Ala. 397, 70 So. 763.

Contract as to Payment of Mortgage Debt.

—A contract between the mortgagor and the mortgagee whereby the latter agrees to accept payment of the mortgage debt in shares of stock is not void for want of mutuality because it does not bind the mortgagor to procure such shares of stock, where the mortgagor actually procures the stock and tenders delivery thereof. *McKenzie v. Stewart*, 196 Ala. 241, 72 So. 109.

Supplying Mutuality. — Though an agreement be unilateral if the party in whose favor the promise is made accepts its performance or does any act in recognition of its implied consideration, this supplies the element of mutuality and gives a right of action. *Pullman Co. v. Meyer*, 195 Ala. 397, 70 So. 763.

Same—Contracts to Mine Coal.

—Where, though an agreement entitling plaintiffs to mine all the coal in a defined territory contained no stipulations or promise obligating them to mine all the coal in such territory, and therefore lacked mutuality, plaintiffs did work and expended money thereunder, the element of mutuality was thereby supplied. *Pratt Consol. Coal Co. v. Short*, 191 Ala. 378, 68 So. 63.

(B) PARTIES, PROPOSALS, AND ACCEPTANCE.**§ 6. Necessity of Assent.**

The minds of two or more parties must meet to make a valid contract. *Phillips-Boyd Pub. Co. v. McKinnon*, 197 Ala. 439, 73 So. 43; *McGowin Lumber, etc., Co. v. Camp Lumber Co.*, 192 Ala. 35, 68 So. 263.

§ 7. Offer and Acceptance in General.

An act of acceptance closes the contract, and ordinarily nothing further is required to make the obligations effective. *Sturdivant v. Mt. Dixie Sanitarium, etc., Co.*, 197 Ala. 280, 72 So. 502.

Promise to Pay—Breach.—Where defendant promised a trustee to pay him an amount of money for plaintiff, though the trust remained executory because of defendant's failure to pay the money, defendant's promise to furnish the rest was none the less a promise to the trustee, and, whatever effect defendant's default had to defeat the actual creation of a trust, it could not alter his promise to pay the trustee. *Martin v. Powell (Ala.)*, 75 So. 358.

§ 8. Revocation or Withdrawal of Offer.

Contract Revocable.—*Hertz v. Montgomery Journal Pub. Co.*, 9 Ala. App. 178, 62 So. 564. See the title CONTRACTS, § 8, vol. 3, p. 296.

§ 10. Acceptance of Offer and Communication Thereof.

A mere unaccepted proposal does not constitute a contract. *McGowin Lumber, etc., Co. v. Camp Lumber Co.*, 192 Ala. 35, 68 So. 263.

Sufficiency of Acceptance.—*Graham v. Caperton*, 176 Ala. 116, 57 So. 741. See the title CONTRACTS, § 10, vol. 3, p. 297.

§ 15. Implied Agreements.

A promise by a debtor, with the assent of his creditor, to pay his debt to a third person, may be implied from any words or conduct evidencing such intention. *Park-Robertson Hdw. Co. v. Copeland*, 11 Ala. App. 447, 66 So. 880.

§ 16. Evidence of Agreement.

Sufficiency.—Evidence held to warrant a finding that the owner of a house with the consent of the contractor promised to pay for materials furnished the contractor out of funds due the contractor. *Park-Robertson Hdw. Co. v. Copeland*, 11 Ala. App. 447, 66 So. 880.

(C) FORMAL REQUISITES.

§ 17. Agreements to Be Reduced to Writing.

Where the parties contracted by parol

with the understanding that a formal instrument was to be prepared later, and such instrument, when prepared, contained stipulations not contemplated by the memorandum the parties had signed, the defendant could not claim that plaintiff's refusal to sign such instrument abrogated the contract. *Southern R. Co. v. Huntsville Lumber Co.*, 191 Ala. 333, 67 So. 695.

§ 23½. Questions for Jury.

Where defendant claimed that the contract was embraced in a letter written to plaintiff and another, while plaintiff averred that the contract was oral, the question is one of fact for the jury. *Barbour v. Cantrell*, 193 Ala. 154, 69 So. 67.

(D) CONSIDERATION.

§ 26. Nature and Elements.

§ 26½. — In General.

That which creates some benefit to the party promising, or causes trouble, injury, inconvenience, prejudice, or detriment to the promisee is a consideration which will uphold a promise. *Dillworth v. Holmes Furniture, etc., Co. (Ala. App.)*, 73 So. 288.

§ 29. Adequacy.

Where a party has fair understanding and his act is not the result of duress or fraud, the court will not set aside a contract because the bargain is rash or improvident. *Sellers v. Knight*, 185 Ala. 96, 64 So. 329.

§ 30. Sufficiency in General.

An agreement between the mortgagor and the mortgagee, whereby the former sells the land for shares of stock, the mortgagee agreeing to accept part of such shares in payment of the mortgage debt, is supported by sufficient consideration. *McKenzie v. Stewart*, 196 Ala. 241, 72 So. 109.

§ 31. Mutual Promises.

§ 32. — In General.

While one promise is sufficient consideration for another, no consideration can be established, where the promise of one party, owing to defective signature to the contract, is not enforceable against

him. *Wood v. Lett*, 195 Ala. 601, 71 So. 177.

§ 40. Rights under Contracts.

Waiver of Interest in Contract.—In the absence of facts creating an estoppel, that an existing right under an executed contract may be waived by an agreement, there must be consideration for the agreement. *Southern States Co. v. Long* (Ala. App.), 73 So. 148.

§ 44. Forbearance.

§ 45. — In General.

Agreement to Extend Time of Payment.—*Starr Piano Co. v. Baker*, 8 Ala. App. 449, 62 So. 549. See the title CONTRACTS, § 45 (1), vol. 3, p. 304.

§ 47. Benefit to Third Person.

A promise, verbal or written, to pay the debt of another if not founded on a precedent liability, or a new consideration, will not support an action. *Dillworth v. Holmes Furniture, etc., Co.* (Ala. App.), 73 So. 288.

A promise to pay for medical services rendered another is supported by sufficient consideration, although the consideration did not move to the promisor; detriment to the promisee in the performance of services and loss of time being sufficient valuable consideration. *Baumhauer v. McGill* (Ala. App.), 73 So. 753.

§ 48. Performance of Legal Obligation.

Contractual Obligations.—Where one has contracted to convey land, subsequent promises to pay him additional consideration as an inducement to perform are void. *McDonough v. Saunders* (Ala.), 78 So. 160.

§ 58. Evidence as to Consideration or Failure Thereof.

§ 61. — Questions for Jury.

What Is Done in Performing Contract for Services.—*Bush v. Russell*, 180 Ala. 590, 61 So. 373. See the title CONTRACTS, § 61, vol. 3, p. 309.

(E) VALIDITY OF ASSENT.

§ 62. Physical or Mental Condition of Party.

Drunkenness.—*Snead v. Scott*, 182 Ala.

97, 62 So. 36, cited in notes in L. R. A. 1915B, 1122, 1123. See the title CONTRACTS, § 62, vol. 3, p. 310.

Drunkenness does not create such legal incapacity as will render a contract wholly void, and, though the party who was intoxicated at the time of the making of the contract may rescind on that ground, the contract is only voidable, and may be affirmed. *Sellers v. Knight*, 185 Ala. 96, 64 So. 329, cited in note in L. R. A. 1915B, 1124; *Lewis v. Davis* (Ala.), 73 So. 419.

§ 63. Mistake.

A mistake by one party as to the meaning of a contract not induced by fraud, undue influence, or abuse of confidence is no defense to an action on the contract. *Outcault Advertising Co. v. Hooten & Co.*, 11 Ala. App. 454, 66 So. 901.

When one who can read and write executes or receives an instrument, he is, in absence of misrepresentation, fraud, or deceit, bound by it, and fact that he did not read it or was ignorant of its contents is no defense. *Herzfeld v. Hayne* (Ala.), 76 So. 973.

§ 64. Fraud and Misrepresentation.

§ 64 (1) In General.

Doing of that which one validly provides in his contract may be done can not be pronounced a fraud upon his right. *Martin v. Powell* (Ala.), 75 So. 358.

Innocent misrepresentations furnish ground for the rescission of a contract. *Baker v. Clark*, 14 Ala. App. 152, 68 So. 593.

Honest belief in the truth of a statement of fact, made as an inducement to the consummation of a contract, does not relieve one making the statement of his legal liability therefor to one induced to act to his detriment thereby. *Manning v. Carter* (Ala.), 77 So. 744.

A contract between a fiduciary and one toward whom he occupies that position must be free from any misrepresentation or concealment, and will be held void if the result of undue influence or artifice. *Rogers v. Brightman*, 189 Ala. 228, 66 So. 71.

The rule that a contract between a fiduciary and one towards whom he occupies that position must be free from imposition and concealment applies not only where the legal relationship of trust and confidence exists between the parties, but in all cases where, as an actual fact, such relations exist. *Rogers v. Brightman*, 189 Ala. 228, 66 So. 71.

Where a husband appointed defendants his executors without bond, the husband, in effect, declared to his wife that defendants were, in his opinion, men on whose personal integrity she could implicitly rely, and so defendants occupied a fiduciary relation toward the wife. *Rogers v. Brightman*, 189 Ala. 228, 66 So. 71.

§ 64 (3) Intent to Deceive.

Misrepresentation of a fact by a party to a contract, whether intended to deceive or not, may entitle the other party to an action if the party reasonably relied thereon, and it formed an inducement to his prejudice. *Bethea-Starr Packing, etc., Co. v. Mayben*, 192 Ala. 542, 68 So. 814.

Mere representations of value of an advertising contract to defendant, made to induce him to make the same, held no defense in the absence of an averment that they were intended as warranties or made with intent to deceive and defraud. *Mertins v. Hubbell Pub. Co.*, 190 Ala. 311, 67 So. 275, cited in note in *L. R. A.* 1917F, 582.

§ 64 (4) Representations as to Contents of Writing.

Failure to Read—Signature Obtained by Fraudulent Misrepresentation of Contents.—When the execution of a written instrument is obtained by fraudulent misrepresentation of its contents, without which the instrument would not have been signed the defrauded party can avoid his signature, notwithstanding he may have neglected to read the instrument or to have it read to him. *Butler Cotton Oil Co. v. Campbell & Son* (Ala. App.), 78 So. 643; *Commercial Finance Co. v. Cooper Bros.*, 192 Ala. 285, 71 So. 684.

Mere fact that party to contract had an opportunity to read it before signing

does not bind him to terms of contract which he did not intend to make and which he was led to make by fraud or deceit of other party. *Herzfeld v. Hayne* (Ala.), 76 So. 973.

Same—Where No Representations to Procure Signature.—When one signs a paper at the instance of another, which he could read and had opportunity to read and was not fraudulently prevented from reading, there is not in a legal sense such a fraud as would vitiate the instrument on the grounds of misrepresentation of its contents, when he failed to read it. *Butler Cotton Oil Co. v. Campbell & Son* (Ala. App.), 78 So. 643.

§ 64 (5) Reliance on Representation.

See ante, "Representations as to Contents of Writing," § 64 (4).

A party can not avoid the contract on account of facts which, at the time of the making of the contract, he knew or could ascertain from the other party, unless relieved of the duty of ascertaining them by the fraud or warranty of the other party. *Metropolitan Life Ins. Co. v. Goodman*, 10 Ala. App. 446, 65 So. 449.

Material false statement, relied upon by party in ignorance of falsity, which materially influenced him to enter contract, constitutes "fraud" authorizing rescission. *Stone v. Walker* (Ala.), 77 So. 554.

§ 64 (8) Suppression of Truth.

In order for mere silence to constitute fraud in procuring execution of an instrument, there must be an intentional concealment, not merely accidental, and a suppression of facts which good faith requires the party to disclose. *Butler Cotton Oil Co. v. Campbell & Son* (Ala. App.), 78 So. 643.

§ 68. Effect of Invalidity.

Wholly Void.—*Fay, etc., Co. v. Independent Lumber Co.*, 178 Ala. 166, 59 So. 470. See the title CONTRACTS, § 68, vol. 3, p. 315.

§ 69. Evidence.

§ 69 (1) Presumptions and Burden of Proof.

Mental capacity to contract is presumed. *Lambert v. State*, 13 Ala. App. 289, 69 So. 261.

Transactions between Parent and Child.

—Relation of parent and child is per se a confidential relation, but it is always presumed prima facie that in all transactions between them parent is the dominant party, and that they are free from undue influence. *Hassell v. Hassell* (Ala.), 77 So. 716.

Contract with Fiduciary. — Where a contract between a fiduciary and one towards whom he occupies that relation is attacked on the ground that the fiduciary was guilty of fraud or concealment, the burden is upon the fiduciary to show the fairness of the contract. *Rogers v. Brightman*, 189 Ala. 228, 66 So. 71.

Contract between Widow and Executors.—Complainant's husband died leaving a will appointing complainant executrix and his partner and another of the defendants coexecutors without bond. Besides many unsecured debts, some of which were due the partnership of which the husband was a member, and others were due another firm of which the other executor was a member, the lands of the husband were subject to a first mortgage due third persons and a second mortgage due complainant. Life insurance of which the complainant was the beneficiary amounted to a sum almost sufficient to discharge the first mortgage and protect complainant's interest as a junior mortgagee. Complainant, who was unfamiliar with business, at the advice of the executors loaned a large part of the life insurance money to them without security and to the partnership of which her husband had been a member. Thereafter, at the request of the executors, she signed a contract whereby she agreed to pay off, out of her personal estate, the first mortgage on one of her husband's two plantations and to transfer it to defendants in consideration of the surrender by defendant of unsecured debts due from her husband to an amount of about \$10,000. The lands of her husband were worth little more than the first mortgage. Held, that though the contract was prepared and executed before an attorney procured by defendants, it was, in view of the relationship between the parties, presumptively fraudulent,

the consideration being grossly inadequate. *Rogers v. Brightman*, 189 Ala. 228, 66 So. 71.

Presumption as to Effect of Fraudulent Representations.—*Batson v. Alexander City Bank*, 179 Ala. 490, 60 So. 313. See the title CONTRACTS, § 69 (1), vol. 3, p. 315.

§ 69 (2) Admissibility.

Evidence to Show Intoxication in Absence of Evidence of Want of Capacity.—*Snead v. Scott*, 182 Ala. 97, 62 So. 36. See the title CONTRACTS, § 69 (2), vol. 3, p. 315.

§ 69 (3) Weight and Sufficiency.

Want of Capacity.—*Snead v. Scott*, 182 Ala. 97, 62 So. 36. See the title CONTRACTS, § 69 (3), vol. 3, p. 315.

(F) LEGALITY OF OBJECT AND OF CONSIDERATION.**§ 73. Contravention of Law in General.**

Agreements Prohibited by Common Law or Statute.—*Georgia Fruit Exch. v. Turnipseed*, 9 Ala. App. 123, 62 So. 542. See the title CONTRACTS, § 73, vol. 3, p. 73.

Illegal Act in Performing.—*Bush v. Russell*, 180 Ala. 590, 61 So. 373. See the title CONTRACTS, § 73, vol. 3, p. 317.

A criminal act is not a valid consideration for a contract. *Pride v. Commercial Union Ins. Co.*, 9 Ala. App. 334, 63 So. 803, judgment affirmed in *Ex parte Pride*, 185 Ala. 672, 64 So. 1019.

A contract in furtherance of a business conducted in violation of law is illegal and unenforceable. *Baker v. Lehman, etc., Co.*, 186 Ala. 493, 65 So. 321.

§ 74. Violation of Statute.**§ 75. — In General.**

General Rule.—*Ellis v. Batson*, 177 Ala. 313, 58 So. 193. See the title CONTRACTS, § 75, vol. 3, p. 317.

A contract to do an act forbidden by law is void as against public policy. *Terre Haute Brewing Co. v. McGeever* (Ala.), 73 So. 889.

Contracts specifically prohibited by law or the enforcement of which violates the law, or the making of which violates laws which were enacted for regulation

and protection, are void. *Griel Bros. Co. v. McLain*, 197 Ala. 136, 72 So. 410.

The Intent of the Law.—*Meridian Life Ins. Co. v. Dean*, 182 Ala. 127, 62 So. 90, 94. See the title CONTRACTS, § 75, vol. 3, p. 317.

Contracts as to professional services rendered by physicians without certificates of qualification, in violation of Code 1907, §§ 1623-1646, are void in the hands of all persons involved in the guilt of the transaction. *Whitehead v. Coker* (Ala. App.), 76 So. 484.

Act Subsequently Made Unlawful.—Where an act or thing contracted to be done is subsequently made unlawful, the promise is avoided. *Advertiser Co. v. State*, 193 Ala. 418, 69 So. 501.

§ 76. — Effect of Prohibition without Penalty.

Test.—*Alford v. Creagh*, 7 Ala. App. 358, 62 So. 254. See the title CONTRACTS, § 76, vol. 3, p. 318.

§ 78. Public Policy in General.

Public Policy Defined.—*Georgia Fruit Exch. v. Turnipseed*, 9 Ala. App. 123, 62 So. 542. See the title CONTRACTS, § 78 (1), vol. 3, p. 318.

To ascertain public policy of the state, acts of legislative department should primarily be looked to, since, if constitutional, they declare in terms such policy. *Denson v. Alabama Fuel, etc., Co. (Ala.)*, 73 So. 525.

§ 82. Restraint of Trade or Competition in Trade.

§ 83. — In General.

§ 83 (1) In General.

Not every contract of purchase and sale which restrains trade to some extent is void unless it injuriously affects the public weal. *Terre Haute Brewing Co. v. McGeever (Ala.)*, 73 So. 889.

General Restraint.—A contract in general restraint of trade is against the policy of the law and void. *Terre Haute Brewing Co. v. McGeever (Ala.)*, 73 So. 889.

General restraints of commerce are all void, whether by bond, covenant, or promise, with or without consideration,

and whether it be of the party's own trade or not. *American Laundry Co. v. Dry-Cleaning Co. (Ala.)*, 74 So. 58.

Unreasonable Restraint of Trade.—*Georgia Fruit Exch. v. Turnipseed*, 9 Ala. App. 123, 62 So. 542. See the title CONTRACTS, § 83 (1), vol. 3, p. 320.

If not shown to be reasonable, contracts in restraint of trade are in themselves, bad in the eye of the law. *American Laundry Co. v. Dry-Cleaning Co. (Ala.)*, 74 So. 58.

A contract making one party sole judge whether one business competes with another is unreasonable, and not enforceable. *American Laundry Co. v. Dry-Cleaning Co. (Ala.)*, 74 So. 58.

Contract Not Void.—A contract whereby a retailer agreed to buy all the beer he needed or bought from the other party is not void as in restraint of trade. *Terre Haute Brewing Co. v. McGeever (Ala.)*, 73 So. 889.

§ 83 (2) Restriction Necessary for Protection.

Whatever restraint in a contract is larger than the necessary protection of the parties is unnecessary and void, as being injurious to the interest of the public, on the ground of public policy. *American Laundry Co. v. Dry-Cleaning Co. (Ala.)*, 74 So. 58.

Test.—*Georgia Fruit Exch. v. Turnipseed*, 9 Ala. App. 123, 62 So. 542. See the title CONTRACTS, § 83 (2), vol. 3, p. 321.

Restriction of trade is allowed to such an extent as is reasonable to protect the interests involved, but the test of the reasonableness and the necessity of the interest to be protected depend upon the peculiar circumstances of each case. *American Laundry Co. v. Dry-Cleaning Co. (Ala.)*, 74 So. 58.

§ 83 (3) Combinations and Agreements to Control Prices and Prevent Competition in General.

All combinations to enhance or depreciate prices are contrary to public policy and void. *American Laundry Co. v. Dry-Cleaning Co. (Ala.)*, 74 So. 58.

He who has commodities to sell in the market has the same right to competition

among buyers as the buyers have to competition among sellers. *American Laundry Co. v. Dry-Cleaning Co.* (Ala.), 74 So. 58.

Contract Held Void.—*Georgia Fruit Exch. v. Turnipseed*, 9 Ala. App. 123, 62 So. 542. See the title CONTRACTS, § 83 (3), vol. 3, p. 321.

§ 84. — General or Partial Restraint.

§ 84 (1) Nature of Business to Which Contract Relates.

An agreement for a limited space upon proper consideration is usually held valid, and the sale of a business by one person to another and the good will of the business is usually held a sufficient consideration. *American Laundry Co. v. Dry-Cleaning Co.* (Ala.), 74 So. 58.

Contract in Respect to Duty Owed to Public.—If a contract in restraint of trade is in respect to a duty which the party owes the public, although it is limited as to time and space, it will not be enforced in equity, but is void. *American Laundry Co. v. Dry-Cleaning Co.* (Ala.), 74 So. 58.

§ 84 (2) Limitations as to Time and Place in General.

Validity.—*Knowles v. Jones*, 182 Ala. 187, 62 So. 514. See the title CONTRACTS, § 84 (2), vol. 3, p. 322.

Contracts in partial restraint of trade are valid when properly restricted as to territory, time, and persons so as to afford proper protection to the parties' interest without being so extensive as to violate the law or to interfere with the public interest. *Terre Haute Brewing Co. v. McGeever* (Ala.), 73 So. 889.

Contracts Held Void.—A contract not to carry on any business whatever is unreasonable, and not enforceable, however limited the time or space may be. *American Laundry Co. v. Dry-Cleaning Co.* (Ala.), 74 So. 58.

While a contract in partial and reasonable restraint of trade will be enforced when directed to protecting and effecting a sale of a business by him who has engaged to refrain from competition, a contract, whereby defendant agreed with a city to discontinue his ice business for

a period of five years, or so long as a plant should be operated by the town or an individual as a home plant, and not to associate himself in any way with another individual, firm, or corporation for the purpose of handling ice in the town or adjacent territory, and containing no provisions for the purchase or sale of defendant's business, although the city purchased the equipment of defendant's ice business, was in general "restraint of trade," and void as against public policy, and hence its assignment by the city conferred no rights upon the assignee. *Pearson v. Duncan & Son* (Ala.), 73 So. 406.

§ 84 (4) Particular Cities or Towns and Small Districts.

Contract Held Valid.—*Smith v. Webb*, 176 Ala. 596, 58 So. 913, cited in notes in L. R. A. 1916C, 629, 630. See the title CONTRACTS, § 84 (4), vol. 3, p. 322.

§ 84 (6) Restrictions Unlimited or Indefinite as to Time.

A contract in total restraint of trade, limited as to space, but unlimited as to time, is not illegal and may continue for the life of the party restrained. *American Laundry Co. v. Dry-Cleaning Co.* (Ala.), 74 So. 58.

Contracts in restraint of trade, unlimited as to time and space, are void as against public policy. *American Laundry Co. v. Dry-Cleaning Co.* (Ala.), 74 So. 58.

§ 84 (7) Restrictions Unlimited as to Place.

A contract in total restraint of trade, limited as to time and unlimited as to territory, is void. *American Laundry Co. v. Dry-Cleaning Co.* (Ala.), 74 So. 58.

§ 86. Control of Corporation.

Contract to Organize and Control Corporation.—*Rush v. Aunspaugh*, 179 Ala. 542, 60 So. 802. See the title CONTRACTS, § 86, vol. 3, p. 323.

§ 91. Ousting Jurisdiction or Limiting Power of Court.

A provision in a note whereby the maker agrees that suit may be brought against him in a certain beat in the

county of the maker's residence is not void as against public policy, notwithstanding Code 1907, § 4648, providing that the suit must be brought in the beat wherein the maker lives, or where the debt was created. *Chandler v. Hardeman*, 12 Ala. App. 572, 68 So. 525.

Code 1907, § 4296, avoiding provisions in a note authorizing the holder to confess judgment for the maker, has no application to a provision wherein the maker agrees to be sued in the certain beat of the county of his residence. *Chandler v. Hardeman*, 12 Ala. App. 572, 68 So. 525.

§ 92. Compounding Offenses.

Agreement Not to Prosecute.—It is a defense to action on note that it was given in consideration of payee's promise not to prosecute maker's brother for embezzlement and such defense may be shown by parol evidence. *People's Bank, etc., Co. v. Floyd* (Ala.), 75 So. 940.

Since seduction is made a felony by Code 1907, § 7776, a contract by which the prosecutrix and her family, for a consideration of \$1,050, agreed to forego prosecution, was illegal. *Berry v. Dunn* (Ala.), 78 So. 51.

Agreement to Dismiss Prosecution.—A contract procured upon a guaranty that a prosecution will be dismissed and the defendant be held harmless is contrary to public policy and unenforceable, and hence plaintiff can not enforce a note and mortgage which defendants executed to save one of their members from criminal prosecution. *Hartsell v. Roberts*, 185 Ala. 201, 64 So. 90.

§ 94. Influencing Action of Administrative Officer.

All Contracts Not Condemned.—*Bush v. Russell*, 180 Ala. 590, 61 So. 373. See the title CONTRACTS, § 94, vol. 3, p. 326.

Contract Held Valid.—*Bush v. Russell*, 180 Ala. 590, 61 So. 373, cited in note in L. R. A. 1916D, 727. See the title CONTRACTS, § 94, vol. 3, p. 326.

Agreements Held Invalid.—*Bush v. Russell*, 180 Ala. 590, 61 So. 373. See the title CONTRACTS, § 94, vol. 3, p. 326.

§ 98. Effect of Illegality.

§ 100. — Partial Illegality.

If the right under a contract can be established without a void stipulation, recovery is not affected by an illegal clause in it. *Denson v. Alabama Fuel, etc., Co.* (Ala.), 73 So. 525.

Invalidity of a provision requiring retailer to sell at retail prices fixed by wholesaler did not invalidate the remainder of the contract. *Rawleigh Medical Co. v. Walker* (Ala. App.), 77 So. 70.

Since, under Code 1907, § 3011, attorney's lien may be enforced without stipulation against settlement without consent of attorney, invalidity of such stipulation does not affect right to lien. *Denson v. Alabama Fuel, etc., Co.* (Ala.), 73 So. 525.

Where an agreement is founded on a legal consideration containing a promise to do several things or to refrain from doing several things, and some only of the promises are illegal, the promises which are not illegal will be held to be valid. *Rawleigh Medical Co. v. Walker* (Ala. App.), 77 So. 70.

A contract which can not be enforced without the aid of a void provision is wholly void; but, if it may be enforced without the aid of such provision, the right of recovery is not thereby affected. *Sales-Davis Co. v. Henderson-Boyd Lumber Co.*, 193 Ala. 166, 69 So. 527.

Where an agreement consists of a single promise, based on a single consideration, if either is illegal the whole contract is void. *Rawleigh Medical Co. v. Walker* (Ala. App.), 77 So. 70.

§ 101. — Relief of Parties.

§ 101 (1) Enforcement of Contract in General.

Rule Illustrated.—*Ellis v. Batson*, 177 Ala. 313, 58 So. 193. See the title CONTRACTS, § 101 (1), vol. 3, p. 330.

Reason of Rule.—The reason why the law will not permit a recovery on an illegal contract is based on public policy, and not in order to protect the defendant who sets up and relies on the illegality of the contract. *Pride v. Commercial Union Ins. Co.*, 9 Ala. App. 334, 63

So. 803, judgment affirmed in *Ex parte Pride*, 185 Ala. 672, 64 So. 1019.

§ 101 (3) Executed Contracts in General.

The illegality of the contract is no defense to an action for money paid by one of the parties for the use of the other, where the contract has been fully executed. *Pride v. Commercial Union Ins. Co.*, 9 Ala. App. 334, 63 So. 803.

Where a written agreement, superseding an antenuptial contract between prospective husband and wife, was illegal and void because it was stipulated that its provisions for the benefit of the wife should be accepted by her in lieu of any claim of dower or of alimony in the event of separation after such contract was executed, the wife having accepted its fruits until it became impossible for the contingency as to alimony to happen, the court would not cancel the contract at the wife's suit, since law and equity leave all who share in illegal or immoral transactions where they find them, and will neither enforce such agreements or contracts if executory, nor undo or rescind them at the suit of a participant when executed. *Cannon v. Birmingham Trust, etc., Co.*, 194 Ala. 469, 69 So. 934.

Where plaintiff's son seduced defendant, who, with her family, agreed to forego prosecution if plaintiff would indorse notes to defendant, and the indorsement was executed so far as transfer of title was concerned, the contract being illegal, plaintiff could not have cancellation of the indorsement and retransfer of title, especially as her further and executory liability as indorser was subject to the complete defense of illegality. *Berry v. Dunn* (Ala.), 78 So. 51.

§ 101 (3) Recovery of Money Paid or Property Transferred.

Bill alleging that plaintiff's son seduced defendant, who with her family, agreed to forego prosecution if plaintiff would indorse notes to defendant, did not make a case of duress, so as to entitle plaintiff to cancellation of the indorsement and retransfer of title. *Berry v. Dunn* (Ala.), 78 So. 51.

Where an insurance broker wrote insurance for a foreign insurer without

having procured the statutory license, no action for money received can be maintained against the insurer, even though it agreed to pay him a percentage of the premiums received, for the contract was not fully executed on the part of the insurer by accepting the premiums, and the only consideration was the broker's illegal conduct. *Pride v. Commercial Union Ins. Co.*, 9 Ala. App. 334, 63 So. 803, judgment affirmed in *Ex parte Pride*, 185 Ala. 672, 64 So. 1019.

Recovery of Property under Lease or Conditional Sale.—*Case v. Monk*, 7 Ala. App. 419, 62 So. 268. See the title CONTRACTS, § 101 (3), vol. 3, p. 331.

Instances When Recovery Barred. — *Ellis v. Batson*, 177 Ala. 313, 58 So. 193. See the title CONTRACTS, § 101 (3), vol. 3, p. 330.

§ 101 (4) Estoppel to Urge Illegality.

While a void thing is no thing, contracts which are void because against public policy may be enforced even in courts of law because of the inability of the party affected to plead their invalidity. *Douglass v. Standard Real Estate Loan Co.*, 189 Ala. 223, 66 So. 614.

Where a foreign insurer refused to pay commissions due its broker, who had procured a license in accordance with the statute, and the broker sued for money received, claiming that insurer received commissions paid by those insured, partly for his benefit, no recovery can be had if for the establishment of the right asserted the broker must show his criminal conduct in writing the insurance without the license. *Pride v. Commercial Union Ins. Co.*, 9 Ala. App. 334, 63 So. 803, judgment affirmed in *Ex parte Pride*, 185 Ala. 672, 64 So. 1019.

Where plaintiff acted as broker for a foreign insurance company without the license required by Acts 1909 (Sp. Sess.) p. 120, the fact that the insurance company was also guilty of crime in not procuring for him a certificate of authority in accordance with Code 1907, § 4561, held not to preclude the company from pleading the illegality of plaintiff's act when sued for compensation. *Pride v. Commercial Union Ins. Co.*, 9 Ala. App.

334, 63 So. 803, judgment affirmed in *Ex parte Pride*, 185 Ala. 672, 64 So. 1019.

Estoppel Not Allowed.—*Ellis v. Batson*, 177 Ala. 313, 58 So. 193. See the title CONTRACTS, § 101 (4), vol. 3, p. 331.

§ 104. Evidence.

Admissibility.—Where defense is that note sued on was given in consideration of payee's promise not to prosecute maker's brother for embezzlement, evidence that after defendant had learned by letter that plaintiff bank would prosecute unless note was signed, she cried while engaged in telephone conversation with her brother about letter was admissible. *People's Bank, etc., Co. v. Floyd (Ala.)*, 75 So. 940.

Where defense is illegality of consideration, evidence that officer of plaintiff bank requested brother of defendant to write her that unless note in suit was signed her brother would be prosecuted, is admissible in connection with other evidence showing that this had been done. *People's Bank, etc., Co. v. Floyd (Ala.)*, 75 So. 940.

Where defense is that note sued on was given in consideration of payee's promise not to prosecute maker's brother for embezzlement, it is proper to prove that subject of defalcation had not been brought to attention of grand jury or prosecuting officer of county. *People's Bank, etc., Co. v. Floyd (Ala.)*, 75 So. 940.

II. CONSTRUCTION AND OPERATION.

(A) GENERAL RULES OF CONSTRUCTION.

§ 106. Application to Contracts in General.

The court will, if possible, give a contract such construction as will make it certain, but can not set up a new contract. *Jones v. Lanier (Ala.)*, 73 So. 535.

Contracts will, if possible, be so construed as to render them enforceable, rather than void for uncertainty. *American Tie, etc., Co. v. Naylor Lumber Co.*, 190 Ala. 319, 67 So. 246.

Construed as a Whole.—A contract must be construed as a whole. *Greil v. Stollenwerck (Ala.)*, 78 So. 79.

§ 107. What Law Governs.

A contract completed in another state is to be construed according to the laws thereof. *Rawleigh Medical Co. v. Walker (Ala. App.)*, 77 So. 70.

The general rule is that a contract is governed, as to its nature, obligation, validity and interpretation, by the law of the place where made, unless the parties have in view some other law, or unless it is to be wholly performed in some other place, in which case such other law or the law of the place of performance governs. *New York Life Ins. Co. v. Scheuer (Ala.)*, 73 So. 409.

§ 108. Place of Making Contract.

A contract "subject to acceptance at the home office" of one of the parties in a foreign state, and marked "accepted," with the date thereof, in that state, was completed in that state. *Rawleigh Medical Co. v. Walker (Ala. App.)*, 77 So. 70.

§ 109. Intention of Parties.

§ 109 (1) In General.

In General.—*Loeb v. Montgomery*, 7 Ala. App. 325, 61 So. 642. See the title CONTRACTS, § 109 (1), vol. 3, p. 333.

The court, in construing a contract, must ascertain the intent of the parties, and give effect thereto, if lawful. *McCormick v. Badham*, 191 Ala. 339, 67 So. 609.

The court, in determining the character of a contract, will look to its purpose and seek to ascertain the intention of the parties. *Tate v. Cody-Henderson Co.*, 11 Ala. App. 350, 66 So. 837.

§ 109 (3) Construing Whole Contract Together.

The court in construing a contract must consider it as a whole and seek to ascertain the intention of the parties, and may assume at least *prima facie* that the parties made a reasonable and rational contract. *Birmingham Waterworks Co. v. Windham*, 190 Ala. 634, 67 So. 424.

What is condition precedent in contract depends, not upon technical words, but on intent of parties, deduced from whole instrument. *Floyd v. Pugh (Ala.)*, 77 So. 323.

§ 111. Language of Instrument.**§ 112. — In General.**

A plain and unambiguous contract is not open to construction. *Birmingham Waterworks Co. v. Windham*, 190 Ala. 634, 67 So. 424.

All general words should be restrained unto the fitness of the matter and person. *Little Cahaba Coal Co. v. Aetna Life Ins. Co.*, 192 Ala. 42, 68 So. 317.

§ 113. — Construction to Give Validity and Effect to Contract.

The law does not favor destruction of contracts for uncertainty, and, if possible to construe the contract so as to effect intention of parties, the court must so construe it. *Limbaugh v. Boaz* (Ala. App.), 78 So. 421.

Doubtful Language.—*Loeb v. Montgomery*, 7 Ala. App. 325, 61 So. 642. See the title CONTRACTS, § 113, vol. 3, p. 334.

§ 114. — Reasonableness of Construction.

A contract will not be so construed as to render it oppressive as to either party, or so as to place one at the mercy of the other, unless such was its manifest intention. *Little Cahaba Coal Co. v. Aetna Life Ins. Co.*, 192 Ala. 42, 68 So. 317.

§ 115. — Construction against Party Using Words.

Doubtful Language.—*Minge v. Green*, 176 Ala. 343, 58 So. 381. See the title CONTRACTS, § 115, vol. 3, p. 335.

Where terms of doubtful meaning are used in a contract, they will be construed against the party who framed them, unless the contract would be thereby annulled or other rules of construction thwarted, and unless the doubtful terms were the common language of both parties. *Denson v. Caddell* (Ala.), 77 So. 720.

Party Promising. — *Loeb v. Montgomery*, 7 Ala. App. 325, 61 So. 642. See the title CONTRACTS, § 115, vol. 3, p. 335.

§ 118½. Separate Clauses.

All the provisions of a contract must

be construed together so as to give harmonious operation to each of them so far as their language will reasonably permit. *Manchester Sawmills Co. v. Arundel Co.*, 197 Ala. 505, 73 So. 24.

§ 121. Construing Instruments Together.

Where the record of the board of road commissioners was part of appellee's contract, and the two are conflicting, they should be construed as a whole, giving effect to each provision if possible. *Mobile County v. Linch* (Ala.), 73 So. 423.

§ 125. Extrinsic Circumstances.

In General.—*Minge v. Green*, 176 Ala. 343, 58 So. 381; *Loeb v. Montgomery*, 7 Ala. App. 325, 61 So. 642; *Smith v. Webb*, 176 Ala. 596, 58 So. 913, 40 L. R. A., N. S., 1191. See the title CONTRACTS, § 125, vol. 3, p. 337.

A contract must be construed in the light of the facts surrounding the parties when it was made, and the relation of the parties and the objects to be accomplished should be considered. *Roach v. McDonald*, 187 Ala. 64, 65 So. 823.

Courts are entitled to have all circumstances going to show conditions under which parties contracted, and what influenced them, to end contract may be construed to give it effect parties intended. *McGowin Lumber, etc., Co. v. Camp Lumber Co.* (Ala. App.), 77 So. 433.

§ 126. Construction by Parties.

As Controlling. — The construction which the parties by their actions have placed upon a contract while the work was progressing will govern. *Mobile County v. Linch* (Ala.), 73 So. 423.

Where the parties to a contract have given it a particular construction, such construction should usually be adopted by the courts. *Jefferson Plumbers, etc., Co. v. Peebles*, 195 Ala. 608, 71 So. 413.

There being nothing to the contrary in its language, the parties may, by mutual consent, interpret ambiguous provisions in a contract for themselves, in which event the court must enforce the contract according to such interpretation. *Birmingham Waterworks Co. v. Hernandez*, 196 Ala. 438, 71 So. 443.

Dealings of parties subsequent to written contract are important as going to show construction by parties themselves while friendly; it being presumed they knew best what was meant by its terms. *McGowin Lumber, etc., Co. v. Camp Lumber Co.* (Ala. App.), 77 So. 433.

Where a contract is ambiguous, the ascertainment of the intent of the parties may be aided by the interpretation they have given the contract. *Birmingham Waterworks Co. v. Windham*, 190 Ala. 634, 67 So. 424.

Where the meaning of a contract is free from ambiguity, the subsequent conduct of the parties, in supposed observance of its terms, can not be considered as aids in its construction. *Twin Tree Lumber Co. v. Ensign*, 193 Ala. 113, 69 So. 525.

Instances.—*Corinth Bank, etc., Co. v. King*, 182 Ala. 403, 62 So. 704; *Southern Bitulithic Co. v. Hughston*, 177 Ala. 559, 58 So. 450. See the title CONTRACTS, § 126, vol. 3, p. 338.

§ 127. Entire or Severable Contracts.

Entire Contract.—Where plaintiff's contract to drive a well was entire, and he failed to substantially perform, he could not, without more, recover on the contract. *Hartsell v. Turner*, 196 Ala. 299, 71 So. 658.

§ 129. Dependent or Independent Stipulations.

Intention of Parties.—Whether stipulations in a contract are dependent or independent covenants depends on the intent of the parties. *McCormick v. Badham*, 191 Ala. 339, 67 So. 609.

Mutual and Dependent Covenants.—Where a thing is to be done by one party as the consideration of a thing to be done by the other, the covenants are mutual and dependent, if to be performed at the same time, and, where one is first to be performed as the condition of the obligation of the other, that which is first to be performed must be done or tendered before suit is maintainable against the other party. *McCormick v. Badham*, 191 Ala. 339, 67 So. 609.

§ 130. Evidence to Aid Construction.

Admissibility.—Warrants issued by

board of commissioners in payment to defendant, for purpose of showing construction of contract by the parties, were properly admitted in evidence. *Mobile County v. Lynch* (Ala.), 73 So. 423.

§ 131. Questions for Jury.

§ 131 (1) In General.

In construing a written contract, where the intent of the parties depends upon the ascertainment of extrinsic facts, such intent is for the jury. *Lutz v. Van Heynigen Brokerage Co.* (Ala.), 75 So. 284.

In an action for compensation for boring a well, whether it was the intention of the parties, after modifying the original contract that defendant should still pay for casing and the removal of plaintiff's machinery, as originally agreed, held for the jury. *Dunaway v. Roden*, 14 Ala. App. 501, 71 So. 70.

In an action for compensation for boring a well, question whether the contract obligated plaintiff merely to "get water," or to get enough water to supply defendant's family and live stock, held for the jury. *Dunaway v. Roden*, 14 Ala. App. 501, 71 So. 70.

In an action on duebill, payable as provided by "original contract," the identity of the "original contract" was a question for the jury, though there was a prior written contract between the parties, which was claimed to be the contract meant. *Sellers v. Dickert*, 185 Ala. 206, 64 So. 40.

§ 131 (1½) When Question for Court in General.

It is the province of the court to construe written contracts, where the meaning is to be collected from the writing without the aid of evidence aliunde. *Lutz v. Van Heynigen Brokerage Co.* (Ala.), 75 So. 284.

The construction of a contract is for the court only when it is in writing or its terms not in dispute. *Dunaway v. Roden*, 14 Ala. App. 501, 71 So. 70.

Where terms of contract are certain, it becomes question for court to construe. *McGowin Lumber, etc., Co. v. Camp Lumber Co.* (Ala. App.), 77 So. 433.

Particular Contracts.—It was the province of the court to interpret a written

contract for sale of standing timber to be cut and removed. *Baskett Lumber, etc., Co. v. Gravlee* (Ala. App.), 73 So. 291.

The construction of a contract for a through interstate shipment of live stock is a matter for the court, and not for the jury. *Nashville, etc., R. Co. v. Camper* (Ala.), 78 So. 925.

§ 131 (6) Time.

Reasonable Time.—*Alford v. Creagh*, 7 Ala. App. 358, 62 So. 254. See the title CONTRACTS, § 131 (6), vol. 3, p. 341.

What is a reasonable time for the performance of a contract, when no time is fixed, is a question for the jury when it depends upon facts intrinsic to the contract which are in dispute, but when it depends upon a construction of a contract in writing or undisputed extrinsic facts, it is a question of law for the court. *Farrow v. Sturdivant Bank*, 184 Ala. 208, 63 So. 973.

(B) PARTIES.

§ 132½. Relation between Parties of Different Parts.

Persons Bound—Intent.—A contract, to which a corporation and others were parties, termed defendant and the others as parties of the second part. By paragraph 2 of the contract, the corporation assumed specific obligations, the paragraph calling the corporation by name, while subsequent paragraphs referred to obligations assumed by parties of the second part. Held, that as the intent of the parties governs, defendant was not bound by that portion of the contract placing particular obligations on the corporation; the subsequent reference to parties of second part showing defendant was not included. *First Nat. Bank v. Henderson*, 196 Ala. 393, 72 So. 91.

§ 137. Rights Acquired by Third Persons.

§ 138. — Privity of Contract in General.

Construction Contract.—*Alexander v. Alabama Western R. Co.*, 179 Ala. 480, 60 So. 295. See the title CONTRACTS, § 138 (2), vol. 3, p. 343.

§ 139. — Agreement for Benefit of Third Person.

Where employer obligates itself to

render medical services to employees and their wives, employing a "company doctor" therefor, the contract is one for a wife's benefit. *Sloss-Sheffield Steel, etc., Co. v. Taylor* (Ala. App.), 77 So. 79.

Contract to Pay Money to a Third Person.—*Mackintosh v. Stewart*, 181 Ala. 328, 61 So. 956. See the title CONTRACTS, § 139 (2), vol. 3, p. 344.

§ 140. Duties and Liabilities of Third Persons.

One not party to contract set up in plea, and having no rights thereunder, was not liable for debt arising out of contract. *Birmingham Waterworks Co. v. Brooks* (Ala. App.), 76 So. 515.

(C) SUBJECT MATTER.

§ 144. Loans and Advances.

Where a bank, in reliance on defendant's letter directing its agent, engaged to purchase cotton on a salary, to arrange for the honoring of checks for the purchase price of cotton which would be taken up every afternoon with drafts on defendant with bills of lading attached, consented to the arrangement, defendant is liable for the amount of checks honored; the requirement as to bills of lading not affecting its liability. *Harris, etc., Co. v. Oneonta Trust, etc., Co.*, 186 Ala. 484, 65 So. 68.

Where a cotton buyer induced a bank to honor its agent's checks for the purchase price of cotton, which checks were to be taken up by drafts subsequently issued, the amount of the exchange and express charges on the funds advanced is properly included in the drafts, where it was agreed that the buyer should pay them. *Harris, etc., Co. v. Oneonta Trust, etc., Co.*, 186 Ala. 484, 65 So. 68.

§ 149. Trade and Business.

Restriction of Competition.—In contract whereby defendant agreed to refrain from engaging in ice business, while town or individual should operate a home plant, reference to operation of "a home plant" by town or individual held only to define period during which defendant should refrain from engaging in ice business. *Pearson v. Duncan & Son* (Ala.), 73 So. 406.

(D) PLACE AND TIME.**§ 153. Reasonable Time.****What Constitutes Reasonable Time. —**

Alford v. Creagh, 7 Ala. App. 358, 62 So. 254. See the title **CONTRACTS**, § 153, vol. 3, p. 349.

Where No Time Is Specified.—*Alford v. Creagh*, 7 Ala. App. 358, 62 So. 254. See the title **CONTRACTS**, § 153, vol. 3, p. 348.

When no time of performance is fixed in a contract, it will be presumed that the parties intended a performance within a reasonable time, as determined from the circumstances. *Farrow v. Sturdivant Bank*, 184 Ala. 208, 63 So. 973.

Where a contract to mine all the coal in a certain territory was silent as to the time of performance, the law presumed an intention that it should be performed within a reasonable time. *Pratt Consol. Coal Co. v. Short*, 191 Ala. 378, 68 So. 63.

An agreement to extend time of payment of debt until debtor was able to pay was tantamount to an agreement to extend it for a reasonable time and not an agreement to discharge the debt forever unless the debtor subsequently became able to pay it. *Starr Piano Co. v. Baker*, 8 Ala. App. 449, 62 So. 549.

(E) CONDITIONS.**§ 161. Conditions Precedent in General.**

What Are Conditions Precedent. — In the law of contracts, a condition precedent is a condition which must be performed before the agreement of the parties becomes a valid and binding contract. *Metropolitan Life Ins. Co. v. Goodman*, 10 Ala. App. 446, 65 So. 449.

In action for breach of contract, where it was understood that contract was not to become effective against defendant, unless another executed it, there could be no recovery, if other failed to execute it. *Ferlesie v. Cook* (Ala.), 78 So. 915.

A contract recited that defendants had bought of plaintiff shares of the stock of an insurance company and certain furniture, that defendants had received the stock and furniture and had paid plaintiff in part, the remainder of the price to be paid on terms that plaintiff

should make good bond to defendants or another insurance company, in the sum of \$2,000, to secure such insurance company from all claims outstanding against the company whose stock had been purchased, and that the sum should be paid in cash, but that, if the bond should not be made, the sum should not be paid plaintiff until he satisfied all claims outstanding against the company whose stock had been purchased, also that if defendants, or either of them or the other insurance company, should advance plaintiff money to secure the claims outstanding against the company whose stock had been purchased, the sum advanced should be deducted from the sum to be paid plaintiff. Held, that by the terms of the contract, a condition precedent which plaintiff was bound to perform was shown. *Floyd v. Pugh* (Ala.), 77 So. 323.

§ 161½. Concurrent Conditions.

"Dependent Condition."—Where mutual covenants go to the whole consideration on both sides, they are "dependent conditions." *Long v. Addix*, 184 Ala. 236, 63 So. 982.

(F) COMPENSATION.**§ 164. Rate or Amount in General.**

A materialman can recover on the owner's promise to pay for materials from the money due the contractor, only what the contractor could have recovered. *Park-Robertson Hdw. Co. v. Copeland*, 11 Ala. App. 447, 66 So. 880.

III. MODIFICATION AND MERGER.**§ 166½. Contracts Subject to Modification.**

Parties to an executory contract may alter it at their pleasure and in any particular they see fit upon no other consideration than mutual consent. *Dunaway v. Roden*, 14 Ala. App. 501, 71 So. 70.

§ 167. Assent of Parties.

Express or Implied Assent.—*Hertz v. Montgomery Journal Pub. Co.*, 9 Ala. App. 178, 62 So. 564. See the title **CONTRACTS**, § 167, vol. 3, p. 356.

Estoppel. — *Hertz v. Montgomery Journal Pub. Co.*, 9 Ala. App. 178, 62 So.

564. See the title **CONTRACTS**, § 167, vol. 3, p. 356.

§ 168. Consideration for Modification.

A modification of an executory agreement, by agreeing to accept a less sum than that due, where one of the parties does not assume any obligation or release any right, is a nudum pactum and void, though mutual obligations, assumed by parties at time of modification, would be a sufficient consideration. *Brown v. Lowndes County (Ala.)*, 78 So. 815.

Sufficiency—Mutual Assent.—*Hertz v. Montgomery Journal Pub. Co.*, 9 Ala. App. 178, 62 So. 564, cited in notes in L. R. A. 1915B, 17, 22, 32. See the title **CONTRACTS**, § 168, vol. 3, p. 357.

So long as a contract is executory the parties may modify it without any new consideration other than that of mutual assent. *Johnson v. McFry*, 14 Ala. App. 170, 68 So. 716.

Parties may by mutual agreement change or modify their contract without any new consideration therefor. *Dickey v. Vaughn (Ala.)*, 73 So. 507.

An executory contract providing for the construction of a building, not being one of the class necessary to be reduced to writing, may be modified by parol, without any new or independent consideration. *George v. Roberts*, 186 Ala. 521, 65 So. 345, cited in notes in L. R. A. 1915B, 17, 32.

Part Payment of Past-Due Debt.—*Black v. Slocumb Mule Co.*, 8 Ala. App. 440, 62 So. 308, cited in note in 52 L. R. A., N. S., 367. See the title **CONTRACTS**, § 168, vol. 3, p. 357.

§ 169. Written Contracts.

Parol Modification.—*Tilley v. Bartow*, 8 Ala. App. 639, 62 So. 330. See the title **CONTRACTS**, § 169, vol. 3, p. 357.

The parties to a written contract so long as it is executory may alter or modify its terms with or without writing. *Johnson v. McFry*, 14 Ala. App. 170, 68 So. 716.

§ 171. Alteration or Addition of Terms.

Where the party who had contracted for a well, agreeing to pay so much a foot, before the well was bored to such

a depth as to procure the water called for, desired to stop the contractor, he had the right to do so, provided the contractor consented, thus effecting a modification of the contract by mutual consent. *Dunaway v. Roden*, 14 Ala. App. 501, 71 So. 70.

§ 174. Operation and Effect.

Contract Relating to Voting Contest.—*Hertz v. Montgomery Journal Pub. Co.*, 9 Ala. App. 178, 62 So. 564. See the title **CONTRACTS**, § 174, vol. 3, p. 359.

§ 175. Evidence.

Burden of Proof.—*Huntsville Elks Club v. Garrity-Hahn Bldg. Co.*, 176 Ala. 128, 57 So. 750, cited in note in L. R. A. 1915D, 3269. See the title **CONTRACTS**, § 175, vol. 3, p. 359.

Admissibility of Evidence.—In an action for compensation for boring a well, where the original contract calling for the giving of a mule in payment was modified to call for a cash payment of so much per foot, its exact terms otherwise being in dispute, plaintiff's evidence as to the value of the mule was properly admitted as a circumstance to aid the jury in determining what the modified contract actually was, and its proper interpretation. *Dunaway v. Roden*, 14 Ala. App. 501, 71 So. 70.

§ 176. Questions for Jury.

In an action for compensation for boring a well, whether the contractor for the work was told by the other party, after water was reached, to work one more day and quit, was a question for the jury. *Dunaway v. Roden*, 14 Ala. App. 501, 71 So. 70.

IV. RESCISSION AND ABANDONMENT.

§ 178. Agreement to Rescind.

§ 179. — Assent of Parties.

To rescind a contract, the minds of the parties thereto must meet in an agreement or mutual release fully settling all rights under the contract. *Reliance Life Ins. Co. v. Garth*, 192 Ala. 91, 68 So. 871.

§ 181. — Consideration.

Parties may rescind an executory con-

tract without new consideration; the mutual assent being sufficient legal consideration. *Messer Real Estate, etc., Co. v. Ruff*, 185 Ala. 236, 64 So. 51.

Where party had agreed to exchange cotton seed for cotton seed meal, an agreement by him to pay difference in value if other party would take back the meal was without consideration, unless intended as a novation in discharge of the obligation under the original contract. *Hoffman v. Moreman*, 184 Ala. 220, 63 So. 942.

§ 183. Grounds for Rescission by Party.

§ 185. — Invalidity of Contract.

Right to rescission of contract for fraud does not depend upon insolvency of other party, nor upon inadequacy of action at law for damages. *Stone v. Walker* (Ala.), 77 So. 554.

§ 188. Conditions Precedent to Rescission.

§ 189. — Restoration of Consideration or Benefit.

Party may not disaffirm avoidable contract, and at same time enjoy benefits thereunder. *Betts v. Ward*, 196 Ala. 248, 72 So. 110.

Restoration is a condition precedent to the exercise of the right to rescind a contract. *Consumers' Coal, etc., Co. v. Yarbrough*, 194 Ala. 482, 69 So. 897.

As condition precedent to exercise of right to rescind contract brought about by false representations and fraud, party complaining, if practicable, must restore or offer to restore what he has received by virtue of contract. *Stone v. Walker* (Ala.), 77 So. 554.

Restoration Impossible through Fraud of Other Party.—*Hafer v. Cole*, 176 Ala. 242, 57 So. 757. See the title CONTRACTS, § 189, vol. 3, p. 364.

Restitution is not condition precedent to exercise of right of rescission of contract, where made impossible by misconduct of the other party. *Consumers' Coal, etc., Co. v. Yarbrough*, 194 Ala. 482, 69 So. 897; *Stone v. Walker* (Ala.), 77 So. 554.

In cases of actual fraud, a court of equity will generally not require a return of the consideration, or offer thereof, by

the complainant, before the filing of his bill for rescission. *King v. Livingston Mfg. Co.*, 192 Ala. 269, 68 So. 897.

Where the consideration received was without value, the rule that a party to contract can not rescind for the other's fraud without offering to return the consideration does not apply. *King v. Livingston Mfg. Co.*, 192 Ala. 269, 68 So. 897.

§ 191. Time for Rescission and Laches.

In General.—*Southern, etc., Ins. Co. v. De Long*, 178 Ala. 110, 59 So. 61. See the title CONTRACTS, § 191, vol. 3, p. 364.

Earliest Practicable Moment.—A party must disaffirm a contract by which he is defrauded at the earliest practicable moment after the discovery of the fraud, unreservedly, and return whatever he has received under it. *Gayle v. Pennington*, 185 Ala. 53, 64 So. 572.

§ 192. Election to Rescind and Notice.

Whether a contracting party has canceled his contract is ordinarily for the jury, since he may elect not to cancel it in spite of acts warranting cancellation. *Imperial Motorcar Co. v. Skinner* (Ala. App.), 78 So. 641.

V. PERFORMANCE OR BREACH.

§ 199. Tender of Performance.

After a party to a contract has repudiated or broken it, he can not reinstate contract by offer to perform. *Mutual Loan Soc. v. Stowe* (Ala. App.), 73 So. 202.

§ 201. Satisfaction of Party.

Where a party contracts to furnish labor and material for a compensation, payment to be made on the contingency of the buyer being satisfied, he will not be protected from the injurious consequences of his contract. *Jones v. Lanier* (Ala.), 73 So. 535.

§ 202. Approval or Decision of Architects, Arbitrators and Others.

§ 203. — In General.

Conclusiveness and Effect of Decision.—While parties to a contract may stipulate that estimates of the work done and of the compensation therefor shall be

made by a third person, such person's action will be final and binding only in the absence of fraud and bad faith. *Catanzano v. Jackson* (Ala.), 73 So. 510.

§ 204. — Certificates in General.

Conclusiveness and Effect.—Defendant, by discharging or dispensing with services of an architect and assuming personal control of erection of a house, could not place it beyond architect's power to give final certificate, and so defeat plaintiff's recovery for substantial execution of contract. *Catanzano v. Jackson* (Ala.), 73 So. 510.

§ 215. Excuses for Nonperformance or Defects.

An employing corporation and the "company doctor" could not refuse to perform their contract to render medical services to an employee's wife because the employee exercised his right to call in another physician. *Sloss-Sheffield Steel, etc., Co. v. Taylor* (Ala. App.), 77 So. 79.

Where defendant agreed to lend plaintiff not to exceed \$2,000 to reconstruct a sawmill and dam, and plaintiff was to complete the improvement out of his own funds if the sum furnished did not suffice, defendant, having breached his agreement, can not defeat recovery because of plaintiff's admitted inability to secure elsewhere funds necessary to complete the improvement should they be required. *Bixby-Theisen Co. v. Evans*, 186 Ala. 507, 65 So. 81.

§ 217. Waiver of Defects and Objections.

Right to Forfeit—Mere Silence.—Waiver by a party to a contract of the right to forfeit it can not be inferred in the absence of language or conduct inconsistent with an intention to insist on a forfeiture, and can not be inferred from mere silence. *Sovereign Camp v. Jones*, 11 Ala. App. 433, 66 So. 834.

Acceptance of Work with Knowledge of Defects.—*Dupuy v. Wright*, 7 Ala. App. 238, 60 So. 997. See the title CONTRACTS, § 217, vol. 3, p. 374.

Where time is of the essence of the contract, it may be waived by the conduct of the party for whose benefit the stipulation is made, as where he recognizes

the contract as still in force after the time for performance is past. *Lowy v. Rosengrant*, 196 Ala. 337, 71 So. 439.

Effect of Waiver of Time as to Other Stipulations.—*Bohanan v. Dodd*, 7 Ala. App. 220, 60 So. 955; *Huntsville Elks Club v. Garrity-Hahn Bldg. Co.*, 176 Ala. 128, 57 So. 750, cited in note in L. R. A. 1915B, 3269. See the title CONTRACTS, § 217, vol. 3, p. 375.

Resumption after Performance Stopped.

—*Southern Bitulithic Co. v. Hughston*, 177 Ala. 559, 58 So. 450. See the title CONTRACTS, § 217, vol. 3, p. 374.

§ 219. Discharge by Impossibility of Performance.

In General.—*Greil Bros. Co. v. Mabson*, 179 Ala. 444, 60 So. 876, cited in note in L. R. A. 1916F, 66. See the title CONTRACTS, § 219, vol. 3, p. 375.

§ 219½. Discharge by Death of Party.

A contract by which defendants sold to W. a one-fifth interest in a cotton brokerage business, W. to pay a specified sum of money, and to receive one-fifth of the net profits, and a salary for the period of five years, and requiring W. to devote his personal services, to effect the successful management of the business, was terminated by the death of W., even if the contract be not regarded as creating a partnership. *Herren v. Harris, etc., Co.* (Ala.), 78 So. 921.

§ 220. Acts or Omissions Constituting Breach in General.

Contracts Held to Be Breached.—*Hertz v. Montgomery Journal Pub. Co.*, 9 Ala. App. 178, 62 So. 564; *Smith v. Webb*, 176 Ala. 596, 58 So. 913, 40 L. R. A., N. S., 1191, cited in note in Ann. Cas. 1915A, 383. See the title CONTRACTS, § 220, vol. 3, p. 376.

§ 221½. Effect of Breach in General.

A party to a contract, upon breach by the other party, must elect between treating the contract as dissolved in toto and insisting on further performance. *Lowy v. Rosengrant*, 196 Ala. 337, 71 So. 439.

As general rule, where one party is unable to perform his part of contract, he

is not entitled to demand performance. *McGowin Lumber, etc., Co. v. Camp Lumber Co.* (Ala. App.), 77 So. 433.

§ 223. Rights and Liabilities on Breach.

In General.—Where a party repudiates a contract, injured party may rescind, and recover upon quantum meruit, and maintain an action for money had and received for money paid, or keep contract alive and maintain assumpsit for breach, or compel specific performance in equity. *Mutual Loan Soc. v. Stowe* (Ala. App.), 73 So. 202.

Recovery of Payments.—Where a party repudiates a contract, injured party may rescind, and maintain an action for money had and received for money paid. *Mutual Loan Soc. v. Stowe* (Ala. App.), 73 So. 202.

§ 224. Evidence.

Admissibility.—In assumpsit for contract price for drilling a well where plaintiff testified defendant made no complaint of the quantity or quality of the water and another witness testified no complaint was made to him, evidence that some time after completion defendant offered to permit plaintiff to remove the whole thing was inadmissible in rebuttal. *Parker v. Law & Sons*, 194 Ala. 693, 69 So. 879.

§ 225. Questions for Jury.

In an action for compensation for boring a well under a contract obligating plaintiff merely to "get water," question, whether the 12 or 14 two-gallon buckets every 12 hours actually produced met the requirement held for the jury. *Dunaway v. Roden*, 14 Ala. App. 501, 71 So. 70.

VI. ACTIONS FOR BREACH.

§ 226. Nature and Form of Remedy.

In General.—Where there was a special contract under which nothing remained to be done except for defendant to pay the amount agreed upon, plaintiff could declare on a breach or on the common counts as for the money so due. *Rutherford v. Cowling* (Ala.), 76 So. 914.

Where nothing remains to be done under an express contract but the payment of money, the creditor may declare

specially on the contract, or may sue on the common counts; but, if the suit is for damages for defendant's breach of the contract, plaintiff must declare specially on the contract, and must aver defendant's breach thereof. *Elrod Lumber Co. v. Moore*, 186 Ala. 430, 65 So. 175.

Damages for Breach.—Wherever equity gives a party the right to specifically enforce an executory contract of sale, the law gives him the right to sue for damages for the breach. *Hamil v. Flowers*, 184 Ala. 301, 63 So. 994.

Assumpsit or Action on Case.—Where there is mere failure to comply with contract, remedy is in assumpsit; but, where one party has entered on performance and the other interferes by more than mere failure to comply, the party aggrieved may have an action on the case. *Limbaugh v. Boaz* (Ala. App.), 78 So. 421.

Election of Remedies.—*Hertz v. Montgomery Journal Pub. Co.*, 9 Ala. App. 178, 62 So. 564. See the title CONTRACTS, § 226 (1), vol. 3, p. 381.

§ 229. Defenses.

Payments by an owner to other creditors of the contractor are no defense to an action upon the owner's prior promise to pay for certain materials out of sums due the contractor. *Park-Robertson Hdw. Co. v. Copeland*, 11 Ala. App. 447, 66 So. 880.

Lack of Benefit to Defendant.—Where defendant contracted to pay a specified sum for an advertising card in plaintiff's legal directory, it was no defense that it brought him no business. *Mertins v. Hubbell Pub. Co.*, 190 Ala. 311, 67 So. 275.

A plea of contributory negligence is by its nature entirely inapt as a defense to a count *ex contractu* for the breach of a contract. *Hart v. Coleman*, 192 Ala. 447, 68 So. 315.

Estoppel to Urge Defense.—*Hertz v. Montgomery Journal Pub. Co.*, 9 Ala. App. 178, 62 So. 564. See the title CONTRACTS, § 229, vol. 3, p. 383.

§ 230. Time to Sue and Limitations.

Expiration of Reasonable Time.—*Starr Piano Co. v. Baker*, 8 Ala. App. 449, 63

So. 549. See the title CONTRACTS, § 230, vol. 3, p. 383.

§ 231. Parties.

Name in Which Action May Be Brought.—Where employer obligates itself to render medical services to employees and their wives, employing a "company doctor" therefor, the contract being one for wife's benefit, she may sue both the company and the doctor in her own name. *Sloss-Sheffield Steel, etc., Co. v. Taylor* (Ala. App.), 77 So. 79.

§ 232. Pleading.

§ 233. — Declaration, Complaint, or Petition in General.

Fulfillment of Condition Precedent. — In action for breach of contract, fulfillment of condition precedent by plaintiff must be averred by him to show liability of defendants. *Floyd v. Pugh* (Ala.), 77 So. 323.

Discharge of plaintiff's burden to aver performance of condition precedent to accrual of claim held made by averment that he had complied with all provisions of contract, etc. *Floyd v. Pugh* (Ala.), 77 So. 323.

§ 234. — Allegation or Statement of Contract or Promise.

Setting Out Contract.—In an action ex contractu the complaint should set out enough of the contract to enable the court to know what it was, or to enable the jury to estimate damages with certainty. *Sloss-Sheffield Steel, etc., Co. v. Payne*, 192 Ala. 69, 68 So. 359.

Showing that Contract in Writing. — In an action for breach of contract, the complaint need not show that the contract breached was in writing. *Buck Creek Lumber Co. v. Nelson*, 188 Ala. 243, 66 So. 476.

Complaint Held Demurrable.—In action by plaintiff, who had agreed to exchange cotton seed meal for cotton seed on agreement by defendant to pay the difference in value if he would take back the meal, complaint held demurrable in that it failed to show that such agreement was a novation in discharge of the original contract, and hence showed no con-

sideration. *Hoffman v. Moreman*, 184 Ala. 220, 63 So. 942.

Where a contract has been modified by a subsequent agreement, plaintiff may declare on it as modified without regard to the original terms of the contract. *Sibley v. Barclay*, 14 Ala. App. 422, 70 So. 201.

In an action for compensation for boring a well, where, under the contract for the work, as modified, the stipulation as to the quantity of water plaintiff was to get was changed, and he was obligated only to bore the well so as to reach water, which he did, he could recover on the special count pleading the modified contract. *Dunaway v. Roden*, 14 Ala. App. 501, 71 So. 70.

§ 235. — Consideration.

As a general rule, in the absence of statutory enactments to the contrary, in actions on contract it is necessary to allege a consideration, but since the statute declares that any contract in writing imports consideration, it need not be alleged. *Birmingham R., etc., Co. v. Littleton* (Ala.), 77 So. 565.

A count charging that defendant promised to furnish plaintiff with lumber, that a third party was indebted to plaintiff, that defendant told plaintiff that he was indebted to the third party, and that defendant would deliver the lumber, and in pursuance of said agreement plaintiff discharged the third party from the indebtedness with his consent, but defendant then refused to comply with the agreement, is demurrable for failure to show consideration, since there is no averment that the contract entered into by the defendant included the release by the plaintiff of what the third party owed him, excluding recourse to the principles of novation. *Perry v. Gallagher* (Ala.), 75 So. 396.

§ 236. — Performance by Plaintiff.

§ 236 (1) Necessity of Alleging Performance.

Where the performance of an act by one party is intended to be concurrent with or dependent upon an act to be performed by the other, neither party can maintain an action against the other without an allegation of performance or of

an offer to perform on his part, or of facts constituting a sufficient excuse for failure to perform, or offer to perform. *Long v. Addix*, 184 Ala. 236, 63 So. 982.

Ability, Readiness or Willingness to Perform.—*Terrell v. Nelson*, 177 Ala. 596, 58 So. 989. See the title CONTRACTS, § 236 (1), vol. 3, p. 388.

Count in complaint in an action ex contractu held demurrable for failure to aver readiness and willingness and ability of the plaintiff to perform at the time of defendant's breach. *Sloss-Sheffield Steel, etc., Co. v. Payne*, 192 Ala. 69, 68 So. 359.

Conditions—"Condition Subsequent."—While a condition which qualifies or defeats the plaintiff's claim, being a "condition subsequent," may be ignored in plaintiff's pleading, the general rule is that plaintiff's performance of a condition precedent must be averred in his complaint, but in lieu of allegations of performance plaintiff may allege facts in excuse of the performance; and an averment that defendant has waived performance will dispense with an allegation of performance, but where plaintiff intends to rely on facts showing defendant's waiver of performance, he must plead such facts so as to clearly show the waiver. *Long v. Addix*, 184 Ala. 236, 63 So. 982.

§ 236 (2) Sufficiency of Allegations.

The complaint in an action on a contract requiring performance by plaintiff within a stipulated period, alleging performance before suit brought after the stipulated period, does not allege performance within the stipulated period. *McCormick v. Badham*, 191 Ala. 339, 67 So. 609.

Particularity Required.—In action for money due on a contract fully executed, the same particularity of averment is not necessary as where the suit is for the breach of an executory contract. *Jackson Lumber Co. v. Trammell* (Ala.), 74 So. 469.

§ 238. — Breach.

A complaint for breach of contract must set forth the essential facts of the breach with such certainty as will apprise de-

fendant in what particulars he has failed to perform and a general averment of a breach, without giving the nature or character thereof, is insufficient. *Woodward Iron Co. v. Frazier*, 190 Ala. 305, 67 So. 430.

Where the effect of a subsequent agreement amounts only to an extension of time of performance of a contract, it is not necessary for plaintiff to plead such extension in setting up a breach, unless time is of the essence of the contract. *Sibley v. Barclay*, 14 Ala. App. 422, 70 So. 201.

Breach Insufficiently Shown.—*Elliott v. Nicoles*, 182 Ala. 159, 62 So. 499. See the title CONTRACTS, § 238 (2), vol. 3, p. 390.

§ 239. — Plea, Answer, or Affidavit of Defense in General.

In assumpsit for work and labor upon a building, a defense that a certificate by the architect was a necessary condition to payment must be specially pleaded. *George v. Roberts*, 186 Ala. 621, 65 So. 345.

Plea setting up waiver of existing right under executed contract must show consideration for agreement relied on as waiver, or estoppel. *Southern States Co. v. Long* (Ala. App.), 73 So. 148.

Plea Held Demurrable.—*Friddle v. Braun*, 180 Ala. 556, 61 So. 59. See the title CONTRACTS, § 239, vol. 3, p. 390.

§ 241. — Want of Consideration.

Where a complaint contained two of the common counts based on expressed and implied promises to pay money in consideration of a precedent and existing debt, and the other counts showed a case of mutual promises which furnished a sufficient consideration to support an action on the other, a plea that the original contracts were void for want of consideration did no more than deny plaintiff's cause of action, and, this having been properly done elsewhere, a demurrer to such plea was properly sustained. *Mertins v. Hubbell Pub. Co.*, 190 Ala. 311, 67 So. 275, cited in note in L. R. A. 1917F, 582.

§ 243. — Nonperformance by Plaintiff.

In assumpsit for work and labor done

upon a building, a defense based upon a provision of the contract making the architect arbiter with respect to differences between the parties must be specially pleaded. *George v. Roberts*, 186 Ala. 521, 65 So. 345.

§ 245. — Replication or Reply and Subsequent Pleadings.

A replication, which sets up versions of the contract relied on substantially contradicting the versions of the contract as set up in the pleas, is in effect a plea of the general issue and is not demurrable. *Varnon v. Nabors*, 189 Ala. 464, 66 So. 593.

Where plaintiff declared on a contract made by the agents of the corporation, whereby the corporation agreed to make a loan to plaintiff, if she would purchase 200 shares of corporate stock, and defendant pleaded that, after the making of that contract, plaintiff agreed to cancel it, and thereafter purchased the stock from an individual, and not from the corporation, replications alleging that the agreement to cancel was signed and the stock purchased from the individual solely to enable the corporation to escape paying commissions to the agents, and with an express agreement that the contract to loan money to the plaintiff would not be thereby affected, were sufficient. *Southern States, etc., Ins. Co. v. Lunsford*, 192 Ala. 76, 68 So. 273.

§ 246. — Issues, Proof, and Variance.

§ 246 (1) In General.

Where matter of complaint for breach of contract is descriptive of that which is material, a variance between allegations and proof is fatal. *Central, etc., R. Co. v. Isbell* (Ala.), 73 So. 648.

§ 246 (2) Matters to Be Proved.

Execution of Contract.—*Tri-City Gas Co. v. Connelly Boiler Works*, 8 Ala. App. 650, 62 So. 333. See the title CONTRACTS, § 246 (2), vol. 3, p. 393.

§ 246 (3) Evidence Admissible under Pleadings in General.

In assumpsit for the contract price for drilling a well, where defendant's plea averred a refusal to accept the work and

permission to remove the equipment, a question whether some indefinite time after completion defendant did not offer to turn the whole thing back to plaintiff was excluded. Held, that though defendant might have rejected the work if not in compliance with the contract, or have claimed a deficiency in the price, such question was inadmissible, not being in support of the plea, or showing any rejection or complaint, particularly as defendant continued to make use of the well. *Parker v. Law & Sons*, 194 Ala. 693, 69 So. 879.

Where plaintiff sues on the common counts for an amount alleged to be due under the terms of an express contract, the form of action does not cut off any defense which defendant might have made if the contract had been specially declared on; defendant being entitled to plead the general issue, and also pleas in recoupment, under which he may show, not only that plaintiff has breached the contract under which the cause of action arose, but also that defendant has been damaged by reason of such breach. *Elrod Lumber Co. v. Moore*, 186 Ala. 430, 65 So. 175.

§ 246 (8) Evidence Admissible under General Denial.

Plaintiff, if defendant's version of the contract sued on is true, not having complied with the contract, this may be shown under the general issue; so that pleas setting up such version are unnecessary. *Southern States Co. v. Long* (Ala. App.), 73 So. 148.

§ 246 (9) Variance as to Date and Terms of Contract in General.

Variance as to Terms of Contract.—

Where one suing on employment contract alleged that compensation agreed upon was \$200 per month, there was no fatal variance where his testimony showed that it was agreed that he should be paid \$150 a month, and that \$50 additional should be retained from his salary as security for faithful performance of his work. *Jackson Lumber Co. v. Trammell* (Ala.), 74 So. 469.

§ 246 (10) Variance as to Performance or Breach.

In action for breach of contract, alleg-

ations of performance on plaintiff's part, and of breach on defendant's, conjunctively averred in complaint, must be proved as alleged. *Central, etc., R. Co. v. Isbell* (Ala.), 73 So. 648.

In General.—*Du Pont De Nemours Powder Co. v. Parsons*, 9 Ala. App. 247, 62 So. 988. See the title **CONTRACTS**, § 246 (10), vol. 3, p. 396.

§ 247. Evidence.

§ 248. — Presumptions and Burden of Proof.

Where, in *assumpsit*, defendant specially pleaded that plaintiff's right of action was based on a special contract which plaintiff had breached, the burden was on defendant not only to show plaintiff's breach, but that defendant had suffered damages thereby. *Elrod Lumber Co. v. Moore*, 186 Ala. 430, 65 So. 175.

The plea of the general issue, in an action *ex contractu* on a joint obligation of all the defendants, puts on plaintiff the burden of proving the case as laid in the complaint. *Brown & Co. v. Matthews*, 14 Ala. App. 428, 70 So. 287.

In action for breach of contract, plea of *non est factum* by one defendant placed

burden on plaintiff to prove the execution of the contract by such defendant. *Ferlesie v. Cook* (Ala.), 78 So. 915.

§ 251. Trial.

§ 253. — Instructions.

Misleading and Confusing Instruction.

—In an action for compensation for boring a well, under an agreement that defendant should give a mule and pay for well casing and the removal of plaintiff's machinery, which was subsequently modified to provide that plaintiff should receive a cash payment in accordance with the number of feet bored, the charge that if the jury believed that plaintiff and defendant first made a contract for plaintiff to bore a well for a mule, and that afterwards a new contract was made whereby the old one was abandoned, plaintiff could not recover for moving his machinery or for casing the well, "provided you find that plaintiff did not comply with the new contract," was properly refused, not only as calculated to mislead as to whether the terms of the original contract adverted to were abrogated by the new agreement, but also as positively confusing. *Dunaway v. Roden*, 14 Ala. App. 501, 71 So. 70.

Contracts of Affreightment.

See ante, **CARRIERS**.

Contracts of Hire.

See post, **MASTER AND SERVANT**.

CONTRIBUTION.

§ 2. Common Interest or Liability.

§ 3½. — Joint Debtors.

Cross References.

See the title **CONTRIBUTION**, vol. 3, p. 406, and references there given.

§ 2. Common Interest or Liability.

§ 3½. — Joint Debtors.

Where there is a single claim against several debtors, if equity has jurisdiction

it will apportion the burden ratably among them; or, if one is compelled to pay more than his share, will give him contribution against the other. *Interstate Land, etc., Co. v. Logan*, 196 Ala. 196, 72 So. 36.

Contributory Negligence.

See post, NEGLIGENCE.

Controversy.

See ante, APPEAL AND ERROR; post, COURTS.

As to amount in controversy, see post, COURTS.

Conversation in Evidence.

See post, CRIMINAL LAW; EVIDENCE.

CONVERSION.

- § 3. Sale of Land under Order of Court.
- § 4. — In General.
- § 8. Directions in Will.
- § 9. — In General.
- § 13. Reconversion.

Cross References.

See the title CONVERSION, vol. 3, p. 409, and references there given.

In addition, see post, TROVER AND CONVERSION.

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| <p>§ 3. Sale of Land under Order of Court.</p> <p>§ 4. — In General.</p> <p>Proceeds Treated as Land.—Upshaw v. Upshaw, 180 Ala. 204, 60 So. 804. See the title CONVERSION, § 4, vol. 3, p. 410.</p> <p>§ 8. Directions in Will.</p> <p>§ 9. — In General.</p> <p>Where a will directed land to be sold and converted into money, equity will</p> | <p>consider such land as money. Hibbler v. Oliver, 193 Ala. 369, 69 So. 477.</p> <p>§ 13. Reconversion.</p> <p>Where a will directed land to be sold and converted into money, that certain of the legatees purchased at the sale, using their legacies in payment of the purchase price, did not constitute a reconversion into realty. Hibbler v. Oliver, 193 Ala. 369, 69 So. 477.</p> |
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CONVICTS.

- § 2. Crimes.
- § 6. Contracts by Public Authorities for Labor.

Cross References.

See the title CONVICTS, vol. 3, p. 414, and references there given.

In addition, see post, CRIMINAL LAW.

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| <p>§ 2. Crimes.</p> <p>Murder.—A person convicted of murder in the first degree and sentenced to be hanged, but afterwards commuted by the governor to life imprisonment, is a convict sentenced to imprisonment for life,</p> | <p>within Code 1907, § 7089, providing that murder in the first degree by such a convict must be punished by death. Johnson v. State, 183 Ala. 79, 63 So. 163.</p> <p>Admissibility of Evidence — Statement of Commutation.—In a prosecution of a</p> |
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convict for murder, under Code 1907, § 7089, providing that any life convict who commits murder in the first degree shall, on conviction, suffer death, after a copy of the judgment sentencing defendant to death had been admitted as evidence, it was proper to admit as evidence the statement of commutation of the punishment to life imprisonment. *Johnson v. State*, 183 Ala. 79, 63 So. 163.

§ 6. Contracts by Public Authorities for Labor.

Authority of Commissioners' Court — "Special Duty."—Under Code 1903, § 3311,

providing that in cases where any special duty required by law is to be performed special terms of the county commissioners' court may be held, the hiring out or disposition of the county convicts, imposed upon such court by Code 1907, vol. 3, p. 422, is in its nature a "special duty," in the performance of which the court might authorize a contract at a special session. *Thames v. State*, 12 Ala. App. 307, 68 So. 474.

Right of Convict to Discharge.—*Huxford v. Brown*, 7 Ala. App. 447, 62 So. 271. See the title CONVICTS, § 6 (9), vol. 3, p. 423.

Corner.

See ante, BOUNDARIES.

CORONERS.

Cross References.

See the title CORONERS, vol. 3, p. 425, and references there given.

Statute—Constitutionality.—The provision of Acts 1915, p. 858, that a person elected coroner must be a practicing phy-

sician in good standing is not unconstitutional. *Board v. State (Ala.)*, 74 So. 364.

CORPORATIONS.

I. Incorporation and Organization.

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- § 10. — Necessity and Amount of Capital Subscribed and Paid.
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- (B) Subscription to Stock.
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- § 348. Compliance with Requirements in General.
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 - § 363 (2) Residence of Parties and Place Where Cause of Action Arose.
 - § 363 (3) Compliance or Noncompliance with Statutory Requirements in General.

Cross References.

See the title CORPORATIONS, vol. 3, p. 427, and references there given.

In addition, see ante, ASSOCIATIONS; BANKS AND BANKING; CONSTITUTIONAL LAW; post, GARNISHMENT; MASTER AND SERVANT; MUNICIPAL CORPORATIONS; RAILROADS; RECEIVERS; WATERS AND WATERCOURSES.

As to quo warranto to prevent usurpation of corporate franchises or charters and correct abuses thereof, see post, QUO WARRANTO. As to mandamus to enforce duty to warn of annual election of officers, see post, MANDAMUS. As to failure of corporation to comply with conditions of doing business in state as defense to prosecution of agent for embezzlement, see post, EMBEZZLEMENT.

I. INCORPORATION AND ORGANIZATION.

§ 7. General Laws.

§ 10. — Necessity and Amount of Capital Subscribed and Paid.

In General.—*Floyd v. State*, 177 Ala. 169, 59 So. 280. See the title CORPORATIONS, § 10, vol. 3, p. 444.

Evasive Compliance.—*Floyd v. State*, 177 Ala. 169, 59 So. 280. See the title CORPORATIONS, § 10, vol. 3, p. 444.

Promoter's Valuation of Property Received in Lieu of Cash.—*Floyd v. State*, 177 Ala. 169, 59 So. 280. See the title CORPORATIONS, § 10, vol. 3, p. 444.

§ 16. De Facto Corporations.

See post, "Persons Entitled," § 17 (1).

The irregularity in the organization of a consolidated corporation, formed before one of the constituent corporations amended its charter, so as to be permitted to consolidate, under Code 1907, § 3481, subd. 11, does not prevent a consolidated corporation from being at least a de facto corporation whose organization could be attacked only by the state. *Alabama Fidelity Mortg., etc., Co. v. Dubberly (Ala.)*, 73 So. 911.

§ 17. Attacking Validity of Incorporation.

§ 17 (1) Persons Entitled.

Where a corporation could be lawfully created, and a bona fide and colorable attempt is made to do so, a de facto corporation results, whose existence and powers can not be questioned in law or equity, except by direct proceeding in the name of the state. *Alabama Fidelity Mortg., etc., Co. v. Dubberly (Ala.)*, 73 So. 911.

A de facto corporation, formed by the consolidation of two other corporations, can be attacked by a stockholder in one of the constituent companies for fraud of the common directors of the consolidated corporations notwithstanding the rule that the organization of a de facto corporation can be attacked only by the state. *Alabama Fidelity Mortg., etc., Co. v. Dubberly (Ala.)*, 73 So. 911.

§ 17 (2) Collateral Attack.

Right of Collateral Attack—Direct At-

tack.—*Floyd v. State*, 177 Ala. 169, 59 So. 280. See the title CORPORATIONS, § 17 (2), vol. 3, p. 449.

§ 18. Acts of Corporators and Promoters.

§ 18 (1) In General.

In General.—*Moore v. Warrior Coal, etc., Co.*, 178 Ala. 234, 59 So. 219. See the title CORPORATIONS, § 18 (1), vol. 3, p. 449.

§ 18 (2) Liability to Corporation and Stockholders in General.

In General.—*Moore v. Warrior Coal, etc., Co.*, 178 Ala. 234, 59 So. 219. See the title CORPORATIONS, § 18 (2), vol. 3, p. 450.

Where promoters of a holding corporation practicing a legal fraud secured more stock than they were entitled to, but on demand returned it to the corporation, stockholders could not in their action for apportionment of such stock object to the settlement with the promoters for less than the amount of dividends paid. *Lyons v. Webster*, 197 Ala. 654, 73 So. 337.

Consolidation—Duties of Promoters—Estoppel of Stockholders.—Where stockholders in two breweries for the purpose of consolidation organized a third brewing corporation, and some of them agreed to accept a certain number of shares of stock in exchange for their shares, but the promoters of the new corporation secured a greater number of shares than the others agreed to accept and retained the excess, their action was a legal fraud upon the new corporation; their relation to it being of fiduciary character and calling for the utmost candor. *Lyons v. Webster*, 197 Ala. 654, 73 So. 337.

In such case where the new corporation discovering the fraud demanded return of the excess shares, the promoter in an action by the old corporation stockholders was not estopped to show the better title of the new corporation. *Lyons v. Webster*, 197 Ala. 654, 73 So. 337.

The doctrine that there can be no rescission of a contract without restoration of all the rescinding party received

thereunder, does not apply where promoters of a corporation practiced a legal fraud and secured a greater number of shares than they were entitled to, and the corporation then demanded return and cancellation of the additional shares. *Lyons v. Webster*, 197 Ala. 654, 73 So. 337.

§ 18 (3) Purchase of Property for Corporation.

In General.—*McQuiddy Printing Co. v. Head*, 7 Ala. App. 384, 62 So. 287. See the title **CORPORATIONS**, § 18 (3), vol. 3, p. 450.

§ 18 (4) Sale of Property to Corporation.

Where holders of option contract to purchase land on which they had paid \$600 formed corporation, putting in land as worth \$12,500, and they had agreed to pay \$9,500 for it, they were not liable to the stockholders as for fraud, since their contract was of some value. *Masberg v. Granville* (Ala.), 75 So. 154.

IV. CAPITAL, STOCK, AND DIVIDENDS.

(B) SUBSCRIPTION TO STOCK.

§ 39½. Power to Issue Stock.

In view of Code 1907, § 3479, providing that preferred stock in no case exceeding two-thirds of the capital stock paid in money may be issued, where a corporation with authorized capital stock of \$2,000 in equal parts of common and preferred stock, of which only \$1,000 was paid in, issued on the same day succeeding incorporation on a mere formal increase of stock preferred stock of \$100,000, the issue was unauthorized and void. *Heide v. Capital Securities Co.* (Ala.), 76 So. 313.

§ 41. Contract of Subscription in General.

§ 44. — Rights and Liabilities of Subscribers.

Tender of Stock.—In an action for breach of contract to deliver corporate stock, a tender at the trial of stock, which had become worthless, would not satisfy plaintiff's claim for damages. *Mutual Loan Soc. v. Stowe* (Ala. App.), 73 So.

202; *Mutual Loan Soc. v. Leonard* (Ala. App.), 73 So. 1005.

Sufficiency of Evidence.—In an action for breach of contract to deliver corporate stock evidence held sufficient to support a verdict for plaintiff and justify the refusal of a new trial. *Mutual Loan Soc. v. Stowe* (Ala. App.), 73 So. 202.

Instruction.—In an action for breach of a contract to deliver corporate stock, where defendant conceded the right to recover at least nominal damages, an instruction that, if the jury believed that defendant treated plaintiff as a stockholder by paying dividends and the plaintiff accepted same, plaintiff would not be entitled to recover, was properly refused. *Mutual Loan Soc. v. Stowe* (Ala. App.), 73 So. 202.

Questions for Jury.—In an action for breach of contract to deliver corporate stock, the value of the stock at the time the contract was breached held for the jury. *Mutual Loan Soc. v. Stowe* (Ala. App.), 73 So. 202.

In an action for breach of contract to deliver corporate stock, alleged to have been made with an agent of the corporation, evidence of breach of the contract held sufficient to go to the jury. *Mutual Loan Soc. v. Stowe* (Ala. App.), 73 So. 202.

In an action for breach of contract to deliver stock, alleged to have been made with an agent of the corporation, evidence of an alleged payment to the agent held insufficient to take to the jury counts for money had and received. *Mutual Loan Soc. v. Stowe* (Ala. App.), 73 So. 202.

Measure of Damages.—In an action for breach of contract to deliver stock, the measure of damages would be the market value of the stock as it existed when the breach occurred, and not necessarily what the plaintiff paid for it. *Mutual Loan Soc. v. Stowe* (Ala. App.), 73 So. 202.

§ 45. Subscriptions or Sales Through Promoters or Agents.

Where plaintiff paid defendant's agent for stock which he did not get, if any act of rescission on his part was necessary, bringing of suit to recover money

paid served that purpose. *Mutual Loan Soc. v. Leston* (Ala.), 76 So. 17.

Question for Jury.—Where there was no authenticated certificate of stock to show that plaintiff was a stockholder in defendant corporation and there was evidence that defendant had denied plaintiff's ownership of stock, contending that an agent had received the money with which the plaintiff intended to pay for the stock and embezzled it to the plaintiff's loss, it can not be said as a matter of law that plaintiff had not the right to recover the money so paid to the agent for stock which he did not get; hence the court erred in giving the general affirmative charge for defendant at the trial, and properly set a judgment for plaintiff aside and granted a new trial. *Mutual Loan Soc. v. Leston* (Ala.), 76 So. 17.

§ 46. Subscriptions Obtained by Misrepresentation.

§ 46 (1) Fraudulent Representations, and Reliance Thereon as Essential to Defeat Subscription.

False Representation Made to Third Party in Presence of Subscriber.—*Southern States Fire, etc., Ins. Co. v. Cromartie*, 181 Ala. 295, 61 So. 907. See the title CORPORATIONS, § 46 (1), vol. 3, p. 463.

§ 46 (2) Absence of Fraudulent Intent.

A court of equity has concurrent jurisdiction with a court of law to enable a buyer of corporate stock to recover the money paid, where the purchase was induced by fraud, and in such suit it is not necessary to prove fraudulent intent, but innocent acts or misrepresentations are sufficient. *King v. Livingston Mfg. Co.*, 192 Ala. 269, 68 So. 897.

§ 46 (3) Matters of Opinion.

Burden of Proof. — *Southern States Fire, etc., Co. v. De Long*, 178 Ala. 110, 59 So. 61. See the title CORPORATIONS, § 46 (3), vol. 3, p. 464.

§ 46 (6) Sufficiency of Evidence to Establish Fraud.

In General. — *Southern States Fire, etc., Co. v. De Long*, 178 Ala. 110, 59 So.

61. See the title CORPORATIONS, § 46 (6), vol. 3, p. 465.

§ 46 (7) Effect of Fraud, and Remedies of Subscribers.

Bill for Rescission.—Averments of a bill against a corporation and some of its stockholders to rescind a purchase of stock in defendant corporation for fraud must be clear, definite, and certain, and state facts to show fraud, and not mere conclusions. *Drennen v. Cooper* (Ala.), 76 So. 94.

Bill for rescission of stock subscription for fraud against corporation in hand of receiver or assignee must show complainant acted promptly after discovery, was not guilty of laches or negligence, and did not ratify the contract or waive fraud, or receive benefits as stockholder. *Stone v. Walker* (Ala.), 77 So. 554.

Same—Failure to Offer to Do Equity.

—A bill to cancel a subscription to the stock of a corporation for fraud is not demurrable in failing to offer to do equity, where it alleged that the complainant had received no profits from his subscriptions. *Wiseola Co. v. Moore*, 187 Ala. 163, 65 So. 398.

Same—Bill Containing Equity. — A bill to cancel a subscription to stock in a corporation, which alleged that the corporation, through its agents, fraudulently misrepresented the amount of the paid-up capital stock, that no certificates had ever been issued, and that plaintiff was denied the right to participate in the meetings of the stockholders or to share in the profits of the corporation, contains equity. *Wiseola Co. v. Moore*, 187 Ala. 163, 65 So. 398.

Same—Bill Held Demurrable.—A bill against a banking corporation and some of its stockholders to rescind a purchase of stock for fraud is demurrable, where it shows that neither the corporation nor one who made fraudulent representations received the benefit of the sale, and that those who received it did not make representations, and does not clearly allege whether the one who made fraudulent representations was agent of those who received the consideration, of the bank, of the purchaser, or was acting

for himself. *Drennen v. Cooper* (Ala.), 76 So. 94.

§ 49. Withdrawal or Cancellation.

See ante, "Effect of Fraud, and Remedies of Subscribers," § 46 (7).

§ 53. Actions on Subscriptions.

Pleading—Trustee's Bill to Recover Unpaid Stock Subscriptions—Equity. —

A bill by the trustee in bankruptcy of an insolvent corporation to recover unpaid stock subscriptions, averred that it was recited in the corporation papers that all of the stock subscribed was paid in full in cash, that the trustee believed and charged that a defendant had never paid for shares for which he subscribed, and that he owed the corporation or the trustee \$9,800, or a large part thereof, and so on, substantially, with reference to the other defendants. Held, that the trustee was entitled to maintain the bill, construed to mean that the corporation papers contained a history of corporation transactions and showed a status of corporate committal estopping the corporation to allege that anything more was due from defendants on their subscription contracts, and so inhibiting the maintenance of an action at law by the bankrupt corporation, though otherwise the bill would be without equity on the ground that the trustee had an adequate remedy at law. *Porter v. Hughes* (Ala.), 73 So. 400.

Where a bill to enforce defendant's liability on a contract for subscription to the stock of a corporation alleged that the corporation was insolvent and that its debts exceeded the amount due on such contract, the bill, though averring cancellation of the contract or a release to defendant by a majority of the shareholders of liability on the contract, is not demurrable for the reason that any surplus would be distributed to such shareholders. *Hundley v. Hewitt*, 195 Ala. 647, 71 So. 419.

(C) ISSUE OF CERTIFICATES.

§ 56½. Issuance and Delivery in General.

It is no defense to a note given in payment for corporate stock that the

certificate of stock had not been delivered, unless there was demand made for the certificate, since the certificate is only evidence of the stock and not the stock itself and, therefore a plea, alleging failure to deliver but not a demand, is demurrable. *Jefferson County Sav. Bank v. Compton*, 192 Ala. 16, 68 So. 261.

§ 57. Issue for Unauthorized or Insufficient Consideration.

Constitutional and Statutory Provisions.—Const. 1901, § 234, and Code 1907, § 3467, prohibiting a corporation from issuing stock except for money, labor done, or property actually received, and making all fictitious increase of stock void, prevent a court from aiding in the enforcement of any contract the execution of which involves a disregard of the provision, and, so far as it is appropriate to protect stockholders from improper discriminations in accepting payment for stock, the provision will be given such effect as to accomplish this purpose. *Minge v. Clark*, 190 Ala. 388, 67 So. 510.

Contract Held Invalid. — A contract contemplated that practically all of the paid-in-capital of a corporation, amounting to \$12,000, should be distributed to the stockholders, and the capital stock of \$50,000 should be reduced to \$38,000, and that the new stock, which had but little, if any, real value, should be sold to defendant for a substantial price. Held, that the contract of sale was invalid, as involving an issue of stock within the prohibition of Const. 1901, § 234, and Code 1907, § 3467, declaring that no corporation shall issue stock except for money, labor done, or property actually received, and plaintiff could not sue for defendant's breach of the contract. *Minge v. Clark*, 190 Ala. 388, 67 So. 510.

§ 57½. Irregular or Erroneous Issue.

Where the issuance of preferred stock was in direct violation of Code 1907, § 3479, stock obtained by a purchaser is void, confers no rights, and subjects him to no liabilities. *Heide v. Capital Securities Co.* (Ala.), 76 So. 313.

§ 59. Rights and Remedies as to Invalid Stock.

An issue of preferred stock, void under Code 1907, § 3479, may be attacked by the purchaser of the stock as well as by the state or the common stockholders. *Heide v. Capital Securities Co.* (Ala.), 76 So. 313.

Purchaser of stock void under Code 1907, § 3479, could not be denied recovery on theory that contract was executed, though ultra vires. *Heide v. Capital Securities Co.* (Ala.), 76 So. 313.

Where the purchaser of stock the issuance of which was void had received two semi-annual dividends and offered to surrender his certificate and demanded a return of his money, his mere failure specifically to announce that the dividends would be returned could not defeat his action. *Heide v. Capital Securities Co.* (Ala.), 76 So. 313.

(D) TRANSFER OF SHARES.

§ 64. Requisites of Transfer in General.

In General.—*McGowin v. Dickson*, 182 Ala. 161, 62 So. 685. See the title CORPORATIONS, § 64, vol. 3, p. 475.

§ 65. Sales.

§ 66. — Contract in General.

Construction.—A contract of sale of corporate stock, which provides that the stock shall be paid for in dividends of the corporation after payment of its present indebtedness, that the price shall bear interest only after accrual of dividends, that in the event the seller shall desire to sell his interest in the corporation within a specified time he shall have an option to purchase the buyer's stock for a specified sum, and that on the buyer voluntarily severing his connection with the corporation within the specified time he shall surrender the stock, makes payment of the price from accruing dividends after discharge of the indebtedness a condition precedent to any obligation on the seller to transfer the stock or to any right in the buyer to require a transfer. *McCormick v. Badham*, 191 Ala. 339, 67 So. 609.

Statements Held Not False Representations.—Statements, made by the agent

of an insurance company to induce the execution of notes in payment of corporate stock, that if the subscriber would purchase stock in the company such stock would pay him annual dividends of at least 12 per cent., and that he would not have to actually pay the notes, but that they would be paid from such dividends, was a statement of the opinion of the agent, and not a representation which would be a defense to an action on the notes, or a renewal thereof. *Armstrong v. Walker* (Ala.), 76 So. 280.

§ 67. — Rescission.

Right to Rescind.—The mere failure of the purchaser of corporate stock to pay notes for deferred payments thereon is no ground for rescission of the contract, in the absence of stipulations to that effect in the contract, or in the absence of provisions to the effect that the payment of the notes should be a condition precedent to a consummation of the sale. *Smith & Sons v. Securities Co.* (Ala.), 73 So. 892.

§ 68. — Performance of Contract.

In General.—*McGowin v. Dickson*, 182 Ala. 161, 62 So. 685. See the title CORPORATIONS, § 68, vol. 3, p. 476.

§ 68½. — Operation and Effect.

Under a contract for the sale of the capital stock of a corporation, which provided that the company's bills and accounts receivable for sales prior to a certain date should belong to the seller, rebates paid by a railroad company to the corporation under order of the Interstate Commerce Commission did not come within the phrase "accounts for sales," since the word "account," when employed in connection with the term "sale," signifies the obligation of a buyer to a seller. *Twin Tree Lumber Co. v. Ensign*, 193 Ala. 113, 69 So. 525.

§ 69. — Warranties and Agreements to Repurchase.

Where defendant sold corporate stock, agreeing that if plaintiff on the following December desired to sell he would repurchase at par, time is of the essence of the contract, and an agreement extending the time works a substantial

modification. *Sibley v. Barclay*, 14 Ala. App. 422, 70 So. 201.

§ 70. — Remedies.

§ 70 (½) In General.

A buyer of corporate stock, with right to demand a transfer on payment of the price out of dividends within a specified period, agreed shortly before the expiration of the period that the seller might sell the stock to a third person and account for the price obtained. The seller sold the stock, but refused to account. Held, that the promise of the seller to account was supported by a consideration consisting of the buyer's surrender of his right to demand a transfer of the stock on payment therefor from dividends, and the buyer could enforce the promise unless he consented to a rescission of the sale made by the seller. *McCormick v. Badham*, 191 Ala. 339, 67 So. 609.

§ 70 (1) Conditions Precedent to Action or Defense.

In General. — *McGowin v. Dickson*, 182 Ala. 161, 62 So. 685. See the title CORPORATIONS, § 70 (1), vol. 3, p. 476.

Where a seller of corporate stock, to be paid for in dividends of the corporation after discharge of a present indebtedness, sold the stock to another before payment of the price, he did not thereby relieve the buyer of the obligation to pay the price from dividends, and the buyer could not maintain an action for breach of contract without first performing the condition precedent of paying the price from dividends. *McCormick v. Badham*, 191 Ala. 339, 67 So. 609.

§ 70 (2) Pleading.

In General.—*Friddle v. Braun*, 180 Ala. 556, 61 So. 59. See the title CORPORATIONS, § 70 (2), vol. 3, p. 476.

A complaint, averring plaintiff's purchase of corporate stock from defendant in consideration of his agreement to repurchase it on a fixed date, and alleging plaintiff's desire and offer to sell, but defendant's refusal, states a good cause of action. *Sibley v. Barclay*, 14 Ala. App. 422, 70 So. 201.

§ 70 (3) Damages or Amount of Recovery.

In an action for breach of a contract to repurchase corporate stock, where the time for repurchase had been extended, damages must be assessed on the basis of the value of the stock at the time of breach and not at the time originally fixed. *Sibley v. Barclay*, 14 Ala. App. 422, 70 So. 201.

Although seller agreed to sell stock of plaintiff buyer to third person, and account for stipulated price obtained, plaintiff, in absence of showing as to what seller would have realized by forcing third person to perform or that amount stipulated was realized by sale made, could only recover market value. *McCormick v. Badham* (Ala.), 77 So. 736.

§ 71. Pledges.

§ 71 (¾) Title to Stock Pledged.

Equitable title is passed to pledgee by simple delivery of stock certificate. *Bank v. United States Fidelity, etc., Co.* (Ala.), 75 So. 168.

Bank's lien on stock of other bank, effected by hypothecation brought to notice of such other bank, could not be impaired by subsequent dealings of other bank with pledgor. *Bank v. American Nat. Bank* (Ala.), 75 So. 310.

§ 71 (4) Priorities.

In action against a corporation to fix a lien on stock standing in the name of one who had put it up as collateral, the corporation claiming a prior lien under Code 1907, § 3476, whether corporation was chargeable with a limited purpose for which the stockholder had received a transfer of the stock from another, who was not a party and was not complaining was a matter in which complainant could have no interest. *Mobile Towing, etc., Co. v. First Nat. Bank* (Ala.), 78 So. 797.

§ 71 (5) Pledges as Bona Fide Purchasers.

A pledgee who accepted a pledge of corporate stock as security for the amount then due from the pledgor is not a purchaser for value; but, if such pledgee thereafter extended further

credit on the security, though not the sole security of the pledge, it became a purchaser for value. *Bank v. Thompson*, 186 Ala. 600, 65 So. 147.

§ 71 (12) Transfer of Stock by Pledgee.

Where the owner of corporate stock indorsed it in blank and delivered it to a copartnership to be pledged under certain restrictions, she thereby gave to the partnership the indicia of authority to make any disposition of the stock, and a purchaser for value without notice of the restrictions upon the authority is not affected by such restrictions. *Bank v. Thompson*, 186 Ala. 600, 65 So. 147.

§ 71 (13) Actions for Possession of Stock or Proceeds Thereof.

Bill Containing Equity.—Bill for accounting by administratrix, against one to whom intestate pledged corporate stock as collateral, alleging that he by fraudulent answers prevented a redemption, subsequently sacrificed it at an unauthorized sale, and procured it at a price less than he could by proper and timely sale, and refused to account even for the surplus over debt, held to contain equity. *Adams v. Adams (Ala.)*, 73 So. 984.

Admissibility of Evidence.—In an action to recover corporate stock which had been pledged to a bank by a copartnership of which plaintiff's husband was a member, where defendant relied upon the authority to sell the stock given by the original pledgee, evidence that plaintiff's husband had authorized his partner, after the original pledge was made, to tell the bank it might sell the stock was inadmissible. *Bank v. Thompson*, 186 Ala. 600, 65 So. 147.

Affirmative Charge Held Error.—Where the owner of corporate stock authorized a copartnership to pledge it to a bank as security for a cotton margin, and there was evidence from which the jury could infer that the balance due the bank from the copartnership was for a margin, it was error for the court to give the affirmative charge for the plaintiff in an action to recover possession of the stock. *Bank v. Thompson*, 186 Ala. 600, 65 So. 147.

Question for Jury.—Where witnesses testified that certain corporate stock was pledged with a bank as collateral or margin, and that the stock was held by the bank as security for any indebtedness of the pledgor, it was a question for the jury whether the witnesses meant only the present indebtedness or the future indebtedness, since the language was susceptible of either meaning. *Bank v. Thompson*, 186 Ala. 600, 65 So. 147.

§ 78½. Evidence as to Transfer.

A decree canceling the transfer of corporate stock in trust for the alleged purpose of relieving the corporation was supported by evidence that respondent who was the president of the company and induced the making of the agreement, concealed the fact that the company had brought out a gusher or gas well, when inquiries were made of him preceding the transfer, and that no such transfer was necessary. *Providence Oil, etc., Co. v. Allen*, 186 Ala. 282, 65 So. 329.

§ 80. Effect of Transfer.

§ 80½. — In General.

Interest of Mortgagee of Stock Prior to Foreclosure.—Where a borrower's one-half interest in a corporation has been assigned by him to a lender as security for a loan, the lender has no right to participate in the governmental affairs of the corporation to the exclusion of the borrower until foreclosure by the lender of such lien on the borrower's interest and stock in the corporation and purchase by the lender of the same at such foreclosure. *Boyett v. Hahn*, 197 Ala. 439, 73 So. 79.

§ 82. — Bona Fide Purchasers.

Under Code 1907, § 3476, giving a corporation a lien on stock for any debts due it by the person in whose name it stands, one is not an innocent purchaser of stock, as against a corporation, by reason of a letter from the corporation, stating that it had no claims against the stock, unless he shows that it was written at such time as induced action to his detriment. *Mobile Towing, etc., Co. v. First Nat. Bank (Ala.)*, 78 So. 797.

Code 1907, § 3471, providing for reg-

istration of corporate stock transfers, contemplates only protection of subsequent purchasers without notice of prior equities, and when such equities have been created by transfer, hypothecation, mortgage, or lien, corporation is bound to regard them from time it receives notice of existence. *Bank v. American Nat. Bank* (Ala.), 75 So. 310.

(E) INTEREST, DIVIDENDS, AND NEW STOCK.

§ 83½. Interest on Shares and Dividends.

Where the corporation to indemnify itself retained dividends due the shareholder, it is liable, the shareholder consenting to the retention of some dividends and objecting to others, for interest from the date of the conversion of dividends retained with consent and for interest from the date of declaration of the other dividends. *Gulf Coal, etc., Co. v. Musgrove*, 195 Ala. 219, 70 So. 179.

§ 84. Rights and Remedies of Stockholders as to Dividends.

§ 85. — Ordinary Stock.

Where a corporation to whose predecessor plaintiff had sold land retained declared dividends as security for possible breaches of covenant of title, and then converted the moneys, plaintiff's remedy is by a suit for dividends declared, and not by an action for failure to declare dividends, for there could be no unlawful discrimination against the stock in the corporation held by plaintiff. *Gulf Coal, etc., Co. v. Musgrove*, 195 Ala. 219, 70 So. 179.

V. MEMBERS AND STOCKHOLDERS.

(A) RIGHTS AND LIABILITIES AS TO CORPORATIONS.

§ 93. Who Are Members or Stockholders.

Deprivation of Status as Stockholder.—*Empire Realty Co. v. Harton*, 176 Ala. 99, 57 So. 763. See the title CORPORATIONS, § 93, vol. 3, p. 487.

§ 94. Evidence of Membership.

The stock book is evidence of the right to vote the stock shown to be in

the name of its owner. *Walsh v. State* (Ala.), 74 So. 45.

§ 102. Dealings with Corporation.

Where defendant, having an option to sell a tract of land, organized plaintiff corporation to purchase the same, and its directors knew that defendant had procured the option and represented the vendor in the transaction, which fact was stated in the corporation's articles, the fact that defendant received a commission from the vendor was no fraud on the corporation, because defendant became a stockholder, and, he having subsequently used the commission as part of a payment due the vendor from the corporation on the land, defendant was entitled to have the same regarded as a legitimate loan to the corporation and to be considered a creditor to that amount. *Baldwin Alabama Truck Farms Co. v. Strode*, 184 Ala. 213, 63 So. 521.

(B) MEETINGS.

§ 104½. Time and Place, and Adjournment.

Annual Meeting.—Under Code 1907, §§ 3463, 3464, 3478, and 3481, where the annual meeting of stockholders is not called or held on the date prescribed in the by-laws, it becomes the duty of the directors within a reasonable time thereafter to call such annual meeting, and when such meeting is held, it becomes the annual meeting. *Walsh v. State* (Ala.), 74 So. 45.

§ 105. Calling and Notice.

By Directors.—The corporate directors are the proper officers to cause to issue notice of the stockholders' meeting when the by-laws do not designate the time and place. *Walsh v. State* (Ala.), 74 So. 45.

(C) SUING OR DEFENDING ON BEHALF OF CORPORATION.

§ 111. Right to Sue or Defend in General.

If corporation promoters perpetrated a fraud upon the corporation, it, and not the independent stockholders, could prima facie bring the suit. *Masberg v. Granville* (Ala.), 75 So. 154.

§ 114. Persons Entitled to Sue or Defend.

Execution Debtor.—*Empire Realty Co. v. Harton*, 176 Ala. 99, 57 So. 763. See the title CORPORATIONS, § 114, vol. 3, p. 497.

Stockholder at Time Suit Brought.—*Empire Realty Co. v. Harton*, 176 Ala. 99, 57 So. 763. See the title CORPORATIONS, § 114, vol. 3, p. 497.

(D) LIABILITY FOR CORPORATE DEBTS AND ACTS.**§ 120. Constitutional and Statutory Provisions.**

Unpaid Subscription—Garnishment.—Plaintiff, under Code 1886, § 2972, issued garnishment in aid of judgment against a corporation to reach an unpaid subscription to stock of the corporation, without having execution against the corporation returned nulla bona. Code 1907, § 4311, enacted after issue of the writ, but before answer of the garnishee, permits any creditor of a corporation, by process of garnishment, to subject to the payment of his debt an unpaid subscription to the capital stock of a corporation, and § 10 declares that the Code shall not affect any existing right, remedy, or defense, and that the laws in force at the adoption of the Code shall continue in force. Held, that plaintiff could not, by virtue of the new statute, reach the garnishee's unpaid stock subscription under the writ as issued. *First Nat. Bank v. Dimmick*, 190 Ala. 359, 67 So. 309.

§ 122. Extent of Liability on Subscription to Stock.**§ 125. — Stock Issued for Unauthorized or Insufficient Consideration.**

When creditor has sued corporation to judgment, and had execution returned unsatisfied, he may proceed in equity to compel payment by stockholders who have surrendered stock and taken assets of corporation instead, and stockholder who has paid subscription with property at inflated value may be subjected by such a creditor likewise. *Bellview Cemetery Co. v. Faulks* (Ala.), 73 So. 927.

§ 130. Actions to Enforce Liability.**§ 144. — Pleading.**

Creditor of corporation, suing stock-

holders to enforce liability for amount they owe company through having paid subscriptions with property at inflated value, is not required to plead his right, title or claim more clearly than to state facts with reference to acts subjecting stockholders to liability. *Bellview Cemetery Co. v. Faulks* (Ala.), 73 So. 927.

§ 146½. — Execution and Enforcement of Judgment.

The complaint, in a suit to cancel deeds, for an accounting, etc., alleged that in 1907 defendant J. began negotiations with a judgment creditor of a realty corporation, in which orator owned stock, for the purchase of the judgments, and purchased them for himself and E., and that, pursuant to the purchase, the judgment creditor transferred the judgments to a bank in trust for J. and E., but that such transfer was not recorded, and that, when executions were issued upon the judgments under which orator's stock in the realty company was sold, the judgment creditor had no interest in the same, but that, in transferring the stock to the bank for the use of J. and E., the latter's intention was to consummate the fraud practiced on the realty company by depriving it of its property, by having execution issued on the judgment and levied on orator's stock, and purchasing it at the sale, in order to prevent orator as a stockholder of the realty company from suing in its behalf to recover the proceeds of the sale of the realty company's property, so that, if orator was released from an insane asylum in which he was, and attempted to file a suit as a stockholder of the company he could not do so. The complaint further alleged that J. as president and E. as secretary of the realty company executed in April, 1906, a deed to J. conveying to him all of the realty company's property, and that there was a stockholders' meeting at which a resolution was unanimously passed authorizing the deed sought to be canceled, but that orator did not vote for such resolution or authorize a sale, and his stock was not represented at the stockholders' meeting, and that the property sold was of a value greatly in excess of anything

paid for it. Held, that the complaint did not sufficiently allege fraud by J. and E. in procuring the issuance of execution under which complainant's stock was sold, so that a demurrer thereto was properly sustained. *Harton v. Johnston*, 186 Ala. 247, 65 So. 47.

Requisites and Validity in General.—Code 1907, §§ 3463, 3464, 3478, 3481, construed together, held to contemplate that if election of corporate directors is not held on the designated date, the election may be held within a reasonable time thereafter. *Walsh v. State (Ala.)*, 74 So. 45.

VI. OFFICERS AND AGENTS.

(A) ELECTION OR APPOINTMENT, QUALIFICATION AND TENURE.

§ 148. Election of Directors.

Where the charter of a corporation provides that annual meetings of stockholders shall be held for the election of officers and directors, the directors can not by a change in by-laws so change the time of holding the annual election as to have the effect of continuing themselves in office, against the will of the majority of stockholders. *Walsh v. State (Ala.)*, 74 So. 45.

That ownership of some of the corporation stock was in litigation, and some had been bought in by the corporation to enforce its statutory lien thereon for debt of a stockholder, was no good reason why the annual election should not be held, and the stockholders entitled to participate therein given the opportunity to express a choice for officers. *Walsh v. State (Ala.)*, 74 So. 45.

Conduct of Election and Count of Votes.—The right to hold annual elections for directors of a corporation and to vote at such elections is inherent in ownership of stock; and a stockholder can not be deprived thereof on allegation that he proposes to use his legal rights for purposes to detriment of the corporation in opinion of other stockholders. *Walsh v. State (Ala.)*, 74 So. 45.

The stock purchased by the corporation to enforce its statutory lien becomes treasury stock, and, as such, is not en-

titled to be voted. *Walsh v. State (Ala.)*, 74 So. 45.

§ 150. Appointment of Agents.

A corporation may confer authority by appointment or vote without the use of a seal. *Alabama Fidelity, etc., Co. v. Jefferson County Sav. Bank (Ala.)*, 73 So. 918.

§ 151. De Facto Officers and Agents.

Necessity for Office.—There can not be de facto officer of corporation, there being no corresponding office in existence. *Kramer v. State (Ala. App.)*, 75 So. 185.

Attempt to Create New Office.—Directors of corporation having only powers given by by-laws, and being so authorized only to fill certain offices, can not create another office; and one attempted to be appointed thereto is not de jure officer. *Kramer v. State (Ala. App.)*, 75 So. 185.

No de facto office results from any attempt of directors of corporation without authority to create office. *Kramer v. State (Ala. App.)*, 75 So. 185.

§ 155. Removal.

A director can not be suspended or removed from office until the end of his term, at least without cause, and if unlawfully removed from office, he is entitled to be reinstated in an appropriate action to test the title to the office of director. *Walsh v. State (Ala.)*, 74 So. 45.

(B) AUTHORITY AND FUNCTIONS.

§ 159. President.

The president of a corporation has no greater power by virtue of his office than any other director, except that he presides over meetings of the board, and his implied powers depend on the nature of the business of the corporation and the powers delegated to him by the board of directors. *Clark v. Minge*, 187 Ala. 97, 65 So. 832.

The treasurer of a corporation has the custody of its funds and the president as such has no implied power to collect money due the corporation; but it is the duty of the treasurer to receive corpo-

rate funds and collect debts. *Clark v. Minge*, 187 Ala. 97, 65 So. 832.

§ 159½. Treasurer.

The treasurer of a corporation has the custody of its funds, and it is his duty to receive corporate funds and collect debts. *Clark v. Minge*, 187 Ala. 97, 65 So. 832.

(C) RIGHTS, DUTIES, AND LIABILITIES AS TO CORPORATION AND ITS MEMBERS.

§ 162. Compensation.

Duration.—An assistant secretary of a corporation, elected by the board of directors and subject to removal by it, who voluntarily abandons his office, can not recover salary accruing thereafter. *Birmingham Realty Co. v. Hale* (Ala. App.), 78 So. 723.

§ 163. Management of Corporate Affairs in General.

Directors.—With respect to particular acts within their authority and subject to their discretion, directors are not liable to the corporation so long as they act in good faith and without gross negligence. *King v. Livingston Mfg. Co.*, 192 Ala. 269, 68 So. 897.

Same.—Liability for Gross Negligence.—Where the directors of a corporation wholly neglect the conduct of its affairs and leave it entirely to inexperienced agents, they are grossly negligent, and are liable for loss resulting from the breaches of trust or negligence of such agents. *King v. Livingston Mfg. Co.*, 192 Ala. 269, 68 So. 897.

Stockholders.—It is not the duty of corporate stockholders to investigate the management of the corporation, and they will not be held to have acquiesced in acts of mismanagement by the directors unless they had knowledge thereof. *King v. Livingston Mfg. Co.*, 192 Ala. 269, 68 So. 897.

§ 164. Corporate Property, Funds, and Securities.

Conversion.—A president and principal stockholder of a corporation has no authority to accept, in payment for goods of the corporation, his individual

note held by the purchaser, and he and the purchaser, if he had knowledge of the facts, are liable in conversion. *Wood v. Hendon* (Ala. App.), 77 So. 921.

§ 166. Individual Profits or Benefits from Corporate Business.

The president of an insolvent corporation could not, in good faith, sell its property to himself, since the corporation's interests and his own were antagonistic. *Bowdon Lime Works v. Moss*, 14 Ala. App. 433, 70 So. 292.

Where the plant and machinery of an insolvent corporation were turned over in satisfaction of a debt, the creditor was not thereby authorized to ratify the previous act of the president of the corporation in selling certain property to himself. *Bowdon Lime Works v. Moss*, 14 Ala. App. 433, 70 So. 292.

§ 167. Fraud as against Corporation or Shareholders.

Where the directors of a corporation knowingly accept the benefit of the fraud of an agent of the corporation in selling stock, they are liable for the fraud. *King v. Livingston Mfg. Co.*, 192 Ala. 269, 68 So. 897.

Directors of a corporation who fail to inform stockholders of the corporation's insolvency before inviting them to purchase new stock are guilty of fraudulent concealment. *King v. Livingston Mfg. Co.*, 192 Ala. 269, 68 So. 897.

§ 169. Actions between Shareholders and Officers or Agents.

§ 169 (½) In General.

Where the president of a corporation fraudulently sold land to the corporation for three times its value, took a mortgage thereon, executed by himself and the secretary to himself, carried on the business of the corporation until it failed, and then foreclosed the mortgage under a power of sale, becoming himself the purchaser of the property on which had been erected a building with the corporation's money at an expense greatly exceeding the value of the lot, stockholders, suing in behalf of all the stockholders, were entitled to have the foreclosure sale set aside and have an ac-

counting where they offered to pay the reasonable value of the land, since the general rule that a party can not affirm a contract in part and rescind it in part upon the ground of fraud is not without limitation. *Peerson v. Gray*, 184 Ala. 312, 63 So. 467.

§ 169 (3) Action by Single or Minority Stockholders.

Minority stockholders can maintain a suit against the directors of the corporation for a wrongful diversion of its funds and transfer of its assets to a consolidated corporation, in fraud of the rights of those stockholders unless the relief sought is foreclosed by the procedure adopted in forming a new corporation, either de facto or de jure. *Alabama Fidelity Mortg., etc., Co. v. Dubberly* (Ala.), 73 So. 911.

Failure of Action by Corporation and Demand that Action Be Brought.—Minority stockholders can maintain a bill to set aside acts of the directors for fraud, without showing a request for redress by the corporation, where the directors owned a majority of the stock, so that such a request would have been unavailing. *Alabama Fidelity Mortg., etc., Co. v. Dubberly* (Ala.), 73 So. 911.

Where the directors whose acts are complained of are in control of the corporation, a stockholder need not apply to them for relief before bringing suit in his own name to enforce their liability to the corporation. *King v. Livingston Mfg. Co.*, 192 Ala. 269, 68 So. 897.

§ 169 (4) Bill, Petition or Complaint in General.

Offer to Do Equity.—A bill by stockholders of a corporation on behalf of all the stockholders against its president, alleging that he as president purchased land from himself at three times its value, giving a mortgage for the purchase price, erected a building thereon with the money of the corporation, and then foreclosed the mortgage, becoming the purchaser himself, asking that the mortgage be canceled, and offering to pay the reasonable value of the property to be ascertained by the court, sufficiently of-

fered to do equity and was not demurrable on that ground. *Peerson v. Gray*, 184 Ala. 312, 63 So. 467.

Allegation of Authority of Officer.—A letter written by the general manager of a corporation to a stockholder announcing a dividend, and falsely reporting large earnings, was presumptively within the scope of his authority, and it is not necessary to allege his authority. *King v. Livingston Mfg. Co.*, 192 Ala. 269, 68 So. 897.

VII. CORPORATE POWERS AND LIABILITIES.

(A) EXTENT AND EXERCISE OF POWERS IN GENERAL.

§ 179. Scope of Corporate Power in General.

Powers not expressly granted to a corporation or powers not necessarily incidental to those expressly granted are without corporation's power. *Alabama Red Cedar Co. v. Tennessee Valley Bank* (Ala.), 76 So. 980.

Under Act Oct. 1, 1903 (Acts 1903, p. 342) § 5 (Code 1907, § 3573), enumerating the powers conferred upon a corporation created thereunder, only those powers, with the powers necessarily implied therefrom, may be exercised by such corporation. *Fairhope Single Tax Corp. v. Melville*, 193 Ala. 289, 69 So. 466.

There is no clearly defined principle of law which determines whether a particular act is ultra vires or not, and the courts have gradually enlarged the implied powers of ordinary corporations, until they may do almost anything that an individual may do, provided the state and its stockholders and creditors do not object. *Sales-Davis Co. v. Henderson-Boyd Lumber Co.*, 193 Ala. 166, 69 So. 527.

§ 179 1/2. Powers Incident to Execution of Those Granted.

Employment of physician by sawmill corporation to look after health of employees is not in violation of Const. 1901, § 233, since it merely is a means of executing its express powers. *Jackson Lumber Co. v. Trammell* (Ala.), 74 So. 469.

§ 188. Effect of Acts Ultra Vires in General.

Strictly speaking, a corporate act is said to be "ultra vires" when it is not within the scope of the powers of the corporation to perform it under any circumstances or for any purpose. *Buck Creek Lumber Co. v. Nelson*, 188 Ala. 243, 66 So. 476, cited in note in *L. R. A.* 1917A, 771; *Mobile Fish, etc., Co. v. Craft*, 197 Ala. 147, 72 So. 399.

Acts or contracts of or for corporation outside powers granted are ultra vires and void under *Const.* 1901, § 233. *Alabama Red Cedar Co. v. Tennessee Valley Bank* (Ala.), 76 So. 980.

§ 189. Ratification of Unauthorized Acts.

Acts within Power of Corporation. — Stockholders may, by ratification, render binding acts done which are within the powers of the corporation, but ultra vires its officers or of a mere majority of its stockholders, but they can not ratify acts ultra vires the corporation. *Alabama, etc., R. Co. v. Loveman Compress Co.*, 196 Ala. 683, 72 So. 311, cited in notes in *L. R. A.* 1917A, 783, 815, 891.

A contract beyond power of corporation can not be ratified by it. *Alabama Red Cedar Co. v. Tennessee Valley Bank* (Ala.), 76 So. 980.

Acts ultra vires the corporation because not authorized by its charter or necessarily incident to charter powers may not be ratified by stockholders under *Const.* 1901, § 233, providing that no corporation shall engage in any business other than that expressly authorized in its charter or articles of incorporation. *Alabama, etc., R. Co. v. Loveman Compress Co.*, 196 Ala. 683, 72 So. 311, cited in notes in *L. R. A.* 1917A, 783, 815, 891.

§ 191. Estoppel to Deny Corporate Powers.

There can be no estoppel to resist contract beyond power of corporation. *Alabama Red Cedar Co. v. Tennessee Valley Bank* (Ala.), 76 So. 980.

§ 193½. Legislative Regulation.

A "corporation" is but a convenience, a facility, possessing only the powers conferred upon it by the creator, and subject to the valid, appropriate meas-

ures of control, surveillance, and regulation which government may impose, to the anticipated or accepted advantage and welfare of the government, of the corporation, of its members, of the public, and of those otherwise affected by the corporation's activities. *Fairhope Single Tax Corp. v. Melville*, 193 Ala. 289, 69 So. 466.

§ 194½. Penalties for Wrongful Acts or Omissions.

Under Code 1907, § 4105, a corporation is not liable for failure to furnish a statement of a defendant's ownership of corporate stock to an officer levying execution, where it did not appear that defendant owned any stock whatsoever. *Roe v. Durham*, 195 Ala. 584, 71 So. 109.

(B) REPRESENTATION OF CORPORATION BY OFFICERS AND AGENTS.

§ 196. Actual or Apparent Authority.

Engineer's Power to Bind Corporation as Surety.—*Alexander v. Alabama Western R. Co.*, 179 Ala. 480, 60 So. 295. See the title CORPORATIONS, § 196, vol. 3, p. 534.

§ 198. Representation of Different Corporations or of Corporation and Individual by Same Person.

If president of a company receives goods knowing they are intended for the company, but turns them over to another company, of which he is also president, the first company is liable as for goods sold, notwithstanding the order by the president was intended for the latter company. *Oil-Well Supply Co. v. West Huntsville Cotton Mills Co.* (Ala.), 73 So. 899.

If the same persons, as directors of two different corporations, represent both in a transaction in which their interests are opposed, that transaction may be avoided by either company, or by a stockholder, without regard to the question of advantage or detriment. *Alabama Fidelity Mortg., etc., Co. v. Dubberly* (Ala.), 73 So. 911.

§ 199. Use of Corporate or Individual Name.

Signatures affixed to instrument do

not always control in determining whether it is that of corporation indicated or that of person signing name; so courts will look to whole instrument in determining same. *Bank v. Jordan* (Ala.), 74 So. 936.

A mortgage reciting that bank had caused instrument to be executed in its own name by H., its president, signed, "People's Savings Bank, H., President," and properly acknowledged as mortgage of bank, was that of the bank, and not of H. individually; the fact that name of H. was not preceded by word "by" and followed by "as president" not showing that mortgage was executed by H. individually. *Bank v. Jordan* (Ala.), 74 So. 936.

§ 203. Purchases, Sales and Warranties.

Purchase by General Manager.—The general manager of a corporation, actively and ostensibly at the head of its business, the principal line of which was wholesale groceries and advancing to farmers, could bind it by a purchase of fertilizers; this being germane to its general business. *Dadeville Union Warehouse, etc., Co. v. Jefferson Fertilizer Co.*, 194 Ala. 683, 69 So. 918.

§ 210. Wrongful Acts or Omissions.

Conspiracy.—To render a corporation liable for a conspiracy, it is necessary that any essential act which was agreed the corporation's agent should do must be done by the agent acting for corporation and within the line and scope of his employment, and in the prosecution of the corporation's business. *National Park Bank v. Louisville, etc., R. Co.* (Ala.), 74 So. 69.

To render a corporation liable for damages caused by a conspiracy in which it participated, it is not necessary that the officers or agents through whom it acted had authority to perform all the acts done in execution of the conspiracy, or agreed to be performed by the other conspirators. *National Park Bank v. Louisville, etc., R. Co.* (Ala.), 74 So. 69.

Slander.—Unless a corporation directs one of its officers to utter the very words, it is not liable for slander uttered in the discharge of his duties. *Republic Iron, etc., Co. v. Self*, 192 Ala. 403, 68

So. 328, L. R. A. 1915F, 516, cited in note in *Ann. Cas.* 1917D, 972.

Abusive and Insulting Language.—Where the manager of defendant's store, in reply to plaintiff's statement that he would take money off a dead man's eyes, used abusive and insulting language and told her to leave the premises, defendant was not liable; the abusive language not being incident to the manager's duties. *Republic Iron, etc., Co. v. Self*, 192 Ala. 403, 68 So. 328.

Wrongful Discharge of Employee.—A corporation will not be liable for the wrongful discharge of an employee by its general manager, unless it afterwards ratifies it. *Birmingham Realty Co. v. Hale* (Ala. App.), 78 So. 723.

Killing Employee.—Where the general agent or manager of defendant corporation in the work of constructing a railway shot and killed an employee after termination of a quarrel over whether the employee had performed his contract to build a part of the road, defendant company was not liable for its manager's act, since it was not in the line of his employment and duties. *Wells v. Henderson Land, etc., Co.* (Ala.), 76 So. 28.

An independent contractor, who does work in his own way, is not an agent within the rule holding a corporation answerable for the willful wrong of its agents done in the line and scope of their authority or employment. *Western Railway v. Turrentine*, 197 Ala. 603, 73 So. 40.

§ 212. Estoppel to Deny Authority or Acts in General.

Failure of corporation to protest when a bank called to its attention the fact that it was holding stock as collateral, and that a corporate officer had informed it that the corporation had no claims against the stock, did not estop the corporation from claiming prior liens, where the bank was not lulled into nonaction nor prejudiced, and could not have enforced collection in any other method than it pursued in attempting to sell the stock; the debtor being insolvent. It is essential to an estoppel that one party has been induced by the declaration or conduct of another to act or desist from acting to his detriment. *Mobile Towing,*

etc., *Co. v. First Nat. Bank (Ala.)*, 78 So. 797.

§ 213. Ratification and Repudiation.

In General.—Stockholders may, by ratification, render binding acts done which are within the powers of the corporation, but ultra vires its officers or of a mere majority of its stockholders, but they can not ratify acts ultra vires the corporation. *Alabama, etc., R. Co. v. Loveman Compress Co.*, 196 Ala. 683, 72 So. 311, cited in notes in *L. R. A.* 1917A, 783, 815, 891.

Necessity of Formal Act.—Since delegation of authority by corporation to write bond need not necessarily be by sealed writing, ratification of agent's act in signing bond need not be by sealed writing. *Alabama Fidelity, etc., Co. v. Jefferson County Sav. Bank (Ala.)*, 73 So. 918.

Silence of a corporation when a letter written by an officer was brought to its attention, as far as ratification was concerned, could not extend beyond the act itself. *Mobile Towing, etc., Co. v. First Nat. Bank (Ala.)*, 78 So. 797.

Acceptance of Benefits.—A corporation which accepts the benefits of a contract made by an officer without authority is estopped to deny authority of such agent or officer if the contract is within charter powers. *Alabama Fidelity, etc., Co. v. Jefferson County Sav. Bank (Ala.)*, 73 So. 918.

While acceptance of consideration of unauthorized contract without knowledge of its terms is not alone ratification, yet, where corporation had full notice of a bond issued by its agent and received the premium, retaining it for two months, there was sufficient proof of ratification. *Alabama Fidelity, etc., Co. v. Jefferson County Sav. Bank (Ala.)*, 73 So. 918.

§ 214. Notice to Officer or Agent as Affecting Corporation.

Knowledge Derived from Officer's Individual Interest or Business.—Private individual knowledge of officer of corporation, acquired in transaction of his own business, while dealing as if he had no official relation to corporation, will

not operate as notice to corporation. *Bank v. American Nat. Bank (Ala.)*, 75 So. 310.

§ 215. Evidence as to Authority.

§ 215 (1) Presumptions as to Authority in General.

The authority of the local manager of a corporation to ratify the acts of inferior agents in detaining plaintiff may be inferred from the fact that he was in exclusive charge of its local business. *Alabama Fuel, etc., Co. v. Rice*, 187 Ala. 458, 65 So. 402.

§ 215 (5) Admissibility and Competency in General.

Parol Evidence.—Whether the general manager of a corporation, undertaking to execute conveyances for it, had proper authority to that end, was a matter of proof aliunde the conveyances. *Dothan Lumber Co. v. Bell Lumber Co.*, 193 Ala. 399, 69 So. 419.

Evidence that certain persons had previously acted in the same capacity on the premises of the defendant corporation is admissible to show their agency, if such acts were of such frequency and notoriety as to justify the inference that they were known to or acquiesced in by the corporation. *Alabama Fuel, etc., Co. v. Rice*, 187 Ala. 458, 65 So. 402.

§ 215 (8) Weight and Sufficiency.

An order for goods written upon stationery of a company, and signed "Pratt, President," is not conclusive evidence that the order is for the company. *Oil-Well Supply Co. v. West Huntsville Cotton Mills Co. (Ala.)*, 73 So. 899.

Authority of President.—In view of Code 1907, § 5303, recognizing the president of a corporation as its official head, evidence on a trial against the president of a land company and against the company that the president was president of a hotel company, that he had granted concessions to sell wares on the property of the land company and the streets laid out by it, that in the controversy leading to his assault of plaintiff he declared that he was in charge of the property, and ordered plaintiff off, and directed a concessionee to lead plaintiff's

wagon off the defendant's property; that in all sales made by the president the sale of "things" on its property or on the streets was forbidden, warranted the inference that he was president of the land company, and that in ejecting plaintiff he was acting in the scope of his authority to protect its property and concessions and was about its business, so as to make it liable for his assault. *Hart v. Jones*, 14 Ala. App. 327, 70 So. 206.

Authority of Agent.—In an action for the agreed price for grading a spur railroad track under an oral contract entered into with an agent of the company, evidence held to show that the contractor was justified in assuming that the agent had authority to make the contract. *St. Louis, etc., R. Co. v. Hall*, 186 Ala. 353, 65 So. 33.

Ratification of Act of Agent.—Evidence held to show that a corporation ratified its agent's act in signing a bond so as to make it liable to the obligee. *Alabama Fidelity, etc., Co. v. Jefferson County Sav. Bank (Ala.)*, 73 So. 918.

§ 216. Questions for Jury as to Authority.

In an action against a corporation for breach of contract, the issue of fact as to whether the contract was made by defendant's representative authorized to bind the corporation was for the jury. *Sloss-Sheffield Steel, etc., Co. v. Payne*, 186 Ala. 341, 64 So. 617.

(C) PROPERTY AND CONVEYANCES.

§ 221. Conveyances by Corporations.

§ 224. — Execution.

Conveyances executed for and in the name of a corporation by its general manager were not void on their face, if the general manager had proper authority to that end. *Dothan Lumber Co. v. Bell Lumber Co.*, 193 Ala. 399, 69 So. 419.

A deed of "Big Hillabee Power Company," purporting on its face to be the deed of the company, and reciting that in witness the grantor had set its hand and seal and delivered it by its president, signed, "L. W. Roberts, Pres't Big

Hillabee Power Co.," was the deed of the company, since any defect in the signature was such as a court of equity would not permit to defeat the right of the grantee. *Nolen v. Henry*, 190 Ala. 540, 67 So. 500.

§ 226. Effect of Conveyances and Transactions Ultra Vires.

A contract between two corporations, to bind either of them, must be within the powers of both. *Sales-Davis Co. v. Henderson-Boyd Lumber Co.*, 193 Ala. 166, 69 So. 527.

Contract for Exemption from Liability.

—A contract between railroad company and corporation, whereby the railroad company is to be held harmless for negligent fires in consideration of the use of a part of its right of way in connection with the corporation's business, is void as ultra vires, it not being authorized by the corporation's charter. *Alabama, etc., R. Co. v. Loveman Compress Co.*, 196 Ala. 683, 72 So. 311, cited in notes in *L. R. A.* 1917A, 783, 815, 891.

(D) CONTRACTS AND INDEBTEDNESS.

§ 228. Contracts before Incorporation or Organization.

Quasi Ratification of Act of Promoters.

—A corporation, to be bound by the acts of its promoters, must do some act making their contract binding on it; strictly speaking, it can not ratify the contract, because ratification implies at least the existence of a person or thing in whose behalf the contract might have been made when it was made. *Stone v. Walker (Ala.)*, 77 So. 554.

§ 228½. Restrictions on Power to Contract.

Under Code 1907, § 3481, subd. 3, defining the powers of corporations, a corporation may make a contract for necessary or reasonable insurance on plant and property. *Sales-Davis Co. v. Henderson-Boyd Lumber Co.*, 193 Ala. 166, 69 So. 527.

§ 230. Formal Requisites in General.

Proper Form.—A contract purporting to be executed by a corporation is in

proper form if subscribed by it (naming it) by its agent (naming him), and concluding, "In witness whereof (it) (naming it), by its agent, has hereunto set its seal, and the said agent hath hereunto subscribed his name." *Amerson v. Corona Coal, etc., Co.*, 194 Ala. 175, 69 So. 601.

Limitation of Powers of Officers and Agents.—Under Code 1907, § 3446, subd. 10, relating to the mode of incorporation, and not to the charter powers of corporations, providing that the certificate of incorporation may contain such other provisions as the incorporators may include for the conduct of its affairs, its directors and stockholders, a provision therein that the contracts of the corporation should be in writing, signed by its president and countersigned by its treasurer, was not a limitation upon its charter powers, but was in effect a by-law or regulation, not affecting the validity of contracts otherwise executed with persons without actual or imputed knowledge thereof; its liability in such case being one of agency as affected by the apparent scope of the authority of the agent acting for it. *Buck Creek Lumber Co. v. Nelson*, 188 Ala. 243, 66 So. 476, cited in note in L. R. A. 1917A, 771.

§ 231. Necessity of Writing.

Evidence Not Showing Writing. — In an action on an account due a corporation and claimed to have been assigned to a bank as collateral, evidence held not to show any written transfer thereof to plaintiff bank. *Clanton Bank v. Robinson*, 195 Ala. 194, 70 So. 270.

§ 232. Contracts under Seal.

Necessity of Seal.—The corporate seal need not be attached to a corporate contract, unless a similar contract when made by an individual would require a seal. *Alabama Fidelity, etc., Co. v. Jefferson County Sav. Bank (Ala.)*, 73 So. 918.

Effect of Seal.—Presence of its seal on a contract, purporting to be executed by a corporation, established it *prima facie* as its act dispensing with proof of its execution by proper and authorized offi-

cers. *Amerson v. Corona Coal, etc., Co.*, 194 Ala. 175, 69 So. 601.

§ 249. Mortgages and Trust Deeds by Corporation.

§ 250. — Form, Requisites, and Validity.

In General.—*Trammell v. Mower*, 182 Ala. 347, 62 So. 528. See the title CORPORATIONS, § 250, vol. 3, p. 555.

Consent or Ratification of Stockholders.—*Trammell v. Mower*, 182 Ala. 347, 62 So. 528. See the title CORPORATIONS, § 250, vol. 3, p. 555.

Under Code 1907, § 3481, subd. 3, providing that no bonded indebtedness of a corporation shall be created or increased nor its real property mortgaged except by the consent of the holders of the majority of the stock, the bill in a suit to set aside a purchase-money mortgage given without the consent of stockholders or directors by the president and secretary was not demurrable on the ground that such consent was unnecessary. *Peerson v. Gray*, 184 Ala. 312, 63 So. 467.

Same—Waiver of Statutory Provision.

—Code 1907, § 3481, providing that the real property of a corporation shall not be mortgaged except by consent of the majority of the capital stock by vote at a meeting called for that purpose, or at a regular meeting, is for the benefit of shareholders and may be waived by them; and an authorization by all the stockholders, though irregularly expressed, of a mortgage on its real property, was a waiver of the provision; the fact that the mortgage covered only a part of its property not affecting the mortgagee's security. *Hillcrest Land Co. v. Foshee*, 189 Ala. 217, 66 So. 478.

Resolution Authorizing Mortgage. — On a bill to foreclose a mortgage executed by a corporation, a resolution of its directors approved by its stockholders that the corporation borrow a certain amount to be evidenced by three notes with interest, etc., secured by a first mortgage on all its then-owned and after-acquired property, with certain exceptions, the notes and mortgage to be executed in the name of the corporation

by its vice president and attested by its secretary, and notes to be negotiable, and the notes and mortgage to contain provisions satisfactory to the mortgagee, in view of the intended partial reorganization of the company, fully understood by a majority of the board, notwithstanding it was not understood by a minority, authorized a mortgage to secure a pre-existing indebtedness, and not an actual loan. *Stuart v. Holt (Ala.)*, 73 So. 390.

§ 257. Rights and Liabilities on Contracts and Securities Ultra Vires.

Misapplication of Proceeds—Rights of Mortgagee.—Where a corporation authorized to negotiate a loan for its own purposes mortgaged its property to one who, in good faith, paid his money to it without knowledge or notice of a previously formed design on the part of its officers to use the proceeds for the benefit of a stockholder, the mortgage was not ultra vires, so as to deprive the lender of his mortgage rights, as, strictly speaking, a corporate act is said to be "ultra vires" when it is not within the scope of the power of the corporation to perform it under any circumstances, or for any purpose. *Hillcrest Land Co. v. Foshee*, 189 Ala. 217, 66 So. 478.

(E) TORTS.

See ante, "Wrongful Acts or Omissions," § 210.

§ 258. Nature and Grounds of Corporate Liability.

Corporation Can Not Commit Slander.—*McIntire v. Cudahy Packing Co.*, 179 Ala. 404, 60 So. 848, cited in note in Ann. Cas. 1917D, 972. See the title CORPORATIONS, § 258, vol. 3, p. 561.

§ 260. Scope of Authority or Employment.

Slander.—*Interstate Amusement Co. v. Martin*, 8 Ala. App. 481, 62 So. 404, cited in note in L. R. A. 1916E, 777. See the title CORPORATIONS, § 260, vol. 3, p. 563.

§ 261. Willful or Malicious Act.

A corporation is liable for the act of its agent who, in the course of his em-

ployment, though unnecessarily and with malice, assaulted and beat plaintiff. *Alabama Fuel, etc., Co. v. Rice*, 187 Ala. 458, 65 So. 402.

In an action against a corporation for wanton injuries, caused by blasting by its servants acting in the line and scope of their authority, it is not necessary to show knowledge or participation on the part of the corporation. *Birmingham Realty Co. v. Thomason*, 8 Ala. App. 535, 63 So. 65.

§ 262½. Conspiracy.

An action may be maintained against a corporation for damages caused by a conspiracy in which it participated. *National Park Bank v. Louisville, etc., R. Co. (Ala.)*, 74 So. 69.

(F) CIVIL ACTIONS.

§ 266. Constitutional and Statutory Provisions.

Code 1907, § 5303, declaring that when suit is against a corporation summons may be executed by delivery of a copy of the summons and complaint to the president or other head thereof, etc., which applies equally to foreign and domestic corporations, is not in violation of those constitutional and statutory provisions fixing the venue of actions against corporations. *Southern R. Co. v. Goggins (Ala.)*, 73 So. 958.

Code 1907, § 6112, relating to venue of actions against corporations for personal injuries, does not affect the nature or measure of liability, but only the form or forum of its enforcement, and does not violate either Const. U. S. Amend. 14 or Const. 1901, § 22, forbidding grants of special privileges or immunities, or Const. 1901, § 240, giving all corporations the right to sue and be sued in all courts as natural persons. *Hatcher v. Southern R. Co.*, 191 Ala. 634, 68 So. 55.

§ 267. Venue.

See ante, "Constitutional and Statutory Provisions," § 266.

County Where "Doing Business by Agent."—A railroad company had formerly maintained a depot in C. county, and, though at the time a suit was filed no station agent was employed there,

the building was still used by the public for the storage of freight and for the convenience of passengers. Trains stopped there, and the company's agents and servants delivered and received freight and accepted and discharged passengers; the charges on freight delivered being prepaid, and that on freight received being collected at destination, and the fares for passengers being collected on the train. Held, that the company was "doing business by agent" in such county within Code 1907, § 6112, providing that corporations may be sued in any county in which they do business by agent. *Louisville, etc., R. Co. v. Dawson*, 14 Ala. App. 272, 68 So. 674.

Actions for Personal Injuries.—Under Code 1907, § 6112, providing that a foreign or domestic corporation may be sued in any county in which it does business by agent, but all actions for personal injuries must be brought in the county where the injury occurred, or in the county where the plaintiff resides, if the corporation does business by agent in that county, an action against a corporation for personal injuries may be brought in the county in which the injury occurred, though the corporation does not do business therein by agent. *American Coal Corp. v. Roux*, 192 Ala. 574, 68 So. 970.

Same—Ejection of Passenger.—Under Code 1907, § 6112, relating to venue of suits against corporations for personal injuries, held, that action for ejection from train and consequent humiliation, etc., occurring in S. county, where plaintiff resided, could not be brought in J. county. *Hatcher v. Southern R. Co.*, 191 Ala. 634, 68 So. 55.

Action for Penalty.—Under Code 1907, §§ 6110, 6112, an action against a corporation for failure to enter satisfaction of a mortgage must be brought in the county where the mortgage is recorded. *Drennen Motor Car Co. v. Evans*, 192 Ala. 150, 68 So. 303.

§ 268. Use of Corporate Name.

Sufficiency of Designation.—*Southern R. Co. v. Hayes*, 183 Ala. 465, 62 So. 874. See the title CORPORATIONS, § 268, vol. 3, p. 566.

§ 270. Process and Notice.

Service of summons on "H. H. Hitt, of Hitt Lumber Company," showed service on H. H. Hitt individually; the words "of Hitt Lumber Company" being mere *descriptio personae*. *Hitt Lumber Co. v. Turner*, 187 Ala. 56, 65 So. 807.

§ 272. Attachment and Garnishment.

A letter written by the agent of the corporation garnished can not be held to be the answer of the corporation sufficient to support judgment against the garnishee on its admission of an indebtedness to defendant, where it did not bear an affidavit reciting that the writer was the duly authorized agent of the corporation to make such answer. *Hutson v. Illinois Cent. R. Co.*, 186 Ala. 456, 65 So. 62.

§ 275. Pleading.

§ 276. — In General.

Authority of Agent.—A declaration, one count of which alleged that the defendant corporation, acting through its duly authorized agents, naming them, made the agreement sued on, and the other count of which alleged that the president of the corporation, acting as president, for the corporation, ratified the agreement, sufficiently avers in each count the authority of the agents to bind the corporation. *Southern States Fire, etc., Ins. Co. v. Lunsford*, 192 Ala. 76, 68 So. 273.

§ 277. — Allegation and Denial of Corporate Existence.

§ 277 (1) In Action by Corporation.

Necessity for Allegation.—A plaintiff corporation need only describe itself in the complaint as a body corporate without alleging facts constituting it a body corporate. *Head v. Robinson, etc., Co.*, 191 Ala. 352, 67 So. 976.

§ 277 (2) In Action against Corporation.

Plea of nul tiel corporation is a good plea in bar. *Ashurst v. Arnold-Henegar-Doyle Co. (Ala.)*, 78 So. 386.

In an action against a master for an assault and battery committed by his superintendent, where an amendment, already allowed, correctly gave the name of the corporation defendant, as affirmed

by its plea, its plea nul tiel corporation was properly stricken. *Central Foundry Co. v. Laird*, 189 Ala. 584, 66 So. 571.

§ 278. — Defense of Ultra Vires.

Ultra Vires—Demurrer.—In an action by a lumber company, member of a lumberman's insurance association, to recover of another member the proportion due from defendant on a policy issued to plaintiff by the association by one holding a power of attorney in fact from the defendant, the question whether the exercise of such power of attorney by defendant was ultra vires, which could be determined only by consideration of the several charters under the laws of the respective states granting incorporation to the members of the association, could not be tested by demurrer. *Sales-Davis Co. v. Henderson-Boyd Lumber Co.*, 193 Ala. 166, 69 So. 527.

§ 280. — Signature, Verification and Accompanying Affidavits.

Verification.—Under Code 1907, § 3969, the plea of nul tiel corporation must be verified, and failure to verify as required thereby renders the plea defective and subject to demurrer. *Ashurst v. Arnold-Henegar-Doyle Co.* (Ala.), 78 So. 386.

§ 281. — Issues, Proof and Variance.

A corporation can only act through its officers, agents, or employees, and an allegation that a corporation directed an assault is supported by proof of an assault by its officers while acting in its behalf. *Hart v. Jones*, 14 Ala. App. 327, 70 So. 206.

The defense of ultra vires is not available to a corporation in an action on a contract made by its agents, unless it is specially pleaded. *Southern States Fire, etc., Ins. Co. v. Lunsford*, 192 Ala. 76, 68 So. 273.

§ 283. Trial.

Question for Jury.—Where fragments of rock were thrown upon adjoining premises by blasting carried on by the servants of a corporation, which was continued after the company had notice of the injury, it was at least a question for the jury whether the company insti-

gated the trespass if it was not shown as a matter of law. *Ex parte Birmingham Realty Co.*, 183 Ala. 444, 63 So. 67.

§ 284. Judgment or Decree.

A default judgment against a defendant corporation can not be sustained; the record failing to show that proof was made that the person served with summons was, at the time of service, such an officer or agent of the corporation as was by law authorized to receive service on its behalf. *Rarden Mercantile Co. v. Hart*, 186 Ala. 513, 65 So. 327.

VIII. INSOLVENCY AND RECEIVERS.

§ 288. What Constitutes Corporate Insolvency.

A corporation which has sufficient property subject to legal process to satisfy all demands is not insolvent so as to authorize a receivership, though it may not have money on hand to meet its liabilities as they mature, and is unable to obtain credit. *Cassels Mills v. First Nat. Bank*, 187 Ala. 325, 65 So. 820.

§ 289. Conveyances When Insolvent or in Contemplation of Insolvency.

Transfer to Stockholders—Right of Corporation to Purchase Its Own Stock.—Transfers of property made by a corporation to one of its directors as consideration for the purchase of its stock held by him at a time when the corporation was insolvent, the amount of property transferred being nearly one-half of the assets of the corporation, were but gifts to the director, and therefore fraudulent in law and void, without regard to the question of intent. *Henderson v. Garner* (Ala.), 75 So. 387.

Where an insolvent corporation purchases its own stock and pays therefor out of the assets, creditors may recover the value of payments received where the stockholders sold with knowledge of the corporation's insolvency and with intent to delay creditors, for the transaction was a fraud upon creditors who were entitled to look to the assets of the corporation for payment, and this is also true though creditors do not rely upon the trust fund doctrine. *Sherrill v. Hutson*, 187 Ala. 189, 65 So. 538.

Where a director and stockholder of a corporation transfers his stock to corporation in exchange for corporate property, the stockholder, as director, will be presumed to have known that corporation was insolvent, and it would be against public policy to permit him to plead his ignorance and profit by his own want of knowledge when it was his duty to know. *Henderson v. Garner* (Ala.), 75 So. 387.

• **§ 291½. Remedies of Members or Stockholders in General.**

Where shareholders in a corporation with knowledge of its insolvency and with intent to delay creditors sell their shares to the corporation, the transaction is actually fraudulent and can be impeached by subsequent as well as existing creditors; but, when the transaction is not tainted with actual fraud, it is void only as to antecedent creditors. *Sherrill v. Hutson*, 187 Ala. 189, 65 So. 538.

§ 292. Remedies of Creditors in General.

Where complainant is creditor of two of merging corporations with prior lien as to some assets which went into merged corporation, he is creditor of latter within Code 1907, § 3509, making assets of insolvent corporations constitute trust fund for payment of creditors. *Alabama, etc., Railway v. Tolman* (Ala.), 76 So. 381.

Under Code 1907, § 3509, mere fact that corporation becomes insolvent does not instantly withdraw all assets from its management, so that they are no longer subject to execution or attachment, or paramount liens. *Standard Chemical, etc., Co. v. Faircloth* (Ala.), 77 So. 31.

§ 293. Creditors' Suits.

Jurisdiction of Equity—Remedy at Law Inadequate.—*Drennen v. Jenkins*, 180 Ala. 261, 60 So. 856. See the title CORPORATIONS, § 293 (4), vol. 3, p. 588.

§ 295. Appointment of Receiver.

§ 296. — Grounds.

§ 296 (1) In General.

The process of receivership is an ancillary remedy in aid of the primary object of litigation which must be of equit-

able cognizance, and a bill can not be maintained for the appointment of a receiver apart from some distinct ground of equitable relief. *Cassels Mills v. First Nat. Bank*, 187 Ala. 325, 65 So. 820.

§ 296 (2) Insolvency and Preference of Creditors.

On a bill by a creditor of a merging corporation in behalf of himself and other creditors against a consolidated corporation, alleging insolvency, and asking relief to the extent that the assets of the merging corporation became a trust fund, subject to be marshaled and distributed under Code 1907, § 3509, application was made for appointment of a receiver pendente lite. Pending a continuance of the cause, a bill was filed in the federal court against the corporation and a receiver appointed. The evidence on the hearing thereafter in the state court tended to establish the insolvency as alleged. Held, that a receiver was properly appointed. *Alabama, etc., Railway v. Tolman* (Ala.), 76 So. 381.

§ 296. — Parties on Application.

Simple Contract Creditors.— Under Code 1907, § 3509, providing that the assets of insolvent corporations constitute a trust fund for the payment of creditors, a simple contract creditor of an insolvent corporation may sue on behalf of himself and all other creditors for the appointment of a receiver and the collection of the assets; and where, after suit brought, other creditors obtain judgments and levy executions against the corporation, a supplemental bill by the creditor, setting out the facts and praying for an injunction to restrain proceedings under the judgments and executions, states a cause of action in equity. *Warren v. Kilgore*, 176 Ala. 476, 58 So. 432.

Debts Evidenced by Trust Deeds.— That the trust deeds securing complainant's debts are to the effect that a sale of the mortgaged property shall operate as a full satisfaction of the indebtedness secured, by the trust deed, can not defeat a bill and application for receiver pendente lite by complainant in behalf of himself and other creditors, not seeking any relief personally against the original corporations, or the consoli-

dated corporation, but only to have the court take possession of the mortgaged property and conserve it. *Alabama, etc., Railway v. Tolman (Ala.)*, 76 So. 381.

§ 299. — Proceedings.

One asking for receivership process must show that he has a right or interest in or to the subject-matter of the proposed receivership, or that it constitutes a special fund to which he has a right to resort. *Cassels Mills v. First Nat. Bank*, 187 Ala. 325, 65 So. 820.

Bill Not Showing Insolvency.—A bill seeking the appointment of a receiver for a corporation which was not filed on behalf of creditors generally, but sought relief for complainants alone, and, though expressing a doubt as to the value of the corporation's property being equal to its debts, alleged complainants' belief that the corporation was solvent if its property and assets were properly preserved and looked after, could not be sustained on demurrer as a bill under Code 1907, § 3509, providing that the assets of insolvent corporations constitute a trust fund for the payment of creditors, and may be marshaled and administered in courts of equity. *Cassels Mills v. First Nat. Bank*, 187 Ala. 325, 65 So. 820.

Same—Sufficiency in Absence of Demurrer or Resistance by Corporation.—A bill by simple contract creditors of a corporation for the appointment of a receiver which did not allege the corporation's insolvency nor facts from which insolvency might be reasonably inferred, but which alleged that the corporation's mill building constructed of highly inflammable material, which, with the machinery therein, constituted substantially all of its property, had been closed down and left without proper insurance, care, and protection, and was in constant danger of destruction by fire which might be communicated from locomotive engines passing with great frequency, would not have been sufficient as against a demurrer, but was not so defective as to be incurable by amendment, waiver, or course of proceedings between the parties, and hence was sufficient to support the appointment of a receiver, where the corporation neither demurred nor

resisted such appointment. *Cassels Mills v. First Nat. Bank*, 187 Ala. 325, 65 So. 820.

Where, in a creditor's suit for the appointment of a receiver for a corporation, the corporation on motion for a receiver appeared by counsel and stated that it would not resist the appointment or take any action whatever, it waived all amended defects in the bill so far as they might have affected the propriety of an order appointing a receiver and every objection to the proceeding save only that the court had not jurisdiction to make any order in the premises; and hence, where the bill was not so defective as to be incurable by amendment, the appointment of a receiver would be affirmed. *Cassels Mills v. First Nat. Bank*, 187 Ala. 325, 65 So. 820.

§ 301. — Effect.

The appointment of a receiver for a corporation does not dissolve the corporation. *Railroad Comm. v. Alabama, etc., R. Co.*, 185 Ala. 354, 64 So. 13.

§ 303. Priorities of Claims.

Creditor of corporation is not as matter of law chargeable with notice of insolvency of company, though managing officers of corporation who become creditors of it as such might be charged with such notice. *Standard Chemical, etc., Co. v. Faircloth (Ala.)*, 77 So. 31.

Insolvency of a corporation, under Code 1907, § 3509, merely authorizes marshaling of its assets in equity, and, if parties with knowledge of the facts after insolvency attempt to acquire a preference or priority of liens, the court will intervene to prevent them, but the same rule does not apply to a creditor or purchaser of the company's property without knowledge or notice of insolvency, or that the funds or property purchased or subjected to his debt were trust property, his rights acquired by a bona fide purchase by virtue of an attachment or garnishment being paramount to any rights of the other creditors, though the company was insolvent when the sale was made or attachment levied; there must be an intent or at-

tempt to acquire a preference or priority as to trust property before a court of equity will annul or set aside sales or attachment proceedings had in good faith without knowledge or notice of the trust relation. *Standard Chemical, etc., Co. v. Faircloth* (Ala.), 77 So. 31.

X. CONSOLIDATION.

§ 310½. Assent of Stockholders.

Stockholders, who participated in the meeting at which a consolidation agreement was adopted, and voted in favor thereof, are not estopped by such vote, or their subsequent acceptance of stock in the consolidated corporation, to attack the agreement for fraud of the directors, of which they were ignorant at the meeting. *Alabama Fidelity Mortg., etc., Co. v. Dubberly* (Ala.), 73 So. 911.

§ 311. Rights and Remedies of Dissenting Stockholders.

The right of stockholders of one of the constituent corporations, who consented to its consolidation, to have the consolidated corporation dissolved for fraud, of which they were ignorant, when they consented, is subordinate to the right of innocent stockholders of the consolidated corporation even though the protection of those rights deprives the former stockholders of their remedy in equity by dissolution, and leaves them only their remedy at law against the directors. *Alabama Fidelity Mortg., etc., Co. v. Dubberly* (Ala.), 73 So. 911.

§ 312. Status of Original and Consolidated Corporations.

"Merger" — "Consolidation." — Under Code 1907, §§ 3502-3508, providing for the merger or consolidation of corporations, "merger" is the absorption of a thing of lesser importance by a greater, whereby the lesser ceases to exist but the greater is not thereby increased, while a "consolidation" takes place when two or more corporations are extinguished and by the same process a new one is created, taking over the assets and assuming the liabilities of those passing out of existence. *Alabama, etc., Railway v. Tolman* (Ala.), 76 So. 381.

§ 315. Actions by or against Consolidated Corporation.

Under Code 1907, § 3509, providing that the assets of insolvent corporations constitute a trust fund for the payment of creditors which may be marshaled and administered in courts of equity, a merger or consolidated corporation may be sued for the debts and liabilities of the original corporations. *Alabama, etc., Railway v. Tolman* (Ala.), 76 So. 381.

Proceeding against Old Corporation.—Consolidated and merging corporations could be sued together, where it was sought to administer the assets of the original companies, only in so far as their assets had gone into the merged corporation. *Alabama, etc., Railway v. Tolman* (Ala.), 76 So. 381.

Code 1907, § 3506, relative to consolidation of corporations, does not relieve constituent corporations of liabilities, and creditor may, if he choose, proceed to judgment and execution against the old corporation. *Pearce v. Brilliant Coal Co.* (Ala.), 77 So. 4.

Limitations.—Code 1907, § 3516, does not require one suing corporation when it is consolidated with others to pursue action to judgment, execution, and satisfaction within five years under penalty of losing his entire claim or demand. *Pearce v. Brilliant Coal Co.* (Ala.), 77 So. 4.

XI. DISSOLUTION AND FORFEITURE OF FRANCHISE.

§ 316. Causes and Grounds in General.

See post, "In General," § 332 (1).

§ 317. Invalid or Fraudulent Corporation.

False Statement of Paid-In Capital.—*Floyd v. State*, 177 Ala. 169, 59 So. 280. See the title CORPORATIONS, § 317, vol. 3, p. 660.

§ 319. Nonuser or Surrender of Franchise.

A willful and persistent failure by a public service corporation to discharge its franchise duties is ground for forfeiting the franchise and dissolving the corporation. *State v. Birmingham Waterworks Co.*, 185 Ala. 388, 64 So. 23.

In view of Code 1907, § 3515, providing that five years nonuser shall forfeit the

franchise of corporations, the failure of the members of a corporation, organized to promote temperance and morality among its members and the community, to hold meetings or to do anything to further the purpose of the corporation, constitutes an abandonment of the corporate franchise, working a dissolution, and the dissolution must be held to have occurred at the time of the abandonment. *Mobile Temperance Hall Ass'n v. Holmes*, 189 Ala. 271, 65 So. 1020.

§ 330. Misuse of Franchise or Powers.

Under Code 1907, §§ 5453, 5465, authorizing an action to exclude such person from a franchise "when any person usurps, intrudes into, or unlawfully holds or exercises" any franchise, construed with § 5450, the state may maintain a proceeding to forfeit the franchise of a public service corporation for abuse of an existing franchise, as well as to prevent the unlawful assumption of a franchise. *State v. Birmingham Waterworks Co.*, 185 Ala. 388, 64 So. 23.

§ 332. Violation of Charter or Statute.

A municipality has implied power to prescribe reasonable conditions precedent to the exercise of the franchise of a public service corporation, the violation of which would authorize a revocation of the franchise; but mere regulations as to the future exercise of the franchise and of a commercial nature are generally deemed conditions subsequent, the violation of which is not a ground for forfeiture. *State v. Birmingham Waterworks Co.*, 185 Ala. 388, 64 So. 23.

§ 334. Insolvency or Nonpayment of Debts.

Power of Court of Equity.—While a court of equity may, where it appears beyond question that the continuation of a profitable business can not be had, decree dissolution of a corporation on petition by a minority of its shareholders, a court of equity has no power, though it appeared that the corporation had lost much money, to decree dissolution where it still had large assets, particularly as in the last year its income exceeded its expenses, notwithstanding it was contended that if dissolution was not decreed

the assets would depreciate so that they would be entirely lost. *Phinizy v. Anniston City Land Co.*, 195 Ala. 656, 71 So. 469.

§ 330. Proceedings to Enforce Dissolution or Forfeiture.

§ 331. — By or in Name of State or Public Officers.

A franchise granted to a public service corporation by a municipality by legislative authority, whether special or general, is granted by the state the same as if directly granted by the legislature, so that the abuse of such franchise may be punished by forfeiture in a suit by the state. *State v. Birmingham Waterworks Co.*, 185 Ala. 388, 64 So. 23.

While an ordinance granting a franchise to a public service corporation is subject to rescission by the municipality for breach in so far as it is contractual in its nature, in so far as it grants a franchise it can not without express authority be annulled by the municipality for abuse, since such annulment can only be had in a suit by the state, or contingently in a suit by the municipality under Code 1907, § 3513. *State v. Birmingham Waterworks Co.*, 185 Ala. 388, 64 So. 23.

§ 332. — By Members or Officers of the Corporation.

§ 333 (1) In General.

A stockholder of a corporation not for pecuniary profit, but for the benefit of its members through their mutual co-operation, organized under Act Oct. 1, 1903, §§ 1-5 (Code 1907, § 3573), for the purpose of owning and leasing real property to apply and demonstrate the single tax theory of taxation, while some of its activities were profitable and it was solvent and out of debt, could not maintain a bill for its dissolution on the ground of its already accomplished or impending failure, financial or otherwise, since the act does not require the concurrent exercise of all its powers, or the profitable exercise of any, and since, without a showing to the contrary, it would be presumed that its governing authority would not needlessly permit its dissolution by the absorption of its assets in unprofitable operations.

Fairhope Single Tax Corp. v. Melville, 193 Ala. 289, 69 So. 466.

When a private business corporation has failed in its purposes, a single stockholder may maintain a bill for its dissolution and the distribution of its assets, whether the corporation be solvent or insolvent. *Decatur Land Co. v. Robinson*, 184 Ala. 322, 63 So. 522.

Where the business can not be profitably continued minority stockholders may maintain a bill to have the assets of the corporation distributed under the orders of the court. *Decatur Land Co. v. Robinson*, 184 Ala. 322, 63 So. 522.

Demand of Redress of Grievances.—It is not a condition precedent to a bill by minority stockholders to administer and dissolve a corporation on the ground that it can not profitably continue business, that they demand of the directors a redress of grievances. *Decatur Land Co. v. Robinson*, 184 Ala. 322, 63 So. 522.

§ 332 (3) Parties.

All of the stockholders of a corporation are necessary parties to a bill for its dissolution, in the absence of a showing that it is practically inconvenient to make them parties, or that their interests are adequately represented. *Alabama Fidelity Mortg., etc., Co. v. Dubberly* (Ala.), 73 So. 911.

While, in a bill by a minority stockholder to administer the affairs of a corporation and to dissolve it, all of the stockholders must be made parties, yet where the bill made many of the larger stockholders parties whose interests were identical with those of the other stockholders, and alleged that other stockholders were numerous and that it would be practically impossible to bring the case to a final hearing if all had to be made parties, complainant was relieved from doing so by chancery court rule 19 authorizing the court in its discretion to dispense with the bringing in of all the interested parties where a sufficient number are before the court to represent all their personal interests. *Decatur Land Co. v. Robinson*, 184 Ala. 322, 63 So. 522.

§ 332 (4) Pleading.

A bill for the dissolution of a corpora-

tion, not averring with sufficient particularity any effort to have the wrongs complained of corrected by its officers, held not maintainable. *Fairhope Single Tax Corp. v. Melville*, 193 Ala. 289, 69 So. 466.

§ 333. Effect of Dissolution in General.

Where bankrupt indorsed notes of corporation and renewed his liability by successive indorsements on renewal notes, since notes were binding against him personally, it was of no consequence that corporation was subsequently dissolved; the renewal being merely that of his personal obligation. *Duncan v. Lum* (Ala.), 77 So. 718.

§ 337. Collection of Unpaid Subscriptions.

In General.—*Drennen v. Jenkins*, 180 Ala. 261, 60 So. 856. See the title CORPORATIONS, § 337, vol. 3, p. 611.

Under Code 1907, § 3509, the assets of an insolvent corporation constitute a trust fund for the payment of creditors, which fund may be marshaled and administered in a court of equity while § 3744 declares that a judgment creditor of a corporation, with execution return "No property found," may by bill in equity subject to the payment of his judgment the unpaid subscription of one or more stockholders, without regard to whether the corporation has called for such subscription or could maintain suit. A corporation to whose stock defendant subscribed became insolvent, was dissolved, and a receiver was appointed. Held, that in such case the receiver might maintain an action on unpaid stock subscriptions for the benefit of creditors, though such creditors had not recovered judgment which was returned unsatisfied; the insolvency and the dissolution of the corporation obviating the necessity of such procedure. *Hundley v. Hewitt*, 195 Ala. 647, 71 So. 419.

Cancelled Subscriptions.—Where a corporation became insolvent, was dissolved and a receiver appointed, a court of equity having general jurisdiction to collect all corporate assets may authorize the receiver to sue to enforce unpaid stock subscriptions due the corporation, though the corporation had, by resolution of stockholders, canceled the subscription, the order of cancellation being one which would be subject to impeachment by

creditors. *Hundley v. Hewitt*, 195 Ala. 447, 71 So. 419.

§ 338½. Distribution among Stockholders.

In the absence of statute, the assets of a corporation, organized to promote temperance, among its members and the community, are on dissolution distributed among the surviving members; the common-law rule with respect to corporations not prevailing. *Mobile Temperance Hall Ass'n v. Holmes*, 189 Ala. 271, 65 So. 1020.

Where a corporation, organized to promote temperance and morality, forfeited its charter because the members abandoned the purposes of the corporation, the assets of the corporation will be distributed among those who were members up to the time of the dissolution or their heirs. *Mobile Temperance Hall Ass'n v. Holmes*, 189 Ala. 271, 65 So. 1020.

§ 339. Actions by or against Corporation after Dissolution.

Rights of Creditors.—A creditor whose claim is contingent and depends upon breach of contract may maintain a suit, under Code 1907, § 3516, providing that after dissolution a corporation shall exist for the settlement of its business and may be sued; the directors being trustees for the collection of assets and payment of debts. *Pankey v. Lippman*, 187 Ala. 199, 65 So. 771.

Under Code 1907, § 3516, a creditor of a corporation may after dissolution maintain a bill to enhance its assets by compelling payment of unpaid subscriptions for stock, even though his claim has not been reduced to judgment in an action at law. *Pankey v. Lippman*, 187 Ala. 199, 65 So. 771.

Capacity of Corporation to Be Sued.

—Where a corporation was dissolved by agreement of shareholders under Code 1907, § 3510, held, that despite § 3511 it continued as a body corporate under § 3516 for 5 years, and so was properly joined in action to hold it under § 4105 for failure to deliver to officer levying execution a statement of defendant's stock. *Roe v. Durham*, 195 Ala. 584, 71 So. 109.

Bill By Heirs Not Alleging Demand

upon Officers to Institute Action. —

Where there were no officers of a dissolved corporation in existence who could sue for the distribution of assets held by defendant, a bill by the heirs of former members who were entitled to participate in the distribution is not bad because of a failure to allege a demand upon corporate officers to institute the action. *Mobile Temperance Hall Ass'n v. Holmes*, 189 Ala. 271, 65 So. 1020.

Bill Containing Equity. — A bill by creditors seeking to invoke the remedy prescribed by Code 1907, § 3516, declaring that corporations dissolved, except by judicial decree, exist as bodies corporate after dissolution for the purpose of settling their business, and that the directors are trustees for the collection of assets and payment of debts, contains equity. *Pankey v. Lippman*, 187 Ala. 199, 65 So. 771.

XII. FOREIGN CORPORATIONS.

§ 347. Carrying on Business within State.

§ 347 (1) In General.

Making Loans in Domicile on Property in Alabama.—A foreign corporation may in state of its domicile make loans on property located in Alabama, though it is not licensed to do business here. *Covey Cotton Oil Co. v. Bank* (Ala. App.), 74 So. 87, certiorari denied in 75 So. 1003.

Mortgage on Property in State. —

Though a foreign corporation to secure a debt contracted in its domicile receives a mortgage executed within the state and binding property therein, it is not doing business within the state, the execution being the act of the mortgagor, and so the mortgage will not be set aside on the ground that the foreign corporation was not licensed to do business in the state. *Covey Cotton Oil Co. v. Bank* (Ala. App.), 74 So. 87, certiorari denied in 75 So. 1003.

Agreement to Install Fixtures—Effect of Noncompliance on Right to Lien.—*Muller Mfg. Co. v. First Nat. Bank*, 176 Ala. 229, 57 So. 762, cited in note in L. R. A. 1917C, 1016. See the title CORPORATIONS, § 347 (1), vol. 3, p. 616.

§ 347 (2) Soliciting Business.

Where a foreign corporation, not authorized to do business in Alabama,

solicited and obtained from defendant a contract to pay a specified sum for insertion of defendant's advertising card in plaintiff's legal directory, such transaction did not constitute "doing business" within the state, within the constitution and statutes requiring foreign corporations doing any business in the state to have a known place of business, and an authorized agent therein, etc. *Mertins v. Hubbell Pub. Co.*, 190 Ala. 311, 67 So. 275.

Where a foreign corporation obtained defendant's contract for the publication of his business card in the corporation's legal directory, which contract was enforceable, though the corporation had not been authorized to do business in Alabama, the fact that it might have done other business of a sort to necessitate compliance with constitutional and statutory provisions relating to that subject, without having complied therewith, did not prohibit the contract in question, nor prevent the corporation from suing thereon. *Mertins v. Hubbell Pub. Co.*, 190 Ala. 311, 67 So. 275.

§ 347 (2½) Soliciting Stock Subscriptions.

The sale of corporate stock by a foreign corporation is the exercise of a corporate function within Const. 1901, § 232, and Code 1907, § 3642, and a sale by an agent for the corporation within the state is transacting business in the state within Code 1907, §§ 3644, 3645. *Jones v. Martin* (Ala. App.), 74 So. 761.

§ 347 (3) Isolated Transactions.

The loaning of money by a foreign corporation and securing its payment by mortgage on real estate is "engaging in business" in the state within the statute, although there be but a single transaction. *Coburn v. Coke*, 193 Ala. 364, 69 So. 574.

§ 347 (5) Taking Notes for Goods Sold or Other Consideration.

Where a machine was ordered through the agent of a foreign corporation, the order sent to the home office, and the machine built there and shipped into the state and delivered to the buyer, the transaction was interstate, and the ex-

ecution and delivery to the agent within the state of notes for the purchase price did not constitute "transacting business" within the state. *Citizens' Nat. Bank v. Bucheit*, 14 Ala. App. 511, 71 So. 82.

Settlement of account between foreign corporation and debtor, who gave notes for balance due, was mere collection of debt, and not transaction of such corporation within state, so that it could recover on notes, though it had not complied with Const. 1901, § 232, and Code 1907, § 3642 stating requirements of foreign corporations before being allowed to do business within the state. *Holman v. Durham Buggy Co.* (Ala.), 76 So. 914.

§ 347 (6) Contracts Not Made or to Be Performed Wholly within State.

Sale of Complete Machine to Be Transported Membris Dejectis and Assembled in This State.—A foreign corporation, although not complying with the foreign corporation statute (Code 1907, §§ 3642-3644, 3651), may recover for the sale of a chattel, complete in the hands of the vendor, although it may, from convenience or necessity, be transported membris disiectis, to be set up or installed by the corporation, since the agreement to merely set it up for use in the vendee's place of business is on its face an incident of the sale, which ought not destroy its character as a single and individual act of interstate commerce, especially where the article sold is complex machinery or apparatus, the satisfactory operation of which must largely depend upon the nicety or perfection of its adjustments, for in such case an agreement to deliver the machinery in working order to the purchaser is a valuable trade inducement. *Puffer Mfg. Co. v. Kelly* (Ala.), 73 So. 403.

A plea, alleging that a bottling machine sold by a foreign corporation was to be assembled within the state, is not sustained by proof that some slats belonging to it and the door of a drum were packed in the drum and were unpacked and put in place by the agent of the corporation, since "assemble," when applied to a machine, means to collect or gather together the parts and place them in their proper relation to each other to consti-

tute the machine. *Citizens' Nat. Bank v. Bucheit*, 14 Ala. App. 511, 71 So. 82.

Sale under Contract for Installation.—

A foreign corporation, although not complying with the foreign corporation laws (Code 1907, §§ 3642-3644, 3651), could recover for soda fountain, although sold under contract for installing, such installation not being an act of "local business" divesting the sale and delivery of its character as an act of interstate commerce. *Puffer Mfg. Co. v. Kelly* (Ala.), 73 So. 403.

Agreement that Old Soda Fountain Be Taken in Part Exchange.—

A foreign corporation, although not complying with the foreign corporation laws (Code 1907, §§ 3642-3644, 3651), could recover for a soda fountain sold under an agreement that vendee's old fountain would be taken in part exchange. *Puffer Mfg. Co. v. Kelly* (Ala.), 73 So. 403.

§ 348. Compliance with Requirements in General.

Statutory provision not enforced to cause innocent persons to suffer. *Alexander v. Alabama Western R. Co.*, 179 Ala. 480, 60 So. 295. See the title CORPORATIONS, § 348, vol. 3, p. 617.

§ 354. Contracts.

§ 354 (3) Complying with Statutory Requirements and Obtaining Permission to Do Business.

Contracts Made Outside of State.—Const. 1901, § 232, and Code 1907, §§ 3642-3644, 3645-3649, 3653, 6628, 6629, regulating foreign corporations doing business within the state, have no extraterritorial operation and do not render void in their inception contracts by foreign corporations made outside the state, but to be performed within the state. *Citizens' Nat. Bank v. Bucheit*, 14 Ala. App. 511, 71 So. 82.

Same—Enforcement at Instance of Corporation.—Where the contract of a foreign corporation made outside the state is to be performed within the state, and to perform it the foreign corporation must engage in business within the state, the courts of the state will refuse their aid to such foreign corporation, if it has not complied with the statutory re-

quirements, in enforcing the contract or recovering the benefits thereof. *Citizens' Nat. Bank v. Bucheit*, 14 Ala. App. 511, 71 So. 82.

Contracts Made within the State.—

Any contract entered into within the state by a foreign corporation not qualified to transact business therein is contrary to the public policy of the state, and gives the corporation no right that the state courts will recognize or enforce at its instance. *Citizens' Nat. Bank v. Bucheit*, 14 Ala. App. 511, 71 So. 82.

Same—Validity against Corporation.—

A contract by a foreign corporation, not declared void by statute though entered into within the state in violation of the constitution and the statute, will be enforced against the corporation in favor of the other party not involved in the guilt of the transaction. *Citizens' Nat. Bank v. Bucheit*, 14 Ala. App. 511, 71 So. 82.

A purchase-money mortgage, executed to one as trustee for a foreign corporation, is enforceable though the corporation has not secured a license to do business in the state. *Drew v. Fort Payne Co.*, 186 Ala. 285, 65 So. 71.

§ 354 (4) Failure to Designate Agent and Place of Business.

Contract Held Not Void.—*Alexander v. Alabama Western R. Co.*, 179 Ala. 480, 60 So. 295. See the title CORPORATIONS, § 354 (4), vol. 3, p. 621.

§ 350. Right to Sue.

A corporation created in another state may sue in the courts of this state. *Ashurst v. Arnold-Henegar-Doyle Co.* (Ala.), 78 So. 386.

Depending on Compliance with Statutory Requirements.—To deny foreign corporation right to invoke jurisdiction of courts suit must be founded on transaction of business within state by corporation without compliance with state law. *Empire Clothing Co. v. Roberts, etc., Shoe Co.* (Ala. App.), 75 So. 634.

A foreign corporation may sue for a debt created in another state or arising in an interstate transaction, though at the time of the creation of the debt it did some business in the state in violation of the statute regulating foreign corpo-

rations. *Vandiver v. American Can Co.*, 190 Ala. 352, 67 So. 299.

Necessity of Designation of Agent and Place of Business.—*Muller Mfg. Co. v. First Nat. Bank*, 176 Ala. 229, 57 So. 762. See the title CORPORATIONS, § 356, vol. 3, p. 623.

Institution and prosecution of a suit by a foreign corporation, without more, is not a prohibited act of business, and action may be brought by it without having a place of business and an authorized agent in the state. *Ashurst v. Arnold-Henegar-Doyle Co. (Ala.)*, 78 So. 386.

§ 357. Actions by or against.

§ 359. — Venue.

Code 1907, § 6112, in so far as it provides that actions can not be brought against foreign corporation in county or counties in which corporation is doing business, is violative of Const. 1901, § 232, fixing venue of actions against foreign corporations, and void. *Ex parte Western Union Tel. Co. (Ala.)*, 76 So. 438.

Under Const. 1901, § 232, and Code 1907, § 6112, as to venue of suit against foreign corporations, in action against foreign corporation a plea in abatement that, when suit was commenced, defendant was not doing business in the county where sued, although cause of action for tort arose there, was not demurrable. *Case Threshing Mach. Co. v. McGuire (Ala.)*, 77 So. 729.

§ 361. — Process.

Service upon the cashier of the state agency of a foreign corporation was good under Code 1907, § 5303, although the cashier was served as treasurer and proof taken before default entered showed him to be such. *Prayter v. Northen*, 195 Ala. 191, 70 So. 156.

Service on cashier of a state agency of a corporation was good under Code 1907, § 5303, although the corporation had des-

ignated another as its agent, who might have been served under § 5306. *Prayter v. Northen*, 195 Ala. 191, 70 So. 156.

§ 363. — Pleading.

§ 363 (9) Residence of Parties and Place Where Cause of Action Arose.

Place of Making Contract.—A plea that "defendant" entered into a contract in Alabama is insufficient, upon a special demurrer, to establish that the contract was made here, for the plaintiff may have agreed to it elsewhere. *Hurst v. Fitz Water Wheel Co.*, 197 Ala. 10, 72 So. 314.

§ 363 (3) Compliance or Noncompliance with Statutory Requirements in General.

In General.—*Ewart Lumber Co. v. American Cement Plaster Co.*, 9 Ala. App. 152, 62 So. 560. See the title CORPORATIONS, § 363 (3), vol. 3, p. 627.

The burden is on the defendant to plead that plaintiff is a foreign corporation which had not complied with the laws, and demurrer does not lie where the complaint does not show such status. *People's Bank v. Moore (Ala.)*, 78 So. 789.

Sufficient Allegation.—The allegation in a bill by a surety company that it had "complied with all the laws of the state * * * with reference to foreign corporations, * * * and was qualified to carry on its business in the state" at the time when, etc., was sufficient as alleging compliance with the laws of Alabama as a nonresident corporation before engaging in business in the state. *Singleton v. United States Fidelity, etc., Co.*, 195 Ala. 506, 70 So. 169.

Direct Averment.—That plaintiff foreign corporation has not complied with the laws of the state as to doing business therein, should be pleaded by direct averment, and not by way of implication. *Ashurst v. Arnold-Henegar-Doyle Co. (Ala.)*, 78 So. 386.

Corpus Delicti.

See post, CRIMINAL LAW; HOMICIDE.

Corroboration.

See post, CRIMINAL LAW; WITNESSES.

COSTS.

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Cross References.

See the title COSTS, vol. 3, p. 631, and references there given.

I. NATURE, GROUNDS, AND EXTENT OF RIGHT IN GENERAL.

§ 1. Nature and Grounds of Right.

Dependent on Statute. — Costs are a mere incident of the suit, and do not arise from any inherent power of the court to award them, but are granted only by virtue of express statutory authority. *Ex parte Cudd*, 195 Ala. 80, 70 So. 721.

Costs, whether in civil or criminal cases are entirely statutory, and, under direct provisions of Code 1907, § 3693, are penal in nature. *Jones v. Tarleton* (Ala. App.), 75 So. 643.

§ 2. Constitutional and Statutory Provisions.

Gen. Acts 1915, p. 598, making costs taxable in the discretion of the court, as justice and equity may require, does not affect Code 1907, § 3684, making taxation of costs excessive, if costs of witnesses not examined are charged to the unsuccessful party. *Central, etc., R. Co. v. McGilvary* (Ala. App.), 77 So. 938.

§ 5. Discretion of Court.

§ 7. —In Equity.

Costs in equity are within control of the court, so that defendant, in a suit in equity, could not be prejudiced by presence of another as party defendant. *Wilson v. Henderson* (Ala.), 75 So. 935.

§ 8. Amount or Value of Recovery.

Costs Not to Exceed Recovery. — Under Code 1907, § 3663, providing that in actions for torts the plaintiff recovers no more costs than damages where such damages do not exceed \$20, unless the presiding judge certifies that greater damages should have been awarded, and on failure to so certify judgment must be rendered against plaintiff for such residue, where in a tort action judgment was rendered for plaintiff for \$10 damages and \$10 costs, and there was no certificate that that plaintiff should have recovered more damages, action of the court in refusing to enter judgment against plaintiff for residue of costs was error. *Danforth v. McClellan*, 196 Ala. 567, 72 So. 104.

The "residue" mentioned in Code 1907,

§ 3663 includes all the costs plaintiff could have recovered whether expended by plaintiff or defendant, less \$10, since a judgment for full costs includes all the fees earned by the officers and witnesses in the case, regardless of the party for which the services were rendered, as judgment for costs can only be rendered for parties to the suit. *Danforth v. McClellan*, 196 Ala. 567, 72 So. 104. 567, 72 So. 104.

§ 9. Prevailing or Successful Party in General.

Where a taxpayer recovered against a county tax assessor and his sureties a fee which he had charged and collected without notifying such taxpayer of the time and place when and where he could appear to assess property, the award of costs to the plaintiff, including those incurred in justice court, was proper, under Code 1907, § 3662, providing that the successful party in all civil cases is entitled to full costs. *Davis v. Curtis*, 192 Ala. 64, 68 So. 419.

Where plaintiff's misrepresentations brought about the litigation, taxation of costs against defendant, in the suit brought by plaintiff, was not warranted. *Manning v. Carter* (Ala.), 77 So. 744.

Claimant, in a suit between other parties involving the right to property, removed his suit to the city court by certiorari, where it was dismissed for want of prosecution, with costs against the claimant, from which he took no appeal. Held, that as his suit never reached the point where an issue had to be made up between plaintiffs in the writ and himself, as directed by Code 1917, § 6040, claimant was the loser in the suit against whom costs were properly taxed. *McCormack v. Malone*, 10 Ala. App. 623, 65 So. 711.

§ 14. Payment or Satisfaction after Commencement of Action.

A general rule attendant upon the payment or satisfaction of the debt is that, when occurring after commencement of action it will not relieve the defendant of liability for costs incurred up to that time. *Schillinger v. Leary* (Ala.), 77 So. 846.

III. PERSONS, PROPERTY, AND FUNDS LIABLE.

§ 30. Parties of Record.

§ 31. — In General.

Judgment in favor of a party for costs does not relieve him from liability to the officers or the witnesses for their fees, though a judgment has gone against the other party for costs which included such fees. *Danforth v. McClellan*, 196 Ala. 567, 72 So 104.

IV. SECURITY FOR PAYMENT.

§ 42. Residence as Affecting Right to Require Security.

Under Code 1907, § 3690, providing that if suit be commenced by a resident, who afterwards removes from the state, defendant may require security for costs, mere removal of plaintiff resident from the state without a change of residence did not subject him to giving security for costs; "removal" as used in the statute including only such absences as amount to a change of residence. *Davis v. Brandon* (Ala.), 75 So. 908.

§ 46. Time for Giving Security.

Under Code 1907, § 3690, providing that if cost bond be not given at or before the next term of court after the term at which it is required, the suit must be dismissed, where a plaintiff removed from the state and was required to file a cost bond and filed one in time limited to \$150, it was not error for the court to allow him to file sufficient security at any time during the term, especially where he filed a sufficient bond on the second day of the term. *Jackson Lumber Co. v. Trammell* (Ala.), 74 So. 469.

The matter of the time allowed a non-resident plaintiff to give security for costs, as required by Code 1907, § 3687, et seq., is largely discretionary with the trial court, and its act in permitting such plaintiff to give security for costs "within the time directed by the court" was not an abuse of its discretion. *Colley v. Atlanta Brewing, etc., Co.*, 196 Ala. 374, 72 So. 45.

§ 51½. Deposit as Security.

Under Code, § 3688, providing that non-residents may deposit money for securi-

ty, etc., it was proper to allow a non-resident personal injury plaintiff to deposit \$50 for such security, where no witnesses had been subpoenaed by either party, and no showing was made that subpoenas would be sought or needed for witnesses within the state. *Western Union Tel. Co. v. Howington* (Ala.), 73 So. 550.

V. AMOUNT, RATE, AND ITEMS.

§ 63. Attorney's Fees.

§ 64. — In General.

The reasonable attorney's fees under the contract of the maker and indorser of a note to pay such fees, if recoverable at all, are recoverable as a part of the contractual obligation, and not as a part of the costs. *Schillinger v. Leary* (Ala.), 77 So. 846.

Where the assignee of a note sued in one action and an indorser in another action for the face of the note, costs, and attorney's fees, and in the action against the maker got judgment, which was paid before the trial of the action against the indorser, it was error to allow attorney's fees and costs against the indorser, but costs should have been allowed only to the time of payment of the judgment in the other action, in view of Code 1907, §§ 5068, 5069, providing how liability on a note may be discharged. *Schillinger v. Leary* (Ala.), 77 So. 846.

§ 65. — Under Special Statutory Provisions.

Where Administration of Trust Involved.—*Wilks v. Wilks*, 176 Ala. 151, 57 So. 776. See the title COSTS, § 65, vol. 3, p. 654.

§ 66. Witnesses' Fees.

§ 67. — In General.

Subpoenaed, but Not Examined.—Under Code 1907, § 3679, providing that no more than two witnesses shall be taxed in any bill of costs who were called to prove any one matter of fact, or having been subpoenaed, were not examined, unless the court, on motion to retax costs, should, in its discretion, consider that the circumstances warranted the examining of more than two witnesses for the proof of a particular fact, or unless such witnesses were summoned or ex-

amined to assail or defend the reputation of a witness for veracity, or to assail or defend the character of a party when put in issue, the successful party to an action may summon as many witnesses as the opposite party on the collateral issues of reputation or character, without laying himself open, to the retaxation of costs of such witnesses, if they were not in fact examined, but the number such party may summon in excess of the other party without so laying himself open is a matter largely in the discretion of the trial judge. *Porter v. Tennessee Coal, etc., R. Co.*, 13 Ala. App. 632, 68 So. 808.

Under Code 1907, § 3684, providing for retaxation of costs, if the taxation is excessive, by charging the costs of witnesses who were not examined, where defendant offered proof that the witnesses named in the motion to retax the costs had been subpoenaed by plaintiff, but not examined, he made a prima facie case. *Central, etc., R. Co. v. McGilvary* (Ala. App.), 77 So. 938.

The taxation in the bill of costs of fees of 54 witnesses summoned by the successful party, but not examined, was prima facie excessive, so that it was the duty of the court to retax the costs of them all, instead of part only, against the successful party, unless such party showed by affidavit or otherwise, subject to disapproval, some real or reasonably apprehended necessity to use such witness. *Porter v. Tennessee Coal, etc., R. Co.*, 13 Ala. App. 632, 68 So. 808.

VI. TAXATION.

§ 71. Remedies for Erroneous Taxation.

§ 73. — Motion for Retaxation—Retaxation by Court on Motion or Appeal.

Motion for Retaxation.—Under Code 1907, § 3684, providing that the party aggrieved by the excessive taxation of costs may move for retaxation setting fourth the particulars wherein the clerk has erred, where costs are improperly taxed against one not liable to pay them, the proper practice is to raise the question by motion to retax, and, from overruling thereof, reserve a bill of exceptions and appeal. *Tuscaloosa v. Hill*, 14 Ala. App. 541, 69 So. 486.

Same—Term of Motion.—Motion to retax costs will not be denied because made at the term succeeding that at which the case was tried. *Central, etc., R. Co. v. McGilvary* (Ala. App.), 77 So. 938.

A motion by sureties on an appeal bond to retax costs under Code 1907, § 3684, authorizing such motion where costs are charged to an improper party, may be heard at next ensuing term of court. *Lockwood v. Thompson* (Ala.), 73 So. 504.

Same—Petition to Retax Insufficient.—*Friddle v. Braun*, 7 Ala. App. 429, 61 So. 57. See the title COSTS, § 73, vol. 3, p. 656.

Same—Sufficiency of Supporting Affidavit.—Where defendant moved to retax costs of witnesses subpoenaed, but not examined, by plaintiff, affidavit merely stating that plaintiff did not subpoena them for the purpose of oppressing defendant, but did so in good faith to meet every contingency that might arise in the cause, was wholly insufficient to overcome the prima facie case, which defendant made by showing that witnesses were subpoenaed and not examined. *Central, etc., R. Co. v. McGilvary* (Ala. App.), 77 So. 938.

Retaxation by Court on Motion—Discretion of Court.—Under Code 1907, § 3679, providing that no more than two witnesses shall be taxed in any bill of costs who were called to prove any one matter of fact, or, having been summoned, were not examined, where the successful party to a litigation in the affidavit opposing the defeated party's motion to retax as costs the fees of 54 witnesses subpoenaed but not examined by the successful party stated that such witnesses were summoned to prove a single material fact in the case, the action of the trial court in allowing the fees of 27 such witnesses as costs, retaxing the fees of the other 27, was a sufficiently liberal exercise of its discretion in favor of the successful party. *Porter v. Tennessee Coal, etc., R. Co.*, 13 Ala. App. 632, 68 So. 808.

Same—Sufficiency of Opposing Affidavit.—Where the affidavit of the successful party to a litigation, in opposition to the defeated party's motion to retax as

costs the fees of 54 witnesses, summoned but not examined by such successful party, alleged that the witnesses were summoned to impeach the testimony of one whom it was expected would be called as a witness by the defeated party, but who was not so called, the trial court did not abuse its discretion, under Code 1907, § 3679, regulating the number of witnesses whose fees may be taxed as costs, by retaxing against the successful party the fees of 27 of such witnesses. *Porter v. Tennessee Coal, etc., R. Co.*, 13 Ala. App. 632, 68 So. 808.

Where the affidavit of the successful party to a litigation, in opposition to the defeated party's motion to retax as costs the fees of 54 witnesses, summoned but not examined by such successful party, alleged that the necessity for examination was obviated by defendant's failure to introduce a single witness in its behalf, or to conduct the trial as it had under several previous trials of the case, such allegation was insufficient to justify the appellate court in characterizing, as an abuse of discretion, the action of the trial court in retaxing the fees as costs to the successful party of 27 of such unexamined witnesses, since the averments of the affidavit showed no sufficient excuse for summoning such witnesses, even if it did for not examining them. *Porter v. Tennessee Coal, etc., R. Co.*, 13 Ala. App. 632, 68 So. 808.

The allegation of the affidavit of the successful party to a litigation, in opposition to the defeated party's motion to retax as costs fees of 54 witnesses summoned but not examined by the successful party, that such witnesses were summoned to defend the character for veracity of the successful party's main witness, was insufficient as a basis for allowing such party any witnesses to sustain the character of such main witness, as it failed to allege facts showing that such party had any reason to expect that the defeated party would attack the character of such witness. *Porter v. Tennessee Coal, etc., R. Co.*, 13 Ala. App. 632, 68 So. 808.

Where the successful party to a litigation failed to examine a number of witnesses, and the defeated party moved to

retax the fees of such witnesses, taxed against it as costs, the successful party's affidavit stating generally that none of the witnesses were subpoenaed to oppress defendant or unnecessarily increase the costs, was insufficient to free such party of the implication of oppression, since it averred merely a mental status, and failed to afford facts showing the good faith of such status upon which issue could be taken. *Porter v. Tennessee Coal, etc., R. Co.*, 13 Ala. App. 632, 68 So. 808.

VII. ON APPEAL OR ERROR, AND ON NEW TRIAL OR MOTION THEREFOR.

§ 79½. Recovery of More Favorable Judgment.

Under Code 1907, § 4723, providing that if plaintiff appeals and does not recover more than the amount for which the justice rendered judgment, he must be taxed with the costs, where plaintiff appealed from a justice's judgment for \$35, the amount of defendant's tender, and on an amended complaint claimed \$50, instead of the \$45, claimed in justice court, and had a verdict for \$35 damages, there was not a recovery for more than the amount for which the justice rendered judgment, and costs were properly taxed against the plaintiff; the costs were not properly a part of the "recovery" and could not be added to the verdict to increase the amount of recovery. *Carden v. Louisville, etc., R. Co.*, 11 Ala. App. 525, 66 So. 921.

§ 82. Modification.

Error in rendering a default judgment against defendants, who had not been properly served, may be corrected in the trial court on motion, or in the supreme court without remanding the cause, if the judgment can be otherwise affirmed, at the costs of the appellant. *Long v. Gwin*, 188 Ala. 196, 66 So. 88.

§ 84. Reversal.

§ 85. — In General.

Where a decree was reversed on respondent's cross-appeal, complaining of the refusal of the court to compel the oral examination of appellant as a witness, appellant must be taxed with the costs of

the appeal. *West v. Cowan*, 189 Ala. 138, 66 So. 816.

§ 94. Damages and Penalties for Frivolous Appeal and Delay.

§ 95. — Right and Grounds in General.

Since a judgment was not superseded by appeal where no bond was executed other than security for costs of appeal under Code 1907, §§ 2872, 3881, the appellee was not entitled to damages as penalty for delay on dismissal for want of prosecution, as Code 1907, § 2893, awarding such damages, is limited to judgments superseded on appeal. *Alabama Power Co. v. Hilyer* (Ala. App.), 67 Sq. 720.

VIII. PAYMENT AND REMEDIES FOR COLLECTION.

§ 101. Stay of Subsequent Action until Payment.

Where a former judgment for plaintiff upon the same cause of action was reversed on defendant's appeal and costs taxed against plaintiff, defendant is not entitled, as of right, to an order staying further proceedings until plaintiff shall pay costs of the former appeal. *Central, etc., R. Co. v. Chambers*, 197 Ala. 93, 72 So. 351.

IX. IN CRIMINAL PROSECUTIONS.

§ 103½. Nature and Grounds of Rights.

Costs in criminal cases are entirely statutory, and under direct provisions of Code 1907, § 3693, are penal in nature. *Jones v. Tarleton* (Ala. App.), 75 So. 643.

§ 108. Liabilities of County.

The right of the convicts to discharge the costs by payment under Code 1907, § 7635, does not relieve the county of its duty to pay such costs, since, if they are paid in part by the convicts before payment by the county, the county is liable only for the balance, and if they are paid by convicts after payment by the county, the amount would be turned over to the county as the party entitled thereto within § 4. *Lovelady v. Copeland* (Ala.), 73 So. 948.

Loc. Acts 1915, p. 3, §§ 1, 4, require the county board to pay the court costs charged against convicts assigned to work on the roads, though the convict has not yet discharged such costs by his labor. *Lovelady v. Copeland* (Ala.), 73 So. 948.

The fact that the convicts required to work on the roads to pay their costs may die or escape before the costs are worked out does not relieve the county of its liability to the clerks for such costs, under Loc. Acts 1915, p. 3, §§ 1, 4; such a contingency being a matter of policy for the consideration of the legislature alone. *Lovelady v. Copeland* (Ala.), 73 So. 948.

§ 114. Costs Taxable against Defendant.

Where witnesses for the state were not examined at the trial, and where there was no showing of a necessity to use them, the costs were not taxable against defendant on conviction. *Blankenship v. State*, 11 Ala. App. 125, 65 So. 860.

§ 120. Costs on Appeal or Error.

Where defendant was convicted on appeal in circuit court on different count from which he had been convicted in inferior court, solicitor's costs in inferior court should not be taxed against him. *Branch v. State* (Ala. App.), 78 So. 411.

§ 124. Imprisonment for Nonpayment.

Where under the law accused was entitled to work out his costs at the rate of 75 instead of 40 cents per day, accused, after he had performed hard labor for the county for the term of his sentence for his crime, and for a sufficient number of days to pay his costs at the legal rate, is entitled to his discharge, and further imprisonment is illegal. *Tennessee Coal, etc., R. Co. v. Butler*, 187 Ala. 51, 65 So. 804.

A judgment in a criminal case, sentencing defendant to hard labor for the payment of costs at 75 cents a day, but not stating the number of days of hard labor, should be corrected. *Mansfield v. State*, 8 Ala. App. 344, 63 So. 11.

Cosureties.

See post, PRINCIPAL AND SURETY.

Cotenants.

See post, JOINT TENANCY; TENANCY IN COMMON.

Counsel.

See ante, ATTORNEY AND CLIENT.

Counterclaim.

See post, SET-OFF AND COUNTERCLAIM.

Counterfeiting.

See the title COUNTERFEITING, vol. 3, p. 673, and references there given.

COUNTIES.

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Cross References.

See the title COUNTIES, vol. 3, p. 678, and references there given.

In addition, see ante, ACTION.

As to trespass by county officers, see post, HIGHWAYS. As to mandamus against county officers, see post, MANDAMUS.

I. CREATION, ALTERATION, EXISTENCE, AND POLITICAL FUNCTIONS.

§ 1½. Constitutional and Statutory Provisions.

Constitutionality of Statutes Relating to Places for Maintaining Offices. — Gen. Acts 1915, p. 549, requiring county officers in counties having a population of 150,000 to maintain, in addition to their offices at the county sites of such counties, offices at each other place in such counties, where a circuit court or court of like jurisdiction is authorized by law to be held for the transaction of all business pertaining thereto, arising in, or connected with, that part of the county, cases arising within which are triable at such place, does not establish a new county or change an existing county boundary in violation of Const. 1901, § 39, providing that the legislature may, by a vote of two-thirds of each house, arrange and designate boundaries for the several counties, but that no new county shall be formed of less extent than 600 square miles, and no existing county shall be reduced to less than 600 square miles, and that new counties and the counties from which they are formed shall have the required number of inhabitants to entitle each one to one representative under the ratio of representation. *Board v. Huey*, 196 Ala. 83, 70 So. 744.

§ 3. Territorial Extent and Boundaries.

§ ¾. — Watercourses.

Formation of New Counties—Rules Respecting Conveyance of Lands Not Controlling.—Since where the reason of a rule ceases, the rule itself ceases, the rules with respect to conveyances of lands bounded by navigable or nonnavigable streams, being dependant upon the rights of the sovereign as against individuals, are not controlling in the formation of new counties. *Tallassee Falls Mfg. Co. v. State*, 13 Ala. App. 623, 68 So. 805.

Same — Middle of Stream. — County

boundaries, described as running up, down, or along watercourses, without more, fix the boundary line at the middle of the stream whether it carries a large or small volume of water, and though the line of approach or departure be described as running to or from one bank of the stream. *Tallassee Falls Mfg. Co. v. State*, 194 Ala. 554, 69 So. 589.

A new county was formed by portions of other counties, and the boundary as to one of such counties was described as "all that portion of Tallapoosa county * * * west of the Tallapoosa river." Held, that the boundary of new county lay along the thread of the Tallapoosa river, since, if it should be construed as lying along the west shore thereof, a part of the river would not be attached to any county, or else it would be attached to Tallapoosa county, and form a narrow strip extending out from it over a distance of 15 miles; the boundary of Tallapoosa county at such point having been fixed at the thread of the river by the original act creating it. *Tallassee Falls Mfg. Co. v. State*, 194 Ala. 554, 69 So. 589, reversing 13 Ala. App. 623, 68 So. 805.

§ 4. Establishment of Boundaries.

Conclusiveness of Official Recognition.

—That the officers of two counties have for a long period of time officially recognized a certain line as the boundary between such counties, is not conclusive as to the true boundary thereof. *Tallassee Falls Mfg. Co. v. State*, 13 Ala. App. 623, 68 So. 805.

II. GOVERNMENT AND OFFICERS.

(B) COUNTY SEAT.

§ 12. Constitutional and Statutory Provisions.

Constitutional Provision as to Change of Courthouse or County Site.—Const. § 41, providing that no courthouse or county site shall be removed, except by a majority vote of the electors of the county voting at an election for the pur-

pose, does not forbid the erection of a new courthouse on a different lot in the same county seat or town, for the terms "courthouse site" and "county site" merely designate the seat of government of the county; and where a city or town is selected as a county seat, the boundary thereof, as then existing, becomes the boundary of the county seat, and, where a town was not incorporated at the time of the building of a courthouse, the boundaries of the municipality, as subsequently laid out, become the county seat, and the board of revenue may designate any lot therein as a new courthouse site. *Board v. Merrill*, 193 Ala. 521, 68 So. 971.

Constitutionality of Statute Respecting Places for Maintaining Offices—"Courthouse"—"County Site."—Gen. Acts 1915, p. 549, does not violate Const. 1901, § 41, providing that no courthouse or county site shall be removed except by a majority vote of the qualified electors of the county, voting at an election held for that purpose, as "courthouse" and "county site" are synonymous and signify the seat of government, and the seat of government is not removed when in good faith some only of the county functions are required to be performed elsewhere than at the county site, especially as the legislature both before and after the adoption of the constitution established branch offices for county offices in certain counties at places other than the county site. *Board v. Huey*, 195 Ala. 83, 70 So. 744. See ante, "Constitutional and Statutory Provisions," § 1½.

§ 20. Change of Site of Public Buildings.

See ante, "Constitutional and Statutory Provisions," § 12.

(C) COUNTY BOARD.

§ 23½. Compensation.

Compensation of Board of Equalization—Statute.—Members of a county board of equalization can not recover compensation for extra sessions held for the hearing of claims of property owners, in view of Acts 1915, pp. 386-413, providing that members of such board shall receive reasonable compensation for sessions

held for the purpose of "visiting, inspecting, examining, equalizing and valuing the real property of the county," and fixing the maximum length and time of sessions, although § 82 of the act provides that failure of the board to perform any of its duties at the time prescribed or to complete its duties within the time specified shall not invalidate its acts, and it was immaterial that such extra unauthorized session were necessary. *Ex parte Mobile County (Ala.)*, 76 So. 2.

§ 26. Meetings.

Board of Revenue—Adjourned Term.—Under the statute declaring that the board of revenue of a county shall meet on the second Monday in February, April, August, and November, and authorizing special sessions as may be required by law, the board must meet in regular sessions on the days specified, but may continue the session from day to day, and a special session is not the prolongation of a regular session, and may be called when a proper adjournment has not been taken in regular session to a subsequent date; and where the minutes of the board show that it was in session on the second Monday of one of the designated months, and in session on the next or succeeding days thereafter, a continuance of the regular session will be presumed, and an adjournment to a subsequent day within the term may be taken, and any act at an adjourned term is as valid as if done on the day of the regular term. *Board v. Merrill*, 193 Ala. 521, 68 So. 971.

Commissioners' Court—Power of Adjournment.—It was within the authority of the court of county commissioners to adjourn its terms from time to time within its discretion and to exercise its powers at such adjourned terms. *Hicks v. State (Ala. App.)*, 75 So. 636.

Same—Authority at Special Term—"Special Duty."—Under Cr. Code 1907, p. 422 et seq., the matter of hiring out convicts held a "special duty" under Code 1907, § 3311, conferring authority on the county commissioners to perform any special duty at a special term of court that they may be required by law to perform, as such expression is used

to distinguish it from the general routine business of such court, provided for by Code 1907, §§ 3306-3323. *Walker v. State*, 12 Ala. App. 229, 67 So. 719.

Same—Application of Judicial Rules.—The court of county commissioners empowered by Act Sept. 22, 1915 (Acts 1915, p. 574) § 2, to establish public roads, is not subject to rules applied to judicial courts as to time and place of exercising judicial functions, although the powers conferred are vested in the court, and not the individuals constituting its personnel. *Hicks v. State* (Ala. App.), 75 So. 636.

§ 27. Minutes and Records.

Time of Entering Minutes.—*Adams v. Southern R. Co.*, 176 Ala. 320, 58 So. 397. See the title COUNTIES, § 27, vol. 3, p. 687.

§ 27½. Reconsideration and Rescission of Action.

Commissioners' Court—Health Officer—Power to Suspend Statute.—Where the county commissioners' court had declared the necessity for an all-time health officer, and put into operation Acts 1915, pp. 786-788, it could not revoke its order, thereby depriving respondent, who had been duly appointed health officer for three years, pursuant to the statute, by the county board of health, of his right to serve out his term; the power to suspend laws being inherent in the legislature only. *State v. Justice* (Ala.), 76 So. 425.

§ 27½a. Operation and Effect of Decisions.

Jurisdiction of Commissioners' Court.—Code 1907, § 3312, giving to the commissioners' courts original and unlimited jurisdiction in relation to the establishment of roads, and the other sections relating to the exercise of such jurisdiction, changed the former rule that the commissioners' courts were courts of special and limited jurisdiction, and the proceedings in such courts under the Code are entitled to a liberal construction to uphold their jurisdiction. *Kirby v. Commissioners*, 186 Ala. 611, 65 So. 163.

(D) OFFICERS AND AGENTS.

§ 29½. Creation and Abolition of Offices.

Gen. Acts 1915, p. 348, abolishes the office of county treasurer in all counties of a population of 50,000 or less, and does not merely suspend the existence of the office of such counties. *State v. Bugg*, 196 Ala. 460, 71 So. 699.

"County Officers"—"State Officers."—Generally officers whose authority, duties, and powers are coextensive with territorial limits or are confined within limits of county in which they have their qualifications for election or appointment, are county officers, and fact that such officer exercises judicial power in certain instances extending beyond confines of his county does not determine that he is not a county officer. *Osborn v. Henry* (Ala.), 76 So. 119.

§ 30. Appointment or Election of Officers.

Election Void—Validity of Executive Appointment.—Where county officers were chosen at a void election, their commissions issued by the governor could not be operative as an executive appointment to fill vacancy. *Longshore v. State* (Ala.), 76 So. 33.

§ 34. Compensation.

§ 36. — Particular Officers, Agents, and Services.

County Treasurer—Excessive Compensation—Recovery Back.—Under Code 1907, § 217, if amount paid county treasurer as compensation exceeds percentage or sum fixed by the statute, the excess is unauthorized and illegal, and may be recovered by the county. *Morgan County v. Fidelity, etc., Co.* (Ala.), 77 So. 233.

Same—Fractional Compensation.—A county treasurer, who received annual salary, and whose term included a fraction of a year, held entitled to be compensated for such fraction pro rata. *Morgan County v. Fidelity, etc., Co.* (Ala.), 77 So. 233.

Board of Equalization—Per Diem Compensation.—Under Acts 1915, p. 386, §§ 70, 77, 80, members of the county board of equalization are entitled to their per

diem compensation for the time they sit in special session to hear objections to assessments after the expiration of the regular session. *Espalla v. Mobile County* (Ala. App.), 73 So. 761.

Statutory Provision—Powers of County Board.—Code 1907, § 217, providing that the county treasurer shall receive such compensation as may be allowed by the court of county commissioners, in no case exceeding $2\frac{1}{2}$ per centum on the money received and paid out, and that his compensation in no case shall exceed the aggregate sum of \$1,000 in any one year, imposes no restrictions on the court's discretion as to the mode and time of payment, whether the compensation be allowed from time to time as a percentage on sums received and disbursed, or once for all by fixing an annual salary, but in either case the allowance is subject to the limitations of the statute as to the amount. *Morgan County v. Fidelity, etc., Co.* (Ala.), 77 So. 233.

"Ex Officio Services"—"Specific Compensation."—Code 1876, § 5025 (Code 1907, § 3703), provides that all persons entitled to have an allowance made by the county commissioners for services designated as "ex officio," and for which no "specific compensation" is provided, shall itemize the services and verify the account by oath. Code 1907, § 3720, provides that for discharging his duties in relation to public roads, the county commissioners shall annually allow the probate judge an amount not exceeding \$90, and that for all other services for the compensation of which no express provision is made by law a sum not exceeding \$200. Held, that in view of common contemporaneous construction, the services rendered by the probate judge in relation to roads must be considered ex officio services under Const. 1901, § 68, providing that the legislature shall have no power to grant or authorize any county or municipal authority to grant any extra compensation to any public officer, or to increase or decrease the fees or compensation of officers during their terms of office, but that this section shall not apply to allowances made by the commissioners' courts, or boards of

revenue, to pay for ex officio services, and hence Act of April 1, 1911 (Laws 1911, p. 154), amending § 3720 so as to permit the county commissioners to allow probate judges already in office compensation for their road duties not exceeding \$400 is valid; for "specific compensation," as used in the Code, means precise compensation, as the fees which have been definitely fixed by law, while "ex officio services" mean those services which the law annexes to a particular office and requires the incumbent to perform. *Macon County v. Abercrombie*, 184 Ala. 283, 63 So. 985, reversing 9 Ala. App. 147, 62 So. 449. See the title COUNTIES, § 36, vol. 3, p. 689.

§ 37. Fees.

§ 37½. — Right in General.

Receiving Illegal Fees.—*Mobile County v. Williams*, 180 Ala. 639, 61 So. 963. See the title COUNTIES, § 37½, vol. 3, p. 689.

§ 40. Authorities and Powers.

Business and Governmental Agency.—*Mobile County v. Williams*, 180 Ala. 639, 61 So. 963. See the title COUNTIES, § 40, vol. 3, p. 689.

§ 40½. Duties and Liabilities.

§ 41. — Treasurer.

Liability for Payment of Illegal Fees. *Mobile County v. Williams*, 180 Ala. 639, 61 So. 963. See the title COUNTIES, § 41, vol. 3, p. 689.

§ 43. Liabilities on Official Bonds.

§ 43½. — In General.

Treasurer's Bond—Obligee.—The fact that the county treasurer's bond was made payable to the state of Alabama, instead of to the county of Cullman, was of no importance or bearing in the county's action on bond. *Searcy v. Cullman County*, 196 Ala. 287, 71 So. 664.

§ 44. — Accrual or Release of Liability by Breach or Fulfillment of Conditions.

Receiving Illegal Fees.—*Mobile County v. Williams*, 180 Ala. 639, 61 So. 963. See the title COUNTIES, § 44 (1), vol. 3, p. 690.

§ 45. — Extent of Liability.

Construction of Statute—Special Fund —“Addition.”—Code 1907, § 210, provides that the treasurer shall give a bond with sureties payable to the county and conditioned as prescribed by law, and that an additional bond shall be required whenever any special fund shall be received by him; § 211 makes it his duty to receive and keep the county's money and disburse it according to law; and § 1500 makes every official bond obligatory as to the breach of their condition during the officer's continuance in office and as to the faithful discharge of any duties subsequently required by law, for the benefit of every person injured by his neglect in performing his official duties. The treasurer subsequently received and misappropriated money from a special fund derived from the sale of county bonds for the construction and maintenance of public roads. Held in the county's action against the treasurer and his sureties on his general official bond, that §§ 210 and 1500 were in *pari materia* and must be considered in view of that relation, that the sureties' obligation included the assurance of his fidelity with respect to the special fund, and that the term “additional” meant supplemental, though an additional bond would not supersede the original bond or minimize the sureties' obligation thereon. *Searcy v. Cullman County*, 196 Ala. 287, 71 So. 664.

§ 47. — Actions.**§ 47 (3) Parties.**

Parties—Plaintiff — Action on Treasurers' Bond—Statutory Provisions.—In view of Code 1907, §§ 2440-2450, expressly authorizing the state to sue to recover county moneys lost by the negligence of any public officer, the state could sue on the bond of a county treasurer by whose deposit of school funds in an insolvent bank the funds were lost. *Bradford v. State (Ala.)*, 77 So. 696.

Parties—Defendant—Treasurers' Bond.—Action by the state on bond of county treasurer by whose deposit of school funds in an insolvent bank the funds were lost need not be against the officer

or his personal representative, in view of Code 1907, § 2443 et seq., providing for suits by the state, and § 1500, making every official bond obligatory on the principal and surety thereon, for the benefit of every person injured. *Bradford v. State (Ala.)*, 77 So. 696.

§ 47 (4) Pleading.

Objectionable Pleading — Trespass by Officers.—In an action for trespass against the board of commissioners of roads and revenue of a county by cutting a fence erected by plaintiff across a road under authority of defendants, which was afterwards rescinded, the plea was objectionable in that it did not show that the board had jurisdiction over the road in question, or that the board had colorable jurisdiction which fairly called for the exercise of judgment with respect thereto, and that its action involved an affirmative decision that it had jurisdiction of the subject-matter and of the person, and that the members of the board determined in good faith without malice that the case presented called for the exercise of such jurisdiction. *Jackson v. Bohlin (Ala. App.)*, 75 So. 697.

III. PROPERTY, CONTRACTS, AND LIABILITIES.**(A) PUBLIC BUILDINGS AND OTHER PROPERTY.****§ 48. Construction of Buildings and Other Work.**

Board of Revenue—Discretionary Power —Statutory Provisions.—Exercise of power by a board of revenue created by Loc. Laws 1911, p. 231, or of courts of county commissioners, under Code, § 130 et seq., and §§ 3306, 3313, 3321 includes authority and discretion in the management, control, maintenance and construction of county public buildings and improvements, and the exercise of discretionary powers will not be controlled by equity, in the absence of fraud, corruption, or unfair dealing. *Board v. Merrill*, 193 Ala. 521, 68 So. 971.

(B) CONTRACTS.**§ 51. Powers of County Board.****§ 51 (1) In General.**

Right to Employ Counsel.—*Walker v.*

Bridgforth, 9 Ala. App. 257, 62 So. 323. See the title COUNTIES, § 51 (1), vol. 3, p. 695.

Discretionary Powers—Building New Courthouse.—The board of revenue of a county, created by Loc. Laws 1911, p. 231, in proceedings to construct a new courthouse, has discretion in advertising for bids for a new courthouse and to employ an architect and determine the time, manner, and how the contract is to be let. *Board v. Merrill*, 193 Ala. 521, 68 So. 971.

Same — Official Action — Validity of Contract.—The minutes of the board of revenue of a county showed a regular meeting of the board on November 9th, at which plans for the construction of a courthouse were accepted, an architect elected, and a contract for the work approved, with authority to the chairman to execute it, and for the payment of specified sums for land for a site. At an adjourned term bids were received, and the board adjourned to another day, when subsequently bids were received. The contract was awarded on December 24th and was duly signed. The minutes failed to show whether the board was constantly in session from day to day to December 24th, or whether the meeting on December 24th was an adjourned meeting. There was no fraud, corruption, or unfair dealing. Held, that the action of the board was within their discretion, which could not be interfered with in equity. *Board v. Merrill*, 193 Ala. 521, 68 So. 971.

Construction of Courthouse — Fraud, Corruption, or Collusion.—That an architect, elected by the board of revenue of a county to assist in the construction of a courthouse, could, by collusion with the contractor, increase the profits of the contractor, did not invalidate the contracts for the courthouse, or for the employment of the architect, in the absence of any fraud, corruption, or collusion between the architect and the members of the board, or between the architect and any contractor. *Board v. Merrill*, 193 Ala. 521, 68 So. 971.

Discretion — Delegating Authority. — In performing their statutory duties in

the location, erection, repair, removal, or furnishing of the county buildings, bridges, and roads, the county commissioners or boards of revenue exercise a function that is quasi legislative, and have a discretion that can not be exercised for them by any other officer, or directed by any court, except when their acts are fraudulent. *Ensley Motor Co. v. O'Rear*, 196 Ala. 481, 71 So. 704.

Power to Purchase Automobile.—Under Gen. Acts 1915, pp. 573-575, §§ 1, 5, 9, vesting courts of county commissioners or boards of revenue with general superintendence over the roads and bridges of their respective counties, the commissioners' court of a county has authority to purchase and maintain an automobile for use in maintaining and inspecting the roads and bridges of the county, and, a proper warrant having issued therefor, such warrant should be duly registered and paid by the county treasurer, as required by law. *Ensley Motor Co. v. O'Rear*, 196 Ala. 481, 71 So. 704.

§ 51 (1½) Power to Contract So as to Bind Successors.

Special Tax—Diversion of Funds. — Under Code 1907, §§ 131, 133, 138, 211, 2206-2208, and Const. 1901, § 215, held that a resolution of the county commissioners to build a courthouse and issue warrants to be redeemed by a special tax of one-fourth of 1 per cent. per annum was within the power of commissioners, and constituted a valid contract, binding on the board of revenue created to replace the board of commissioners, which could not divert the special fund so created to road building. *Board v. Farson, Son & Co.*, 197 Ala. 375, 72 So. 613.

§ 51 (2) Construction of Buildings.

Statutory Provisions — Contracts. — Under Code 1907, §§ 131, 133, 138, 211, 2206-2208, and Const. 1901, § 215, held that a resolution of the county commissioners to build a courthouse and issue warrants to be redeemed by a special tax constituted a valid contract to pay in the manner provided, and that such sections became a part of the contract.

Board v. Farson, Son & Co., 197 Ala. 375, 72 So. 613.

§ 53. Validity and Sufficiency.

Construction of Courthouse — Fraud, Corruption, or Collusion.—That architect selected by board of revenue of a county contracting for a courthouse could act in collusion with contractor held not to invalidate contracts for courthouse or employment of architect. *Board v. Merrill*, 193 Ala. 521, 68 So. 971.

Same — Official Action — Validity of Contract.—Action of board of revenue of a county executing a contract for the construction of a courthouse and for the election of an architect held within their power and not to be interfered with in equity. *Board v. Merrill*, 193 Ala. 521, 68 So. 971.

Consideration for Contract — Evasion of Constitution.—An agreement whereby a county attempted to lease electric light fixtures, installed under illegal contract, from the contractor in evasion of Const. 1901, § 224, limiting the amount of indebtedness which a county might incur, held without consideration; the title to the fixtures having passed to the county by becoming part of the realty through the contractor's voluntary act. *Moody v. Terrell-Hedges Co.* (Ala. App.), 78 So. 639.

§ 54. Unauthorized or Illegal Contracts.

Unauthorized Contract — Subsequent Contract.—Where a contract to install electric light fixtures in a county courthouse was illegal under Const. 1901, § 224, a subsequent contract, whereby the county leased the fixtures, being founded on the prior contract, was likewise illegal and void. *Moody v. Terrell-Hedges Co.* (Ala. App.), 78 So. 639.

Rights under Invalid Contract. — Where contract to install electric light fixtures in a county courthouse was invalid because the county has exceeded its debt limit, under Const. 1901, § 224, such contract being not only void, but illegal as opposed to public policy, conferred no rights on the contractor, and the courts will not aid in reimbursing the loss nor in restoring the property delivered. *Moody*

v. Terrell-Hedges Co. (Ala. App.), 78 So. 639.

(C) COUNTY EXPENSES AND CHARGES AND STATUTORY LIABILITIES.

§ 58. Nature and Grounds of Liability.

Claims against Counties.—*Walker v. Bridgforth*, 9 Ala. App. 257, 62 So. 323. See the title COUNTIES, § 58, vol. 3, p. 696.

§ 60. Expenses Connected with Administration of Justice.

§ 61. — Criminal Prosecutions.

Fees of Officers—When Liability Accrues.—*Mims v. State*, 180 Ala. 511, 61 So. 811. See the title COUNTIES, § 61, vol. 3, p. 697.

Same—Necessity of Surplus in Fund over Amount of Witness Fees.—*Mims v. State*, 180 Ala. 511, 61 So. 811. See the title COUNTIES, § 61, vol. 3, p. 697.

Same—Partial Payment in Labor. — *Mims v. State*, 180 Ala. 511, 61 So. 811. See the title COUNTIES, § 61, vol. 3, p. 697.

Same—Clerk of Court—Statutory Provisions.—Under Code 1907, §§ 6635, 6636, giving the clerk of court a fee for the entry of forfeiture against defendant and for final judgment of forfeiture, and providing that of the fees specified which accrue on a forfeiture against bail must be taxed as costs and collected under execution against such bail, unless excused therefrom by the court, fees for services rendered by the clerk of the criminal court of a county in cases wherein conditional judgments against defaulting defendants and their bail were made final and executions returned "No property found," or in cases wherein conditional judgments were set aside for good cause, could not be taxed against the county. *Copeland v. Jefferson County*, 192 Ala. 12, 68 So. 285.

IV. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

§ 69. Power to Incur Indebtedness in General.

Implied Power to Contract Debts. — *Gunter v. Hackworth*, 182 Ala. 205, 62

So. 101, cited in notes in L. R. A. 1917E, 438, 451, 454. See the title COUNTIES, § 69, vol. 3, p. 699.

Liability of County for Claims.—No officer can charge a county with the payment of any claim due him, however meritorious, or whatever benefit the county may have derived therefrom, unless expressly or by necessary implication authorized by law, the policy of the state being to remove liability on any account except as it is expressed or implied by statute. *Ensley Motor Co. v. O'Rear*, 196 Ala. 481, 71 So. 704.

Power to Expend Funds.—The power of the board of revenue or court of county commissioners to expend funds is not confined strictly to claims enumerated by statute. *Ensley Motor Co. v. O'Rear*, 196 Ala. 481, 71 So. 704.

§ 70. Limitation of Amount of Indebtedness.

Constitutional Limitations.—*Gunter v. Hackworth*, 182 Ala. 205, 62 So. 101. See the title COUNTIES, § 70, vol. 3, p. 699.

Limitations Not Retroactive.—*Gunter v. Hackworth*, 182 Ala. 205, 62 So. 101. See the title COUNTIES, § 70, vol. 3, p. 699.

Constitutional Provisions—Limitations of Indebtedness.—Under Const. 1901, § 215, authorizing special county taxes to pay debts thereafter created for certain purposes, a county which had exceeded the debt limit imposed by § 224 could not levy special taxes to pay debts thereafter created in erecting a courthouse and constructing public roads, or for the accumulation of a fund for such purposes. *Southern R. Co. v. Jackson County*, 189 Ala. 436, 66 So. 570.

Interest Not Due—"Become Indebted."—Under Const. 1901, § 224, providing that no county shall become indebted in an amount, including present indebtedness, greater than $3\frac{1}{2}$ per cent. of the assessed value, the words "become indebted" contemplate that, in computing a county's debt limit, the face value of its obligations and accrued interest must be included but not interest not yet due. *O'Rear v. Sartain*, 193 Ala. 275, 69 So. 554, cited in note in L. R. A. 1917E, 455.

Constitutional Debt Limit—Voluntary

Obligation.—Where a county has reached its constitutional debt limit, all voluntary obligations assumed or incurred after the expenditure of the revenues on hand or in valid expectancy are unenforceable. *Brown v. Gay-Padgett Hdw. Co.*, 188 Ala. 423, 66 So. 161.

Same—Borrowing Money.—Where a county has reached its constitutional debt limit, it can not borrow money, even to provide funds for current and necessary municipal expenses. *Brown v. Gay-Padgett Hdw. Co.*, 188 Ala. 423, 66 So. 161, cited in note in L. R. A. 1917E, 446.

Classification of County Debts.—Legitimate county debts are of two classes; those which are prescribed by law, and purely involuntary as to the county, which are preferred claims, and which the treasurer must set aside sufficient funds to pay, under Code 1907, § 153; and those merely authorized by law, which the county may not incur when it has reached its constitutional debt limit. *Brown v. Gay-Padgett Hdw. Co.*, 188 Ala. 423, 66 So. 161, cited in note in L. R. A. 1917E, 449.

Current Obligations.—Though a county has reached its constitutional debt limit, it may anticipate revenues actually assessed to pay ordinary current obligations incurred for the year in which the revenues are assessed and payable. *Brown v. Gay-Padgett Hdw. Co.*, 188 Ala. 423, 66 So. 161, cited in notes in L. R. A. 1917E, 438, 446.

Bonds Not Issued—Present Indebtedness.—Under Const. 1901, § 224, limiting the amount to which a county may be indebted to $3\frac{1}{2}$ per cent. of the assessed valuation of the property, road bonds not issued can not be counted as a present indebtedness. *O'Rear v. Sartain*, 193 Ala. 275, 69 So. 554.

Constitutional Provision — "Assessed Value" — "Assessment." — "Assessed value," as used in Const. 1901, § 224, providing that no county shall become indebted in amount greater than $3\frac{1}{2}$ per cent. of assessed value of property therein, means value of property assessed for taxation. *Smith v. Austin (Ala.)*, 76 So. 404.

§ 70½. Submission of Question of Expenditure to Popular Vote.

Indebtedness — Interest-Bearing Warrants.—The issuance by the authority of the commissioners' courts of interest-bearing warrants on the county treasurer, payable at stated times in the future to pay for public buildings, public roads, and bridges, is not the issuance of bonds within Const. 1901, § 222, forbidding the issuance of bonds by a county, except after submission of the question to a popular vote, and the commissioners' court is competent to issue such interest-bearing warrants, unless restrained by § 224, limiting county indebtedness. *Littlejohn v. Littlejohn*, 195 Ala. 614, 71 So. 448.

Same—"Bond."—In Const. 1901, § 222, forbidding the issuance of bonds by the county except upon submission of question to popular vote, "bond," signifies an obligation in writing to pay a sum of money at a future date and commonly bears no specific designation of the person or entity in whose favor the promise runs. *Littlejohn v. Littlejohn*, 195 Ala. 614, 71 So. 448.

§ 70½a. Borrowing Money.

Constitutionality of Statute — Lending Credit—Law Library.—Loc. Acts 1915, pp. 372, 373, in so far as it authorizes and requires the board of revenue of Jefferson county to pay over \$150 each month out of the general funds of the county to the secretary of the Birmingham Bar Association, or some other person to be designated by the judges of the courts of record in the county, for the maintenance of a public law library in the city of Birmingham, violates Const. 1901, § 94, providing that the legislature shall not authorize any county to lend its credit or grant public money in aid of any individual or association, as the county acquired no interest in the library or any voice in its control. *Rogers v. White*, 14 Ala. App. 482, 70 So. 994.

§ 70½b. Limitations on Use of Funds or Credit.

Improving Streets and Sidewalks Around County Building.—County funds

may be appropriated for partial payment of the improvement by a town of the streets and the sidewalk around the block occupied by the county buildings. *Eutaw v. Coleman*, 189 Ala. 164, 66 So. 464.

Salary to Secretary of Bar Association—Constitutionality.—Loc. Acts 1915, pp. 372, 373, in so far as authorizing the payment of \$150 per month by the board of revenue of Jefferson county to the secretary of the Birmingham Bar Association, held to violate Const. 1901, § 94, forbidding the legislature to authorize any county to lend credit or grant public money in aid of any association. *Rogers v. White*, 14 Ala. App. 482, 70 So. 994.

§ 75. Warrants and Certificates of Indebtedness.

§ 76. — Power to Issue.

Interest-Bearing Warrants.—Boards of revenue and courts of county commissioners may issue interest-bearing warrants for obligations of the county for erection of a courthouse and purchase of necessary land. *Board v. Merrill*, 193 Ala. 521, 68 So. 971.

Statutory Provisions—Improvement of City Streets—Payment.—Under Act 1915, p. 878, commissioners' court has power to order payment for unauthorized services rendered county previous to approval of act in improving highways in a city, and where probate judge issues a warrant on county treasurer, refusal of payment is unauthorized; warrant being issued in good faith, and county having received benefits. *Ryan v. Goodrich (Ala.)*, 75 So. 17.

Same—Warrants Redeemed by Special Taxes.—Under Code 1907, §§ 131, 133, 138, 2206-2208, and Const. 1901, § 215, held that resolution of county commissioners to build a courthouse and issue warrants to be redeemed by a special tax was within the power of the commissioners. *Board v. Farson, & Son Co.*, 197 Ala. 375, 72 So. 613.

§ 77. — Issuance, Requisites, and Validity.

A Warrant on a Void Order.—*Mobile County v. Williams*, 180 Ala. 639, 61 So. 963. See the title COUNTIES, § 77, vol. 3, p. 702.

§ 78. — Construction and Operation.

"County Warrant."—A county warrant is the command of one duly authorized officer to another to pay from county funds a specific sum to a designated person whose claim therefor has been allowed by the court of county commissioners. *Littlejohn v. Littlejohn*, 195 Ala. 614, 71 So. 448.

§ 79. — Assignment and Other Transfer.

Nature of Contract.—A county warrant has not the attributes of commercial paper and is not assignable, and hence no action can be brought thereon by a transferee. *Littlejohn v. Littlejohn*, 195 Ala. 614, 71 So. 448.

§ 82. Power to Issue Bonds.**§ 83. — In General.**

Indebtedness — Time of Issuance — Time of Election. — In determining whether a county has exceeded its debt limit, the validity of a contemplated issue of bonds depends on the condition of the indebtedness at the time of issuance, and not at the time of the election authorizing the same. *O'Rear v. Sartain*, 193 Ala. 275, 69 So. 554, cited in note in L. R. A. 1917E, 455.

§ 86. Proceedings Preliminary to Issue of Bonds.**§ 87. — Petition or Assent of Taxpayers or Voters.**

Sufficiency of Publication of Election.—*Hearn v. Court*, 182 Ala. 392, 62 So. 535. See the title COUNTIES, § 87, vol. 3, p. 704.

Same—Character of Bonds — "Road" Bonds.—Under Code 1907 § 161, requiring ballots in elections on the issuing of county bonds to state the character of the bonds, a ballot designating the bonds as "road" bonds sufficiently states their character. *Thomason v. Commissioners*, 184 Ala. 28, 63 So. 87.

Statutory Provision — "Repairing and Improving" — "Constructing." — Code 1907, § 158, authorizing the calling of county elections for the voting of bonds to construct public buildings or roads, etc., should receive a very liberal con-

struction, and, the words "repairing and improving" being in a sense included in "constructing," an order for and notice of election to vote on bonds for constructing, repairing, and improving roads is not invalid. *Thomason v. Commissioners*, 184 Ala. 28, 63 So. 87.

§ 88½. Construction and Operation.

Negotiability—Action by Transferee.—Bonds authoritatively issued by agencies of the government are commercial paper capable of assignment and transfer, and the succeeding owner may found an action thereon. *Littlejohn v. Littlejohn*, 195 Ala. 614, 71 So. 448.

§ 91. Taxation.**§ 92. — In General.**

Constitutional Provisions — Excess Taxes.—Const. 1901, § 224, provides that no county shall become indebted in an amount, including present indebtedness, greater than 3½ per cent. of the assessed value of the property therein. Section 215 provides that no county shall levy a greater rate of taxation in any one year than one-half of 1 per cent. Held, that § 215, confers no right to levy taxes to pay debt incurred in excess of the limitation fixed by § 224. *O'Rear v. Sartain*, 193 Ala. 275, 69 So. 554.

Same—"Debt" and "Liability."—Under Const. 1901, § 215, prohibiting a county from levying a greater rate of taxation than one-half of one per cent., provided that to pay any debt or liability now existing or hereafter incurred for public bridges or roads, an additional levy may be made, the terms "debt" and "liability" comprehend the engagement for payment of interest, and recognize the power to incur obligation to be discharged in the future. *Littlejohn v. Littlejohn*, 195 Ala. 614, 71 So. 448.

§ 94. Disposition of Taxes and Other Revenue.

Distribution of Fund.—A special bridge tax collected by a county pursuant to Const. 1901, § 215, is county money, and the town can not compel the county commissioners to pay over to it a portion thereof. *State v. Commissioners' Court*, 187 Ala. 643, 65 So. 998.

Constitutionality of Statute—Power of Legislature.—Acts 1909 (Sp. Sess.) p. 304, directing the payment to cities of one-half the special road tax provided for by Const. 1901, § 215, which further provides that it shall be used exclusively for the purpose therein declared is void, since the legislature can not change the disposition of tax made by the constitution, so that payment to a city under the statute was payment of an illegal claim and was recoverable by the county. *Demopolis v. Marengo County*, 195 Ala. 214, 70 So. 275.

Discretionary Powers of Commissioners.—The act of the county commissioners in paying to the city a portion of a road tax directed by constitution to be used only by the county, being without their powers and void, the city could not, to defeat recovery thereof, rely upon the discretionary powers of the board. *Demopolis v. Marengo County*, 195 Ala. 214, 70 So. 275.

Diversion of Proceeds.—Under Const. 1901, § 215, limiting the rate of taxation, but providing that to pay any debt or liability for necessary public buildings, bridges, or roads an additional levy may be made the application of the proceeds of a special levy to provide means to discharge a debt or liability for the construction of public roads to the payment of installments of interest on such debt or liability, is not a diversion of the proceeds of the special levy. *Littlejohn v. Littlejohn*, 195 Ala. 614, 71 So. 448.

Employment of Excess Taxes.—Under Code 1907, § 138, authorizing county commissioners to levy a special tax not exceeding one-fourth of one per cent. per annum for payment of certain debts, to be applied only to the purpose for which levied, the commissioners may employ any excess of the proceeds of such a tax over the needs of the special purpose to other legitimate purposes of the county. *Board v. Farson, Son & Co.*, 197 Ala. 375, 72 So. 613.

§ 95. Rights and Remedies of Taxpayers.

Motion to Set Aside Void Proceeding—Certiorari.—A complaining taxpayer must, except in cases of fraud, go before

the board of revenue or county commissioners proceeding to the courthouse to move to set aside the proceeding, and, failing, apply for writ of certiorari. *Board v. Merrill*, 193 So. 971.

Construction of Courthouse Restrain Acceptance of Bids.—In a suit by a taxpayer to restrain the board of revenue of a county from accepting bids for a new courthouse or contract for its construction from whom a site had been secured were not necessary parties. *Merrill*, 193 Ala. 521, 68 So. 971.

Same—Review of Action Injunction.—A bill by a taxpayer to restrain the board of revenue of a county from accepting any bids for a new courthouse, and from entering into a contract for its construction, states a cause of action within the jurisdiction of the court, alleging fraud, collusion, or unfair dealing on the part of the members thereof with other persons, to divert public funds to their own benefit or the benefit of other persons for and with whom the board has entered into a contract. *Board v. Merrill*, 193 Ala. 521, 68 So. 971.

V. CLAIMS AGAINST COUNTY

§ 98. Time for Presentation.

Probate Judge Issuing Certificate.—The general statute, requiring the presentation of claims and creating a period, held not applicable, where the probate judge issues a certificate for the county for privilege tax previously collected. *Lovelady v. Board*, 191 Ala. 96, 68 So. 48.

§ 99. Verification and Proof.

Statutory Provisions.—Statute 180 Ala. 514, 61 So. 814, cited in 50 L. R. A., N. S., 185. See COUNTRIES, § 99, vol. 3, p. 710.

By City against County for Tax.—*State v. Board*, 180 Ala. 514, cited in note in 50 L. R. A., N. S., 185. See the title COUNTRIES, vol. 3, p. 710.

§ 101. Audit and Allowance or Disallowance.

Statutory Provision — Compromise of Claim for Fees.—*Mobile County v. Williams*, 180 Ala. 639, 61 So. 963. See the title COUNTIES, § 101 (2), vol. 3, p. 711.

§ 103. Effect of Allowance or Disallowance.**§ 103 (1) Conclusiveness and Effect of Adjudication in General.**

Recovery of Amount Paid. — *Mobile County v. Williams*, 180 Ala. 639, 61 So. 963. See the title COUNTIES, § 103 (1), vol. 3, p. 713.

§ 103 (3) Effect as to Other Remedies for Collection.

Claimant's Acceptance of Reduced Amount. — Where an original demand against a county is presented to the board of revenue or commissioners' court, and is reduced in amount and allowed, the claimant must elect to accept or reject the diminished amount, and, if he accepts, he can not sue for the difference. *Brown v. Lowndes County (Ala.)*, 78 So. 815.

§ 104. Payment.

Effect of Payment of Illegal Fees. — *Mobile County v. Williams*, 180 Ala. 639, 61 So. 963. See the title COUNTIES, § 104, vol. 3, p. 714.

County Attorney.

See post, DISTRICT AND PROSECUTING ATTORNEY.

County Clerks.

See ante, CLERKS OF COURTS.

County Commissioners.

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County Courts.

See post, COURTS.

COURTS.

I. Nature, Extent, and Exercise of Jurisdiction in General.

- § 3. Jurisdiction of Cause of Action.
- § 5. — Place of Accrual of Cause of Action—Local or Transitory Actions.
- § 6. Jurisdiction of the Person.
- § 7. — Domicile or Residence of Party.
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Cross References.

See the title COURTS, vol. 3, p. 720, and references there given.

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I. NATURE, EXTENT, AND EXERCISE OF JURISDICTION IN GENERAL.

§ 3. Jurisdiction of Cause of Action.

§ 5. — Place of Accrual of Cause of Action—Local or Transitory Actions.

Cause of Action Arising in Another State—Statutory Provisions.—Gen. Acts Sp. Sess. 1907, p. 67, providing that when, either by common law or the statutes of another state, a cause of action has arisen in the other state against any person or corporation, the cause of action is enforceable in the courts of this state, approved August 26, 1907, is unaffected by Code 1907, in view of Acts 1907, p. 499, adopting the Code and providing that no

acts passed on or after July 9, 1907, shall be repealed or affected by the Code, and Acts Sp. Sess. 1909, p. 174, § 2, providing that acts passed at the special sessions of the legislature are unaffected by the Code. *Southern R. Co. v. Jordan*, 192 Ala. 528, 68 So. 418.

Same—Defendant Locally Served. —

Courts of one state may take jurisdiction of transitory cause of action originating in another state when defendant has been locally found and served, although both parties are at the time domiciliary residents of the foreign state. *Weaver v. Alabama, etc., R. Co. (Ala.)*, 76 So. 364.

Transitory Action in General.—Where county purchased road material to be taken from surface of land of which plaintiff had undisputed possession, a

third person, claiming as owner of minerals in the land, could not, after material was removed, in a transitory action, recover it or damages for its conversion from either the plaintiff or the county. *De Kalb County v. McClain* (Ala.), 78 So. 961.

§ 6. Jurisdiction of the Person.

§ 7. — Domicile or Residence of Party.

Actions against Nonresidents.—While a resident of another state can not validly be served in such other state with process of a court of this state, he is suable on coming into this state, if the court has jurisdiction of the subject matter. *Cooper v. Lake Wood Co. (Ala.)*, 75 So. 307.

One claiming damages against a non-resident must sue him in the state of his residence, unless, without a fraud on the law, he can obtain service upon such nonresident in this state. *Sessoms Grocery Co. v. International Sugar Feed Co.*, 188 Ala. 232, 66 So. 479.

§ 8. Jurisdiction of Property or Other Subject Matter Involved.

The jurisdiction of a court over personal causes of action depends, aside from the presence of the parties in court, upon the court's jurisdiction over the subject matter to be adjudicated. *Huntsville Grocery Co. v. Johnson*, 13 Ala. App. 488, 69 So. 967.

Bringing action in an improper county is not a jurisdictional defect, where the court has general jurisdiction of the subject matter; for statutes of venue regulate, not the jurisdiction of the courts, but only the procedure. *King v. State* (Ala. App.), 77 So. 935.

§ 9. Mode of Acquiring or Exercising Jurisdiction in General.

Seeking to Obtain Jurisdiction by Fraud.—A resident, claiming a right of action for damages against a nonresident for breach of an agreement of sale, ordering a car of foodstuff from such nonresident ostensibly with a purpose of paying for it in cash upon its arrival in this state, which was shipped with bill of lading attached so that the title was retained by the nonresident shipper, and,

instead of paying the draft, attaching the contents of the car, in its action against the nonresident, could not be permitted to use such breach of faith to litigate its claim in this state, since this court will not lend jurisdiction to those seeking to obtain it by fraud upon the law. *Sessoms Grocery Co. v. International Sugar Feed Co.*, 188 Ala. 232, 66 So. 479.

§ 10. Consent of Parties as to Jurisdiction.

§ 11. — In General.

See post, "In General," § 23 (1).

§ 12. — Of Cause of Action or Subject Matter.

The jurisdiction of the subject matter can not be conferred by consent, waiver, or agreement. *Chandler v. Hardeman*, 12 Ala. App. 572, 68 So. 525.

§ 13. — Of the Person.

Jurisdiction of the person may be conferred by consent, waiver, or agreement. *Chandler v. Hardeman*, 12 Ala. App. 572, 68 So. 525.

§ 17. Jurisdiction to Be Shown by Record.

§ 18. — In General.

In attachment jurisdictional facts must appear of record. *Herrick v. Herrick*, 186 Ala. 439, 65 So. 146.

§ 19. — Special, Limited, or Inferior Jurisdiction.

Courts of Record—Parol Evidence.—Under Code 1907, § 3306, making the court of county commissioners a court of record and prescribing its constitution, § 3314, requiring the probate judge, who is a member of the court, to make all records and issue orders and process, and § 3321, making the provisions as to courts of county commissioners applicable to all similar courts of like jurisdiction, the board of revenue of Mobile county is a court of record, its functions bringing it within the statutes, and parol evidence is inadmissible to evidence its acts, which can be shown only by its written record. *Mobile County v. Mad-dox*, 195 Ala. 336, 70 So. 259.

§ 20. Presumptions as to Jurisdiction.**§ 21. — In General.**

In attachment no presumptions are indulged in favor of jurisdiction, and the jurisdiction exercised by superior courts does not extend beyond what is expressly shown. *Herrick v. Herrick*, 186 Ala. 439, 65 So. 146.

§ 22. — Special, Limited, or Inferior Jurisdiction.

Compliance with Statute Defining Grounds of Jurisdiction.—*Rucker v. Tennessee Coal, etc., R. Co.*, 176 Ala. 456, 58 So. 465. See the title COURTS, § 22, vol. 3, p. 732.

§ 23. Waiver of Objections.**§ 23 (1) In General.**

See ante, "Of Cause of Action or Subject Matter," § 12; "Of the Person," § 13.

Waiver of Right to Object—Consent to Exercise of Jurisdiction.—In order for a defendant, who is a nonresident, to waive his right to object to the lack of jurisdiction, or to consent to the court's exercising such jurisdiction as to his person, he must appear in court by agent or counsel, and consent for the court to proceed, or in some way contest plaintiff's right to a personal judgment, or must appear to have agreed to pay or satisfy such judgment, if rendered. *Terminal Oil Mill Co. v. Planters, etc., Co.*, 197 Ala. 429, 73 So. 18.

Where a foreign corporation, sued by attachment, did not appear generally did not consent to personal judgment against it, and did not contest plaintiff's right to such judgment until the court had stricken its plea to the jurisdiction, its resistance to the judgment thereafter was compulsory, and so not a waiver of its rights to object, nor a consent to the jurisdiction. *Terminal Oil Mill Co. v. Planters, etc., Co.*, 197 Ala. 429, 73 So. 18.

§ 23 (3) Estoppel Arising from Submitting to or Invoking Jurisdiction.

By Answering without Objection to Jurisdiction.—Where defendant pleads a plea not going to the irregularity or invalidity of the process, the question of territorial jurisdiction or venue is there-

by waived. *Cooper v. Lake Wood Co.* (Ala.), 75 So. 307.

§ 24. Determination of Questions of Jurisdiction in General.

Finding Conclusive as to Jurisdiction.—*Stephens v. Court*, 180 Ala. 531, 61 So. 917. See the title COURTS, § 24, vol. 3, p. 733.

II. ESTABLISHMENT, ORGANIZATION, AND PROCEDURE IN GENERAL.**(A) CREATION AND CONSTITUTION, AND COURT OFFICERS.****§ 25. Creation and Abolition in General.**

See post, "County Courts and Other Local Courts," § 25½ (3).

§ 25½. Constitutional and Statutory Provisions.**§ 25½ (1) In General.**

See post, "Judicial Departments, Circuits, and Districts," § 27.

Inferior Court in Lieu of Justices of Peace.—Acts 1915, p. 231, providing for inferior court in lieu of justices of the peace in certain precincts, is not invalidated by reason of naming some precincts by number and including others in a general designation since it can not be presumed that the legislature was ignorant of the situation or of the effect of its language. *McGehee v. State* (Ala.), 74 So. 374.

In Const. 1901, § 168, providing that where one or more precincts lie within, or partly within, a city or incorporated town having more than 1,500 inhabitants, the legislature may provide by law for the election of not more than two justices of the peace and one constable for each of such precincts, or an inferior court for such precinct or precincts, in lieu of "all" justices of the peace therein, the word "all" refers to justices within the territory of the court to be created, and not to justices in all the precincts in the city where the court is established. *McGehee v. State* (Ala.), 74 So. 374.

§ 25½ (2) Intermediate Appellate Courts.

Loc. Acts 1915, p. 9, creating Montgomery court of common pleas to take

place of existing inferior court which had supplanted justices of peace, does not violate Const. 1901, § 168, restricting jurisdiction of inferior courts in civil cases to amount within justice's jurisdiction, merely because act confers a criminal jurisdiction exceeding that possessed by justices. *Hails v. State* (Ala. App.), 75 So. 724.

§ 25½ (3) County Courts and Other Local Courts.

Abolition of Court.—Loc. Acts 1911, p. 30, abolishing a county court and transferring pending cases to a circuit court, is not in violation of Const. 1901, § 171, forbidding the abolishment of a court without conferring its jurisdiction on another court. *State v. Brock*, 180 Ala. 503, 61 So. 646.

Court for Dallas County.—Loc. Acts 1915, p. 436, creating inferior court for Dallas county, is unconstitutional. *Pitts v. Berry* (Ala. App.), 75 So. 630.

Court for Montgomery County.—Loc. Acts 1915, p. 9, creating Montgomery court of common pleas, was intended to establish a court in lieu of existing inferior court, and is therefore governed by Const. 1901, § 168, defining jurisdiction of inferior courts, etc. *Hails v. State* (Ala. App.), 75 So. 724.

County Court of Hale County.—Acts 1915, p. 862, et seq., repealed acts for Hale county pertaining to county court, so far as not otherwise saved by it and other acts, and put in force in county Code provisions relating to county court, excepting as it or other general acts might apply to such court. *State v. Torbert* (Ala.), 77 So. 37.

Same—Probate Judge as Judge.—In view of Acts 1915, p. 862, et seq., in effect repealing many local acts providing for or relating to county courts in the respective counties, including Hale county, provided for by Code 1907, §§ 6696-6732, the Code provisions control in regard thereto, except as changed by other general and local statutes in force, and the probate judge of Hale county is ex officio judge of the county court, under § 6696, authorized and required to discharge the duties of judge of the

county court. *State v. Torbert* (Ala.), 77 So. 37.

§ 27. Judicial Departments, Circuits, and Districts.

Counties of certain populations, and containing property of certain assessed valuations, now — since the constitution of 1901—may alone constitute a judicial circuit. *State v. Black* (Ala.), 74 So. 387.

Discretion of Legislature.—Const. 1901, § 144, guarantees that each county shall have a circuit court or a court of like jurisdiction, but leaves it to the discretion of the legislature what the court shall be. *Smith v. Stiles*, 195 Ala. 107, 70 So. 905.

Detaching Counties From Circuit. — Under Const. 1901, § 147, providing that counties of certain population and taxable property need not be included in any circuit court or chancery division, when a county is detached from a circuit, it in effect becomes a circuit in itself. *Smith v. Stiles*, 195 Ala. 107, 70 So. 905.

Where two counties at a distance from each other, each qualified to constitute a separate judicial district, were removed from the circuit in which they had formerly been, it can not be presumed that the legislature intended to group them in a single circuit. *Smith v. Stiles*, 195 Ala. 107, 70 So. 905.

§ 30. Transfer or Change of Jurisdiction.

When chancery court ceased to exist by operation of law, causes pending therein were transferred for trial or decision to circuit court, which was clothed with power either to set aside former submission and have resubmission, or to render decision on original submission. *Thompson v. Johnson* (Ala.), 78 So. 91.

Where a city court sitting in equity awarded the custody of a child to one of two rival claimants "until the further order of the court," the case was still pending; and when the court subsequently ceased to exist, it was transferred as a pending cause by operation of law to the circuit court. *McDaniel v. Youngblood* (Ala.), 77 So. 674.

§ 30½. Consolidation.

Montgomery court of common pleas created by Loc. Acts 1915, p. 9, was not

merged into circuit court by consolidated court bill of 1915. *Hails v. State* (Ala. App.), 75 So. 724.

After consolidation of law and equity court of Monroe county at midnight, January 14, 1917, with the circuit court, by Gen. Acts 1915, p. 279, regular judge of law and equity court had no jurisdiction over causes pending therein. *Ex parte City Bank, etc., Co.* (Ala.), 76 So. 372.

§ 32½. Stenographers.

Place of Service.—Under Acts Sp. Sess. 1909, p. 263, providing for the appointment of trial court stenographers by the judge thereof, and providing in § 4 that the stenographer shall serve in the circuit for which he is appointed, the judge has no right to assign a court stenographer to serve in another circuit to which the judge is assigned to preside. *Ex parte Hill*, 196 Ala. 462, 71 So. 994.

Proceedings for Removal—Place of Trial.—Where a judge files charges against a court stenographer of his own circuit, he must try such charged at some appropriate place within that circuit, and not in another circuit where he has been assigned to preside temporarily. *Ex parte Hill*, 196 Ala. 462, 71 So. 994.

Official Reporter — Compensation. — The judge of the Marengo county circuit is a circuit judge, the county constituting a separate circuit, and is under duty to appoint a competent court reporter, and, such reporter having been appointed, and having performed the service and received the proper certificate, it became the duty of a bank acting as treasurer for the county to pay the entire amount under Acts 1915, p. 861, § 5, providing that each official circuit court reporter shall receive \$1,200 a year, etc. *Marengo County Bank v. Miller* (Ala. App.), 75 So. 632.

(B) TERMS, VACATIONS, PLACE AND TIME OF HOLDING COURT, COURTHOUSES, AND ACCOMMODATIONS.

§ 34½. Power to Regulate Places and Times of Holding Court.

Time of Holding Court.—The only limitation upon the power of the judge

of the circuit court to appoint a time for the holding of his court other than the times fixed by law, if any, is that it must be held within the times designated by Acts 1915, pp. 707, 708, § 2, from the first Monday in January to and including the last Saturday of June, and from the first Monday after the Fourth of July to and including the last Saturday before Christmas. *Carson v. Sleigh* (Ala.), 78 So. 229.

§ 34½a. Constitutional and Statutory Provisions.

Construction of Statute. — Acts Sp. Sess. 1909, p. 15, § 2, providing for holding terms of the circuit court at Albertville in Marshall county, and giving that court original jurisdiction of all causes of action arising within the territory embraced in "the Albertville district," must be construed with the general laws bearing upon the matters with which it deals. *Huntsville Grocery Co. v. Johnson*, 13 Ala. App. 488, 69 So. 967.

§ 36. Special or Extraordinary Terms.

Power to Hold Probate Courts.—*Ex parte Griffin*, 177 Ala. 243, 59 So. 303. See the title COURTS, § 36 (1), vol. 3, p. 737.

§ 38. Extension or Adjournment of Terms.

§ 38 (1) Adjournment of Term in General.

Adjourned Term to Commence Immediately.—Under Code 1907, § 3249, providing that when, in the opinion of the judge of the circuit, an adjourned or special term of the circuit court in any county is necessary, he may by order direct such court convened immediately, or at such day as he may designate, and may make such orders as may be necessary for the drawing and organizing of grand and petit juries, where there was not sufficient time to try a case before the regular term would expire by law, the court did not err in ordering an adjourned term to commence immediately, and in then adjourning the regular term, and immediately reconvening the court in the adjourned term; it being in his discretion to call an adjourned rather

than a special term, and to have it begin at once, instead of at some future time. *Athens v. Miller*, 190 Ala. 82, 66 So. 702.

The judge of Morgan county law and equity court has all powers conferred on circuit judges in ordering adjournments, and, an adjourned term being but a continuance of regular term, the jurors may, on appropriate order, be carried over to the adjourned term at which the court may exercise all the jurisdiction it could exercise at regular term. *White v. State* (Ala. App.), 72 So. 771.

The act creating the law and equity court of Morgan county (Acts 1907, p. 170, § 1) confers upon that court all the jurisdiction, functions, and powers which are now, or may hereafter be, by law conferred upon the several circuit, chancery, and city courts. Section 3 confers upon the judge of that court all the powers and functions which are, or may hereafter be, lawfully exercised by the judges of the circuit courts and chancellors of the state. Section 7 provides that the court shall be held in each year as may be determined and fixed by the presiding judge, and also provides for two regular terms in each year. Section 19 provides that all laws of a general nature then in force or thereafter enacted, giving jurisdiction to the circuit and chancery courts, shall extend and apply to said court. Code 1907, § 3249, authorizes the judge of the circuit court to call a special or adjourned term of said court. Held, that the judge of the law and equity court of Morgan county can, during the regular term, order the holding of adjourned term to try undisposed of cases at a time not fixed for a regular term. *Ex parte Brown* (Ala. App.), 72 So. 772, certiorari denied in 73 So. 999.

Under Code 1907, § 3292, giving circuit judges power to call special or adjourned terms of the court, and the act creating the Morgan county law and equity court, Loc. Acts 1907, p. 194, § 3, giving the judge the same powers as circuit judges, that judge had power to call and hold an adjourned term at which a

criminal case could be tried, where the record showed an order made during regular term time, providing for holding adjourned term; the adjourned term being but a continuation of the regular term. *Ogles v. State* (Ala. App.), 72 So. 598.

§ 38 (3) Nature of Adjourned Term.

Continuation of Regular Term.—*Ashford v. McKee*, 183 Ala. 620, 62 So. 879. See the title COURTS, § 38 (3), vol. 3, p. 739.

An adjourned term is a continuation of the regular term. *Ex parte Brown* (Ala. App.), 72 So. 772, certiorari denied in 73 So. 999; *Ogles v. State* (Ala. App.), 72 So. 598; *White v. State* (Ala. App.), 72 So. 771.

§ 38 (4) Power of Court at Adjourned Term.

A court can exercise all the authority and jurisdiction at an adjourned term it could exercise at the regular term. *Ex parte Brown* (Ala. App.), 72 So. 772 certiorari denied in 73 So. 999.

Necessary Steps to Be Taken.—*Ashford v. McKee*, 183 Ala. 620, 62 So. 879. See the title COURTS, § 38 (4), vol. 3, p. 740.

(C) RULES OF COURT AND CONDUCT OF BUSINESS.

§ 45½. In General.

Rule of practice 43 (175 Ala. xx, 61 South. viii), requiring one appealing from a conviction to file with the clerk of the trial court a truly dated, written, signed statement that he appeals from the judgment, upon the filing of which the clerk must, within 20 days, forward a proper certificate of appeal to the clerk of the appellate court to be docketed therein, is not in conflict with the statute giving the right of appeal, and its adoption was within the authority of the supreme court. *Upshaw v. State*, 11 Ala. App. 310, 66 So. 821.

§ 47½. Conduct of Particular Proceedings.

Code 1907, § 3272, subd. 8, making it duty of clerks of courts to keep book, in which must be entered minutes of each day's proceedings during term, and or-

ders and judgments, in order in which they are made or rendered, presupposes reading of minutes each morning in open court, which reading, however, is directory. *Wilder v. Bush* (Ala.), 75 So. 143.

(D) RULES OF DECISION, ADJUDICATIONS, OPINIONS, AND RECORDS.

§ 48. Previous Decisions as Controlling or as Precedents.

§ 49. — In General.

Stare Decisis.—The doctrine of stare decisis should be of great force, even as to matters of mere practice. *Allen v. Fincher*, 187 Ala. 599, 65 So. 946.

The authority of adjudged cases is confined to the points actually decided and the true principle of the decision. *Ex parte Gunter*, 193 Ala. 486, 69 So. 442.

Same—Must Yield to Reason, Justice, and Decencies of Civilized Society.—*Norton v. Randolph*, 176 Ala. 381, 58 So. 283. See the title COURTS, § 49, vol. 3, p. 743.

§ 51. — Decisions of Higher Court or Court of Last Resort.

Right to Overrule.—*Davis v. Clausen*, 7 Ala. App. 381, 62 So. 267. See the title COURTS, § 51, vol. 3, p. 743.

Must Be Followed.—*Williams v. State*, 7 Ala. App. 124, 62 So. 294. See the title COURTS, § 51, vol. 3, p. 743.

The decisions of the supreme court are binding on the court of appeals. *Louisville, etc., Co. v. Risenstein*, 14 Ala. App. 205, 68 So. 243; *Johns v. State*, 13 Ala. App. 283, 69 So. 259; *Wofford Oil Co. v. Burgin*, 11 Ala. App. 477, 66 So. 931; *Carroll v. Blackburn*, 12 Ala. App. 648, 68 So. 515.

The appellate court is bound to conform its decisions to those of the supreme court. *Birmingham R., etc., Co. v. Torpy*, 14 Ala. App. 320, 70 So. 198.

Under Act March 9, 1911 (Laws 1911, p. 100) § 10, the court of appeals must follow a decision of the supreme court holding a local statute applicable to interstate shipments. *Illinois Cent. R. Co. v. Kilgore & Son*, 12 Ala. App. 358, 67 So. 707, certiorari denied in *Ex parte*

Kilgore & Son, 191 Ala. 671, 67 So. 1002.

Where errors assigned on appeal to the court of appeals are identically the same as errors assigned on the appeal of a codefendant, jointly indicted with appellant but separately tried, and such assignments have been passed upon by the supreme court in the other case, the questions are not open for consideration in the court of appeals. *Fowler v. State*, 8 Ala. App. 168, 63 So. 40.

Construction of Contract.—The court of appeals must follow a decision of the supreme court construing a contract, though a previous decision of the court of appeals construed the same contract differently. *Birmingham Waterworks Co. v. Kirkland*, 12 Ala. App. 472, 67 So. 757.

Approval of Charge.—Where the supreme court approves a charge given in a certain case, the court of appeals can not criticize the charge when offered in another case to the issues of which it is applicable. *Fealy v. Birmingham* (Ala. App.), 73 So. 296.

Opinion Criticised.—A decision of the supreme court, having stood undisturbed for more than 25 years, will not be overruled, under the rule of stare decisis, though criticised. *Barrett v. Brownlee*, 190 Ala. 613, 67 So. 467.

§ 52. — Dicta.

Not Binding.—*Realty Inv. Co. v. Mobile*, 181 Ala. 184, 61 So. 248. See the title COURTS, § 52, vol. 3, p. 743.

The court of appeals is not bound to follow mere dicta in the decisions of the supreme court. *Wofford Oil Co. v. Burgin*, 11 Ala. App. 477, 66 So. 931.

The fact that court in passing on case of limited facts uses particular and comprehensive language does not render that case authority for doctrine broader than its facts. *Henderson v. Garner* (Ala.) 75 So. 387.

Where an expression in an opinion of the supreme court is in conflict with established precedent, fixed by that court, and is merely dicta, it may be disregarded by the court of appeals. *McCoy v. Prince*, 197 Ala. 665, 73 So. 386.

Decision Held Not Dictum.—*Waters v. Gadsden-Alabama City Land Co.*, 182 Ala. 284, 62 So. 75. See the title COURTS, § 52, vol. 3, p. 743.

§ 53. — Rules of Property.

Decisions long acquiesced in and acted upon and specifically relied on in the instant case become a rule of property and settled law. *Board v. Farson, Son & Co.*, 197 Ala. 375, 72 So. 613.

Construction of Statute.—*Reynolds v. Lee*, 180 Ala. 76, 60 So. 101; *Cowley v. Shields*, 180 Ala. 48, 60 So. 267. See the title COURTS, § 53 (3), vol. 3, p. 744.

§ 55. — Decisions of United States Courts as Authority in State Courts.

§ 55 (1) In General.

The effect of a discharge in bankruptcy is a federal question, and a state court is bound by the decisions of the federal supreme court in its adjudication thereof. *Butler-Kyser Mfg. Co. v. Mitchell & Co.*, 195 Ala. 240, 70 So. 665.

§ 55 (2) Validity of State Statutes under Federal Constitution.

The Supreme Court of United States having declared that state laws authorizing recovery for mental suffering for negligent failure to deliver a telegram are invalid as unwarrantably affecting interstate commerce, discussion of the validity of such laws in state courts is useless. *Western Union Telegraph Co. v. Hawkins* (Ala.), 73 So. 973.

Reasonableness of notice of suit or of service of process by publication, opportunity to become parties to such judicial proceeding affecting personal or property rights, and right of appeal are questions governed by constructions by United States Supreme Court of state statutes providing for due process of law under Const. U. S. Amend. 14. *Gill v. More* (Ala.), 76 So. 453.

§ 55 (3) Construction of Federal Constitution, Statutes, and Treaties.

Federal Constitution.—A decision of the United States Supreme Court construing the interstate commerce clause of the United States Constitution is final

and binding on the state courts, and a prior decision of the state court, in conflict therewith, will be overruled. *State v. Delaye*, 193 Ala. 500, 68 So. 993.

§ 58. Quorum and Number of Judges Necessary to Adjudication.

Contest of Homestead Exemption.—Gen. Acts 1915, p. 811, §§ 7, 9, 10, apply to the circuit court of Mobile, and a single judge could hear and decide a contest of homestead exemption in an equity case. *Kimball v. Cunningham Hdw. Co.* (Ala.), 78 So. 787.

§ 59. Opinions.

Discussion of Facts of Case.—*Rittenberry v. Wharton*, 182 Ala. 388, 62 So. 672. See the title COURTS, § 59, vol. 3, p. 745.

When Decisions Relate to Questions of Fact Only.—Under Acts 1915, p. 595, § 3, providing that justices of the supreme court shall not be required to write opinions in cases where the decisions relate to questions of fact only, where a discussion of the evidence would serve no useful purpose, the court will merely state its conclusion on questions of fact. *Farley v. Baldwin* (Ala.), 77 So. 723. See *Wilkinson v. Flowers* (Ala. App.), 77 So. 982.

Under Acts 1915, p. 595, § 3, amending Code 1907, § 5999, so as to provide that justices of the supreme court shall not be required to write opinions in cases where the decisions relate to questions of fact only, etc., an opinion need not be rendered in a case where the only question at issue was the propriety of the chancellor's determination of fact questions. *Underwood v. Underwood* (Ala.), 77 So. 233.

Reaffirmance of Previous Decision.—Under Acts 1915, p. 595, § 3, amending Code 1907, § 5999, to provide that the justices of the supreme court need not write opinions in cases where the decision merely reaffirms previous decisions, questions presented by charges refused to defendant in his trial for homicide, involving no new principle of law, require no separate treatment in the opinion on appeal. *Madison v. State*, 196 Ala. 590, 71 So. 706.

§ 60. Records.**§ 62. — What Constitutes.**

Records of Excise Commission.—Excise Comm. v. State, 179 Ala. 654, 60 So. 812. See the title COURTS, § 62, vol. 3, p. 746.

§ 63. — Making and Custody.

Change in Minutes.—Where change in minutes of trial court was made by its clerk before they were signed by judge at end of term, party who procured clerk to make change was not liable to party injured. *Wilder v. Bush* (Ala.), 75 So. 143.

Selection of Jurors—Record Not Showing Order Fixing Number of Venire. —

In a prosecution for murder, where the minutes of the court recited that the court drew 50 names, making, with those of the regular jurors, 78 jurors from which the jury should be selected, and that the sheriff was ordered to summon the said 50 persons so drawn, there was a sufficient compliance with Jury Law (Acts 1909, p. 319) § 32, providing that, on an indictment for a capital felony, the court must order the sheriff to summon not less than 50 nor more than 100 persons, including those drawn and summoned on the regular juries for the week set for the trial of the case, and shall draw from the jury box the number of names required with the regular jurors drawn for the week set for trial, even though the record did not show an order fixing the number of the venire. *Waldrop v. State*, 185 Ala. 20, 64 So. 80.

§ 65. — Amendment and Correction.**§ 65 (1) Power to Amend in General.**

No third person has right to alter or correct even a clerical error contained in the journals of any court, and it is a serious assumption for any third person to attempt to do so personally or to procure a clerk or register to do so. *Wilder v. Bush* (Ala.), 75 So. 143.

§ 65 (2) Authority of Clerk.

Clerk of court should write judgments from bench notes and pleadings in each cause, which entries are, in general sense, in fieri until minutes are signed by presiding judge, or until adjournment of

court, or expiration of limitation fixed by statute, and until such time clerk may make minutes speak truth by correcting clerical errors. *Wilder v. Bush* (Ala.), 75 So. 143.

§ 65 (3) Errors or Omissions Which May Be Corrected.

Clerical errors in journals of court are not only those made by clerk but also those mistakes apparent on record, made by counsel or even by court in progress of trial. *Wilder v. Bush* (Ala.), 75 So. 143.

§ 65 (4) Time of Amendment.

Under Alabama practice, trial court retains control of journals during entire term, or for time specified by statute, and throughout such time court may add to, strike out, or alter its journals, or incorporate new matter, but on final adjournment control is lost. *Wilder v. Bush* (Ala.), 75 So. 143.

Under Code 1907, §§ 2891, 3256, 4139, 4140, clerical misprisions in journals of court may be corrected after adjournment. *Wilder v. Bush* (Ala.), 75 So. 143.

§ 65½. — Operation and Effect.

A record once established by competent judicial authority is incontestable save for causes and by methods within the exclusive power of a court of chancery. *Campbell v. Byers*, 189 Ala. 307, 66 So. 651.

III. COURTS OF GENERAL ORIGINAL JURISDICTION.**§ 66. Courts Invested with General Jurisdiction.**

By Acts 1915, p. 279, jurisdiction and powers of chancery court have been conferred on circuit court, which tries and determines every proceeding in equity according to rules formerly administered in chancery court. *Carson v. Sleight* (Ala.), 78 So. 229.

§ 67. Amount or Value in Controversy.**§ 69. — Matter in Dispute, or Amount or Value Claimed or Involved.**

Recovery of Less than Jurisdictional Amount.—A \$40 judgment for failure to furnish medical attention pursuant to contract of employment secured in Bessemer city court should be set aside and

suit dismissed under Code 1907, § 5355, requiring such action with certain exceptions, where plaintiff recovers less than court's jurisdictional amount. *Woodward Iron Co. v. Keller* (Ala.), 74 So. 933.

Same—Not Applicable to Tort Actions.—Code 1907, § 5355, providing that judgment must be set aside and suit dismissed where plaintiff recovers an amount below court's jurisdiction, except in certain cases, applies to contract, but not to tort, actions. *Woodward Iron Co. v. Keller* (Ala.), 74 So. 933.

Same—Failure to File Affidavit That Sum in Excess of Jurisdictional Amount Actually Due.—In suit in the circuit court on the common counts for \$65, where there was no question of set-off, the case being tried on the general issue, and plaintiff did not file any affidavit that a sum in excess of \$50 was actually due him, as required by Code 1907, § 5355, touching proceedings when the amount sued for or received is less than the limit of jurisdiction, defendant's motion, to set aside judgment for plaintiff for \$18.50, and to dismiss the suit, on the ground that the sum recovered was not within the jurisdiction of the court, should have been granted. *Manning v. Giles* (Ala.), 73 So. 428.

Same—Effect of Affidavit.—Under Code 1907, § 5355, declaring that if a sum below the jurisdiction of the court be recovered, judgment must be set aside, unless plaintiff or some one for him make an affidavit stating that an amount within the jurisdiction of the court was actually due, and that recovery was prevented by failure of proof, the truth of the affidavit can not be controverted, and its filing is conclusive of his right to retain his judgment, and is a bar to dismissal of the action. *Bullock v. Mason*, 194 Ala. 663, 69 So. 882.

IV. COURTS OF LIMITED OR INFERIOR JURISDICTION.

§ 72. Limitations as to Amount or Value in Controversy.

§ 74. — Amount or Value Claimed or Involved.

While the city court only has jurisdic-

tion in assumpsit when the amount in controversy exceeds \$50, where the sum claimed exceeds such amount, the judgment is not rendered void because the recovery does not exceed \$50. *Black v. Ryan*, 194 Ala. 667, 69 So. 633.

§ 74½. Territorial Limitations.

Const. 1901, § 232, declares that no foreign corporation shall do business in the state without having at least one known place of business and an authorized agent or agents, and such corporation may be sued in any county where it does business by service of process upon any agent anywhere in the state, while § 240 declares that corporations shall have the right to sue and be subject to be sued in all courts in like cases as natural persons. Code 1907, § 6110, provides that all actions on contracts except as otherwise provided must be brought in the county in which the defendant or one of the defendants resides, and all other personal actions, if the defendant or one of the defendants has within the state a permanent residence, may be brought in the county of such residence, etc., while § 6112 declares that a foreign or domestic corporation may be sued in any county in which it does business by an agent, but all actions for personal injuries must be brought in the county where the injury occurred or in the county where plaintiff resides if such corporation does business by agent in the county of plaintiff's residence. Defendant railroad company incorporated in a foreign state killed plaintiff's cow in the county of plaintiff's residence. Held, that an action might be maintained in the circuit or city court of another county in which defendant did business, being based on service upon defendant's agent within such county. *Southern R. Co. v. Goggins* (Ala.), 73 So. 958.

§ 74½a. Particular Courts of Special Civil Jurisdiction.

Court in Lieu of Justices of Peace.—Loc. Acts 1915, p. 231, creating an inferior court in lieu of justices of the peace, extends to such court only the jurisdiction theretofore possessed by justices of the peace. *McGehee v. State* (Ala.), 74 So. 374.

§ 77. Municipal Courts.**§ 79. — Procedure.**

Judgment.—Local Law Feb. 28, 1889, § 20, limiting the control of the city court of Birmingham over its judgment to 30 days, has no reference to the right of the court to enter judgment on the verdict. *McEntire v. Paffe*, 12 Ala. App. 507, 67 So. 713.

A judgment of the city court of Birmingham entered more than three months after verdict, but during the same term as that in which the verdict was rendered, is valid. *McEntire v. Paffe*, 12 Ala. App. 507, 67 So. 713.

Same—Alteration after Term.—Where the term at which a case in the city court of Birmingham was tried had ended, under Loc. Acts 1911, p. 58, before motion to set aside the second judgment entry or to correct the same was made November 8, 1915, the court could not alter or amend such second judgment entry except for clerical error or omission, on record evidence; parol evidence being inadmissible to alter, amend, or correct a record by amendment nunc pro tunc. *Prudential Casualty Co. v. Kerr*, 14 Ala. App. 539, 71 So. 979.

Unauthorized Order Setting Aside Judgment.—*Southern R. Co. v. Griffith*, 177 Ala. 364, 58 So. 425. See the title COURTS, § 79 (3), vol. 3, p. 752.

§ 80. — Review of Proceedings.**§ 80 (1) Right of Review.**

Judgment Not "against" Appellant.—*First Ave. Coal, etc., Co. v. Hite*, 9 Ala. App. 251, 62 So. 1918. See the title COURTS, § 80 (1), vol. 3, p. 752.

§ 80 (2½) Dismissal of Appeal.

Appeal from Void Judgment.—Gen. and Loc. Acts 1901, p. 1854, clothes the city court of Bessemer with the jurisdiction of circuit and chancery courts of the state. Code 1907, § 3255, provides that the circuit court shall have jurisdiction in all actions at law when the sum in controversy exceeds \$50. Held, that an appeal from judgment rendered by the city court of Bessemer in an action wherein the amount claimed was \$38.20, there being nothing in the record to

show that the case originated elsewhere, and that the city court was exercising its appellate jurisdiction, will be dismissed, as the amount was less than the minimum amount over which the city court had jurisdiction. *Cornelius v. Lowery*, 14 Ala. App. 454, 70 So. 305.

§ 80 (3) Review.

Conclusiveness of Findings.—Conclusion of city court below sitting without jury upon the testimony ore tenus must be treated on appeal like the verdict of a jury on issues of fact. *Burger v. Peerless, etc., Mfg. Co.*, 97 Ala. 470, 73 So. 77.

If decree of city court is passed after hearing, where witnesses were examined ore tenus, the supreme court can not disturb it, unless plainly erroneous. *Everett v. Cooper (Ala.)*, 75 So. 332.

Though the findings of the Bessemer city court may be reviewed without any presumption in their favor under the statute creating that court, the appellate court should not disregard the fact that the trial court had better opportunity to determine the weight of the testimony, because it had the witnesses before it. *Long-Lewis Hdw. Co. v. Ewing*, 13 Ala. App. 435, 68 So. 794.

In Absence of Objection or Exception.

—Where to the finding and conclusion of the city court trying a case without a jury there was no objection or exception, as required by the practice act of such city court, such finding and conclusion was not presented for review on appeal. *Adams v. Bibby*, 194 Ala. 652, 69 So. 588.

§ 80 (4) Determination and Disposition of Cause.

Under Acts 1907, p. 570, § 17, the court on appeal from law and equity court of Mobile of case tried by court, if it finds error must render such judgment as should have been rendered below, or may reverse and remand for further proceedings if in its judgment it seems right. *Mobile West Shore Tract. Co. v. Austill*, 197 Ala. 432, 73 So. 4.

Trial De Novo.—The law relating to appeals and certioraris from the courts of justices of the peace applies to appeals and certioraris from the municipal court

under Loc. Acts 1915, p. 236, § 20, certiorari from the municipal to the circuit court operated as an appeal, and the cause stood for trial de novo in the circuit court under Code 1907, § 4720, providing when and how cases on appeal shall be tried in the circuit court. *Roddan v. Brown* (Ala.), 77 So. 403.

V. COURTS OF PROBATE JURISDICTION.

§ 81. Nature and Scope of Jurisdiction in General.

General Jurisdiction.—*Milbra v. Sloss-Sheffield Steel, etc., Co.*, 182 Ala. 622, 62 So. 176. See the title COURTS, § 81, vol. 3, p. 754.

Property Left to Executors in Trust.—*Burch v. Gaston*, 182 Ala. 467, 62 So. 508. See the title COURTS, § 81, vol. 3, p. 754.

§ 85. Procedure in General.

Records.—While probate judges need not be learned in the law, the records and judgments of the county court are so simple in form that they should make clear and accurate entries as to the disposition of cases, the fines imposed, and the costs taxed in any case. *State v. Hasty*, 184 Ala. 121, 63 So. 559.

Decree Held Valid.—Ex parte Griffin, 177 Ala. 243, 59 So. 303. See the title COURTS, § 85 (2), vol. 3, p. 755.

Appealable Order.—Under Code 1907, § 2855, providing that appeal lies to the circuit or supreme court from any final decree of the probate court, or order, judgment, or decree of the probate judge, an order of the probate court dismissing escheat proceedings on the ground that the property descended and did not escheat, is appealable. *McKenzie v. Jensen*, 195 Ala. 36, 70 So. 678.

VI. COURTS OF APPELLATE JURISDICTION.

§ 86. Supervisory Jurisdiction.

Constitutional Provision.—Ex parte Louisville, etc., R. Co., 176 Ala. 631, 58 So. 315. See the title COURTS, § 86, vol. 3, p. 756.

Power of Control over Court of Appeals.—Ex parte Louisville, etc., R. Co.,

176 Ala. 631, 58 So. 315. See the title COURTS, § 86, vol. 3, p. 756.

Matters of Fact Alone.—Ex parte Steverson, 177 Ala. 384, 58 So. 992. See the title COURTS, § 86, vol. 3, p. 756.

§ 86½. Certificate of Questions by Court of Appeals to Supreme Court.

Where the court of appeals holds a statute unconstitutional, it should, as in case of disagreement between the judges, certify the question for determination by the supreme court. *Wofford Oil Co. v. Burgin*, 11 Ala. App. 477, 66 So. 931.

Where there is a supreme court decision, the court of appeals should follow it, and should not certify the case to the supreme court so as to give it opportunity to change its decision. *Illinois Cent. R. Co. v. Kilgore & Son*, 12 Ala. App. 358, 67 So. 707, certiorari denied in *Ex parte Kilgore & Son*, 191 Ala. 671, 67 So. 1002.

§ 87. Original Jurisdiction in General.

Disbarment Proceedings.—Under Code 1907, § 3008, the jurisdiction of the supreme court in disbarment proceedings is strictly appellate. Ex parte Peters, 195 Ala. 67, 70 So. 648.

§ 88. Issuance of Prerogative or Remedial Writs.

§ 88 (2) Certiorari.

Appropriate Remedy to Review Decisions of Court of Appeals.—Ex parte Louisville, etc., R. Co., 176 Ala. 631, 58 So. 315. See the title COURTS, § 88 (2), vol. 3, p. 757.

Decisions Not Conflicting.—Ex parte Richard, 180 Ala. 580, 61 So. 819. See the title COURTS, § 88 (2), vol. 3, p. 757.

§ 88 (5) Prohibition.

The court of appeals has jurisdiction of a petition praying for a writ of prohibition to restrain a circuit judge from hearing a petition for a writ of habeas corpus by one held under a valid judgment of conviction of operating a gaming table, on the ground that the sentence imposed is void, in view of statute according it power to issue such writs as are necessary to give it superintendence and control over courts of inferior jurisdiction

in matters over which it has final appellate jurisdiction. *State v. Gunter* (Ala. App.), 77 So. 443.

§ 88½. Procedure.

In Issuance of Writs—Prohibition. — The state, with the attorney general as relator, may by petition for prohibition invoke the supervisory powers of the supreme court, under Const. 1901, § 140, over inferior courts. *Ex parte State* (Ala.), 75 So. 327.

Where the supreme court's supervisory power is invoked to annul by prohibition a wholly void act of a tribunal, such tribunal need not be first moved to avoid the subject of complaint. *Ex parte State* (Ala.), 75 So. 327.

Same—Mandamus. — Where an original petition for writ of mandamus was submitted on the petition and demurrer thereto, and the respondent did not indicate, on the overruling of the demurrer, that he wished to answer further, thus leading the court to consider the case as one solely of law on the record, it was not error to issue the writ without affording an opportunity to answer, particularly where it did not appear that the answer would contain matters not already considered. *State v. Pugh*, 14 Ala. App. 585, 70 So. 973.

Original—Waiver.—Where in original mandamus in the appellate court to compel revival of an action after death of the defendant, the petition for a writ made the original record in the case part of the petition, it is immaterial that the original complaint was not before the court; respondent not having objected until after determination of the petition for the writ. *State v. Pugh*, 14 Ala. App. 585, 70 So. 973.

VII. UNITED STATES COURTS.

(C) JURISDICTION DEPENDENT ON AMOUNT OR VALUE IN CONTROVERSY.

§ 92½. Statutory Provisions.

By direct proviso in Act March 3, 1887, c. 373, § 6, 24 Stat. 555, and Act Aug. 13, 1888, c. 266, § 6, 25 Stat. 436, suits pending at the time the jurisdictional amount of United States Circuit Courts was

raised from \$500 to \$2,000, were saved from the operation of the statute. *Murphy v. Pipkin*, 191 Ala. 111, 67 So. 675.

VIII. CONCURRENT AND CONFLICTING JURISDICTION, AND COMITY.

(A) COURTS OF SAME STATE, AND TRANSFER OF CAUSES.

§ 94. Exclusive or Concurrent Jurisdiction.

Allotment of Dower.—Statutory jurisdiction conferred on courts of probate in allotment of dower does not take away original jurisdiction prevailing in courts of chancery. *Yarbrough v. Yarbrough* (Ala.), 75 So. 932.

Code 1907, § 3835, providing that when land out of which dower is demanded has been alienated by the husband, and from improvements made by the alienee, or from any other cause an assignment of dower by metes and bounds will be unjust, the court of probate must decline jurisdiction, clearly implies that the power conferred on the probate court for the assignment of dower was intended to be concurrent with that of the chancery court and limited to cases where such estate might be justly assigned by metes and bounds. *Yarbrough v. Yarbrough* (Ala.), 75 So. 932.

§ 97. Pendency and Scope of Prior Proceeding.

As a general rule, where the jurisdiction of a court and the right of plaintiff to sue therein once attach, such right can not be arrested or taken away by proceedings in another court. *Eastburn v. Canizas*, 193 Ala. 574, 69 So. 459.

Settlement of Estates.—Gen. Acts 1911, p. 574, as amended by Gen. Acts 1915, p. 738, does not give chancery court jurisdiction of final settlement of estates, where probate court has entered upon exercise of its jurisdiction and much less after a final decree has been entered in that court. *Carpenter v. Carpenter* (Ala.), 75 So. 472.

Code 1907, §§ 6168, 6169, allow a widow to dissent from the provision made by her husband's will, and in lieu thereof to take such part of the personal estate

as she would have been entitled to on his intestacy, and require such dissent to be filed within 12 months from the probate of the will. Section 3763 gives to the widow of an intestate leaving no children all his personal property, and § 2810 provides that any legatee, after 12 months from the grant of letters testamentary, may sue at law and recover the legacy, upon proof that the executor assented thereto. Testator, leaving no children, and whose estate consisted wholly of personal property, bequeathed \$1,000 to each of his five sisters and the balance to his wife, and the widow duly filed her dissent from the will, and the legatees thereafter sued the widow, as executrix, to compel payment of their legacies, and, pending such suits, the executrix filed her account and petitioned for a final settlement of the estate. Held, that as the probate court had original jurisdiction over the administration, and as the widow was entitled to all the personal estate on distribution, it might retain jurisdiction and order the settlement and distribution of the estate, notwithstanding the pending suits. *Eastburn v. Canizas*, 193 Ala. 574, 69 So. 459.

§ 101. Transfer of Causes.

§ 103. — Causes Which May Be Transferred—Grounds.

See post, "Proceedings," § 104.

§ 104. — Proceedings.

Removal of Administration to Chancery Court.—In suit to remove an estate from the probate to the chancery court, etc., where respondents demurred, without denying the will, its probate, or pendency of the administration in the probate court, or that complainant had not been paid her annuity under the will, demurrer having been overruled, the court did not improvidently make order of removal to the chancery court, though the bill was not framed to meet Acts 1915, p. 738, authorizing summary order of removal. *Gurley v. Bushnell* (Ala.), 76 So. 324.

Same—On Whose Application Cause

Removed.—*Snodgrass v. Snodgrass*, 176 Ala. 160, 57 So. 474. See the title COURTS, § 104 (2), vol. 3, p. 764.

§ 105. — Effect of Transfer and Proceedings Had Thereafter.

Where action pending in state court is removed to another state court, any attempted subsequent action therein by first tribunal is beyond its jurisdiction. *Ex parte City Bank, etc., Co.* (Ala.), 76 So. 372.

(B) STATE COURTS AND UNITED STATES COURTS.

§ 106. Exclusive or Concurrent Jurisdiction.

The federal statutes regulating interstate commerce are recognized and enforced by the state courts. *Central, etc., R. Co. v. Patterson*, 12 Ala. App. 369, 68 So. 513.

§ 108. Pendency and Scope of Prior Proceeding.

In bill by creditors against insolvent consolidated corporation, held state court having first acquired jurisdiction properly appointed receiver, although federal court pending application had appointed one. *Alabama, etc., Railway v. Tolman* (Ala.), 76 So. 381.

(C) COURTS OF DIFFERENT STATES OR COUNTIES.

§ 114. Comity between Courts of Different States.

Custody of Children.—The court of another state having at instance of the father assumed jurisdiction to protect children as infant children within the jurisdiction of that state, and they having become wards of that court, and the father in violation of the decree intrusting the children's custody to him, having removed them from that state, the courts of Alabama, recognizing the sovereign authority of the other state in respect thereto, as a matter of comity, will refuse to deal with the question relating to the future welfare of the children. *Burns v. Shapley* (Ala. App.), 77 So. 447.

Covenant, Action of.

See the title COVENANT, ACTION OF, vol. 3, p. 768, and references there given.

COVENANTS.

I. Requisites and Validity.

(A) Express Covenants.

§ ½a. Acceptance of Deed Containing Covenants on Part of Grantee.

(B) Implied Covenants.

§ 1. Words of Conveyance.

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(A) Covenants in General.

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(C) Covenants Running with the Land.

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§ 35. Covenants of Title in General.

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IV. Actions for Breach.

§ 45. Defenses.

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§ 65. Effect of Recovery on Title to Property.

Cross References.

See the title COVENANTS, vol. 3, p. 769, and references there given.

I. REQUISITES AND VALIDITY.**(A) EXPRESS COVENANTS.****§ 1/2a. Acceptance of Deed Containing Covenants on Part of Grantee.**

Grantee, by accepting conveyance, held estopped to contest validity of covenant creating an easement over other land owned by the grantee. *Weil v. Hill*, 193 Ala. 407, 69 So. 438.

(B) IMPLIED COVENANTS.**§ 1. Words of Conveyance.****§ 2. — Particular Words.**

"Grant, Bargain, Sell, and Convey."—*Mackintosh v. Stewart*, 181 Ala. 328, 61 So. 956. See the title COVENANTS, § 2, vol. 3, p. 772.

II. CONSTRUCTION AND OPERATION.**(A) COVENANTS IN GENERAL.****§ 7. Persons Liable on Personal Covenants.**

Remaindermen.—*Abney v. Abney*, 182 Ala. 213, 62 So. 64. See the title COVENANTS, § 7, vol. 3, p. 774.

§ 9 1/2. Limitation to Estate Conveyed.

A warranty in a conveyance of telephone plant and system applies only to property to which the writing evidences the passing of title. *Wilder v. Tatum* (Ala. App.), 73 So. 833.

(B) COVENANTS OF TITLE.**§ 11 1/2. Nature and Operation in General.**

A general covenant of title does not include a covenant of quantity, the lands being sold by metes and bounds, a statement as to their acreage being a description only. *Gulf Coal, etc., Co. v. Musgrove*, 195 Ala. 219, 70 So. 179.

§ 12. Knowledge of Parties as to Defects in Title or Incumbrances.

Knowledge on Part of Grantee of Title.—*Mackintosh v. Stewart*, 181 Ala. 328, 61 So. 956. See the title COVENANTS, § 12, vol. 3, p. 775.

Knowledge of incumbrances at time of the covenant by covenantee does not bar his right of recovery on covenants of warranty, for these covenants are taken

for protection and indemnity against unknown incumbrances or defects in title. *Anniston Lumber, etc., Co. v. Griffiths* (Ala.), 73 So. 418.

Presumption of Knowledge.—*Mackintosh v. Stewart*, 181 Ala. 328, 61 So. 956. See the title COVENANTS, § 12, vol. 3, p. 775.

§ 13. Covenant of Seisin.

Express and Implied Covenants.—*Mackintosh v. Stewart*, 181 Ala. 328, 61 So. 956. See the title COVENANTS, § 13, vol. 3, p. 775.

§ 16. Covenant of Warranty.**§ 18. — General Warranty.**

A covenant of general warranty of title is in substance and effect a covenant for possession and quiet enjoyment. *Gulf Coal, etc., Co. v. Musgrove*, 195 Ala. 219, 70 So. 179.

Deed Reciting Mortgage on Property.

—Where deed recited that premises were subject to described mortgage, and habendum clause covenanted that property was free from incumbrances "except above-mentioned mortgage," the general covenant of warranty was modified by the preceding recitals, and did not obligate the grantor to pay the mortgage. *Toney v. Dewey* (Ala.), 78 So. 887.

(C) COVENANTS RUNNING WITH THE LAND.**§ 22. Covenant as to Use of Property.**

If a restriction imposed by grantor or proprietor upon granted premises would naturally operate to enhance value of his adjacent premises whether retained by him or another, it is a strong circumstance that restriction was not for mere use of grantor, but is appendant to the premises. *Leek v. Meeks* (Ala.), 74 So. 31.

§ 23. Persons Entitled to Enforce Real Covenants.**§ 24. — Grantees and Assignees in General.**

A transfer of land after breach of the grantor's covenant of title does not carry with it the damages, for they do not run with the land or inure to the benefit of subsequent grantees. *Gulf,*

Coal, etc., Co. v. Musgrove, 195 Ala. 219, 70 So. 179.

A successor corporation which took over the property of the corporation to which plaintiff transferred land, held not entitled to assert a lien on plaintiff's new shares, based on a breach of warranty in the sale, no right of action for covenants breached being assigned. **Gulf Coal, etc., Co. v. Musgrove**, 195 Ala. 219, 70 So. 179.

A stipulation held to show that a grantor of land never had any title, and so a general covenant which was one for possession and quiet enjoyment was breached when made, consequently a grantee of the original grantee can not recover for the breach. **Gulf Coal, etc., Co. v. Musgrove**, 195 Ala. 219, 70 So. 179.

III. PERFORMANCE OR BREACH.

§ 35. Covenants of Title in General.

When Broken — Effect of Acts by Stranger Subsequent to Conveyance.—**Mackintosh v. Stewart**, 181 Ala. 328, 61 So. 956. See the title COVENANTS, § 35, vol. 3, p. 779.

§ 36. Covenants of Seisin.

What Constitutes Breach.—**Mackintosh v. Stewart**, 181 Ala. 328, 61 So. 956. See the title COVENANTS, § 36, vol. 3, p. 779.

§ 37. Covenant of Right to Convey.

See post, "Issues, Proot, and Variance," § 51.

§ 38. Covenant against Incumbrances.

A covenant against incumbrances is a covenant in presenti, and is broken as soon as made if there is an existing defect of title or an incumbrance, and proof of eviction of the grantee is not necessary to show a breach. **Anniston Lumber, etc., Co. v. Griffith (Ala.)**, 73 So. 418.

§ 39. Covenant for Quiet Enjoyment.

A covenant in a deed held equivalent to a covenant for possession and quiet enjoyment, and hence not to have been broken until the grantee's possession and enjoyment were interfered with. **Musgrove v. Cordova Coal, etc., Co.**, 191 Ala. 419, 67 So. 582.

Grantee Entitled to Recover.—A grantee who took with a covenant for possession and quiet enjoyment held to have been evicted and entitled to recover. **Musgrove**

v. Cordova Coal, etc., Co., 191 Ala. 419, 67 So. 582.

Necessity for Eviction — Outstanding Title.—Breach of a general covenant which was one of possession and quiet enjoyment can not be established by proof of an outstanding superior title but eviction must be shown. **Gulf Coal, etc., Co. v. Musgrove**, 195 Ala. 219, 70 So. 179.

IV. ACTIONS FOR BREACH.

§ 45. Defenses.

Fraud.—The only fraud which can be set up by the grantor in a court of law to avoid an express warranty against liens, contained in a deed, is that which goes to the execution of the deed. **Blackmon v. Quennelle**, 189 Ala. 630, 66 So. 608.

So long as the grantor retained the consideration for the deed, she could not avoid for fraud an express warranty against liens. **Blackmon v. Quennelle**, 189 Ala. 630, 66 So. 608.

§ 48. Pleading.

§ 49. — Declaration, Complaint, or Petition.

Sufficient Allegations of Breach.—**Mackintosh v. Stewart**, 181 Ala. 328, 61 So. 956. See the title COVENANTS, § 49 (1), vol. 3, p. 785.

The complaint, in an action for breach of covenant of seisin, and of good right to convey, which alleges that defendant executed a deed covenanting that he was seized in fee of the premises and had a good right to convey, while he had no title to a described part of the premises, states a good cause of action. **Garner v. Morris**, 187 Ala. 658, 65 So. 1000.

Allegation of Time of Breach.—It is unnecessary to allege when the covenant was breached by the eviction of plaintiff or his vendee; the time of the eviction being relevant only on the question of limitations, which is a defense. **Merritt v. Wyatt**, 184 Ala. 262, 63 So. 962.

Averment that Warrantor Notified of Eviction.—In an action for breach of a covenant of warranty made on the sale of land, it is unnecessary to aver that the warrantor was notified of the eviction of plaintiff or his vendee. **Merritt v. Wyatt**, 184 Ala. 262, 63 So. 962.

Showing that Persons Ousted Entitled to Property.—A complaint held sufficient to show that the persons ousted were those entitled to the property. *Merritt v. Wyatt*, 184 Ala. 262, 63 So. 962.

Stating Cause of Action for Damages in Defending Litigation.—A complaint which alleges that the grantee incurred expenses in litigation as to title, and that the grantor was notified of the litigation and called on to defend it, states a cause of action for damages in defending the litigation. *Garner v. Morris*, 187 Ala. 658, 65 So. 1000.

§ 51. — Issues, Proof, and Variance.

In an action for breach of covenant of warranty it is unnecessary to prove that the warrantor was notified of the eviction of plaintiff or his vendee. *Merritt v. Wyatt*, 184 Ala. 262, 63 So. 962.

A covenant of good right to convey being breached when made if the covenantor had no title, in an action for the breach of such covenant because the covenantor did not have title to the mineral, evidence of eviction, ouster, or surrender was unnecessary. *Partridge v. Bates* (Ala.), 78 So. 911.

§ 52. Evidence.

§ 54. — Admissibility in General.

In suit involving breach of warranty in conveyance of telephone plant and system in which it appeared that a third party owned a part of system conveyed, it was error to allow grantee to show whether an association had paid such third party for their telephone line and who owned the capital stock of said association. *Wilder v. Tatum* (Ala. App.), 73 So. 833.

§ 56. Damages.

§ 61. — Covenant of Warranty.

Measure of damages for breach of warranty in conveyance of a telephone plant and system was value of that which was lost at time of loss, and, if warranty was breached in making, value at that time. *Wilder v. Tatum* (Ala. App.), 73 So. 833.

§ 63. Trial.

§ 63½. — In General.

Misleading Instruction.—In an action by a grantee for breach of warranty of seisin, an instruction on the right of the grantee to recover for attorney's fees incurred in an unsuccessful defense of the title held misleading. *Garner v. Morris*, 187 Ala. 658, 65 So. 1000.

Affirmative Charge Erroneously Given.

— In an action for breach of warranty of good right to convey plaintiff's evidence that defendant did not have title to the minerals, but only to the surface, supported the material averments of the complaint, and rendered erroneous an affirmative charge for defendant. *Partridge v. Bates* (Ala.), 78 So. 911.

§ 65. Effect of Recovery on Title to Property.

Revesting Title Conveyed in Covenantor. — *Mackintosh v. Stewart*, 181 Ala. 328, 61 So. 956. See the title COVENANTS, § 65, vol. 3, p. 791.

Protection of Both Vendor and Purchaser.—*Mackintosh v. Stewart*, 181 Ala. 328, 61 So. 956. See the title COVENANTS, § 65, vol. 3, p. 791.

Coverture.

See post, HUSBAND AND WIFE.

CREDITORS' SUIT.

- § 1. Nature and Scope of Remedy.
- § 3. Adequate Remedy at Law.
- § 4. — In General.
- § 5. Grounds of Remedy in General.
- § 23. Discovery.
- § 28. Pleading.
- § 30. — Bill, Complaint, or Petition.

Cross References.

See the title CREDITORS' SUIT, vol. 3, p. 792, and references there given.

In addition, see ante, ASSIGNMENTS FOR BENEFIT OF CREDITORS; BANKRUPTCY.

§ 1. Nature and Scope of Remedy.

Bill in equity, as amended, construed as an ordinary creditor's bill for the discovery of assets, whether equitable or legal, and their subjection to plaintiff's claim for attorney's services. *Harton v. Amason* (Ala.), 76 So. 953.

§ 3. Adequate Remedy at Law.

§ 4. — In General.

A creditor may resort to a creditor's suit without exhausting his ordinary remedy at law. *Fidelity Mortg. Bond Co. v. Morris*, 191 Ala. 318, 68 So. 153.

While a judgment creditor may sell a judgment debtor's interest in land despite fraudulent effort to substitute name of debtor's wife in recorded deed, he may also have relief in equity to render his judgment lien more effectual. *Autauga Banking, etc. Co. v. Chambliss* (Ala.), 75 So. 463.

§ 5. Grounds of Remedy in General.

Fraudulent Conveyance. — Defendant's fraudulent conveyance of assets held not

necessary to the equity of a creditor's bill for the discovery of assets and their subjection to complainant's claim. *Harton v. Amason* (Ala.), 76 So. 953. See ante, "Nature and Scope of Remedy," § 1.

§ 23. Discovery.

Showing Necessity for Discovery. — *Elliott v. Kyle*, 176 Ala. 167, 57 So. 752. See the title CREDITORS' SUIT, § 23, vol. 3, p. 802.

§ 28. Pleading.

§ 30. — Bill, Complaint, or Petition.

Bill — Verification. — While a bill for discovery must be sworn to where the equity of the bill rests upon discovery alone, a creditor's bill to follow and subject to his demand, the proceeds of money fraudulently donated to defendants by the debtor need not be sworn to, though it also prays for a discovery of the property in which such money has been invested, since the discovery is incidental and auxiliary, and the equity of the bill is not dependent thereon. *Shelton v. Timmons*, 139 Ala. 289, 66 So. 9.

Crimes.

See post, CRIMINAL LAW.

CRIMINAL LAW.

I. Nature and Elements of Crime and Defenses in General.

- § ½. Power to Define and Punish Crime.
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III. Parties to Offenses.

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- § 76. Limitations Applicable.
- § 78. Commencement of Prosecution.
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- § 91½. — Motion, Demurrer, or Plea in Abatement.
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XVII. Punishment and Prevention of Crime.

§ 802. Extent of Punishment in General.

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§ 802 (2) Power of Courts to Impose Particular Kinds of Punishment.

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Cross References.

See the title CRIMINAL LAW, vol. 4, p. 1, and references there given.

In addition, see ante, APPEAL AND ERROR; ARREST; BAIL; COSTS; COURTS; post, GRAND JURY; HOMICIDE; INDICTMENT AND INFORMATION; STATUTES; WITNESSES.

As to costs in criminal prosecutions, see ante, COSTS. As to fines, see post, FINES. As to grand juries and inquisitions by them, see post, GRAND JURY. As to proceedings for discharge from imprisonment by habeas corpus, see post, HABEAS CORPUS. As to findings and requisites of indictments or other accusations, objections thereto and motions to quash, etc., see post, INDICTMENT AND INFORMATION. As to responsibility for criminal acts of particular persons, see post, INFANTS; INSANE PERSONS, and other specific titles. As to affect of adjudication of acquittal, conviction, judgment or sentence, see post, JUDGMENT. As to guaranty of trial by jury, see post, JURY. As to pardon or commutation of sentence, see post, PARDON.

I. NATURE AND ELEMENTS OF CRIME AND DEFENSES IN GENERAL.

§ ½. Power to Define and Punish Crime.

States. — It is within the power of the legislature to make guilty of vagrancy persons engaged in unlawful callings, such as keeping a gambling house. *Bran-non v. State*, 12 Ala. App. 189, 67 So. 634,

certiorari denied in 191 Ala. 29, 67 So. 1007.

§ 4. Statutory Provisions.

See generally post, STATUTES.

§ 6. — Repeal.

Under Code 1907, § 7806, a prosecution for a violation of a statute is not destroyed by the repeal of the act after conviction thereunder. *Balsam v. State*, 13 Ala. App. 252, 69 So. 226.

§ 7. Criminal Intent and Malice.**§ 8. — In General.**

The criminal "intent" which is the purpose to use a particular means to effect the result and accomplish the purpose differs from "motive," which is the power impelling action to a definite result. *Jones v. State*, 13 Ala. App. 10, 68 So. 690.

§ 9. — Acts Prohibited by Statute.

The rule that a wrongful act and a wrongful intent must concur to constitute a crime does not deny to the state the power to create and define as a crime the mere doing of an act which but for the statute would not be an offense. *State v. Southern Exp. Co. (Ala.)*, 75 So. 343.

§ 10. — Motive.

Definition. — "Motive" is an inducement or that which leads or tempts the mind to do or commit the crime charged. *Spicer v. State*, 188 Ala. 9, 65 So. 972.

Necessity. — *Ward v. State*, 182 Ala. 1, 62 So. 703. See the title CRIMINAL LAW, § 10, vol. 4, p. 45.

Intent Distinguished from Motive.—The criminal "intent" which is the purpose to use a particular means to effect the result and accomplish the purpose differs from the motive which is the power impelling action to a definite result. *Jones v. State*, 13 Ala. App. 10, 68 So. 690.

Necessity of Having Relation to Act Charged.—The motive attributed to accused can not be imagined or speculated upon but must have some relation to the act charged according to known rules and principles of human conduct, or it can not be considered a legitimate part of the proof. *Spicer v. State*, 188 Ala. 9, 65 So. 972.

§ 14½. Different Offenses in Same Transaction.

A conviction of defendant for carrying a concealed pistol and of public drunkenness is not to be regarded as a conviction of two offenses for one act, where there was evidence of separate acts constituting the two offenses. *Boatner v. State*, 8 Ala. App. 361, 63 So. 33.

§ 14½a. Defenses in General.

"Alibi."—An "alibi" is a general traverse of the material averment of the in-

dictment that the defendant committed the crime charged against him. *Ragsdale v. State*, 12 Ala. App. 1, 67 So. 783.

Inconsistent Defenses. — Accused may set up inconsistent defenses. *Love v. State (Ala. App.)*, 75 So. 189.

§ 17. Entrapment.

Sale of Liquor Induced by Officer. — Accused held guilty of violating the liquor law, though the sale was induced by an officer. *Swope v. State*, 12 Ala. App. 297, 68 So. 562, cited in note in *Ann. Cas.* 1916C, 732.

Abstraction of Examination Papers Induced by Medical Examiner.—Where a state medical examiner, through an agent, entrapped defendant, an employee about the State Capitol, into entering his office and abstracting therefrom the examination papers of the agent, the defendant was not guilty of burglary. *Adams v. State*, 13 Ala. App. 330, 69 So. 357.

Erroneous Instruction. — Instruction that if the jury believe that the state's witness sought to entrap the defendant into violating the law they must acquit is properly refused, the mere fact that defendant yielded to solicitation of a witness for the state being no justification. *Strother v. State (Ala. App.)*, 72 So. 566.

§ 21. Attempts.

Definition.—*Burton v. State*, 8 Ala. App. 295, 62 So. 394. See the title CRIMINAL LAW, § 21, vol. 4, p. 48.

At Common Law.—*Burton v. State*, 8 Ala. App. 295, 62 So. 394. See the title CRIMINAL LAW, § 21, vol. 4, p. 48.

III. PARTIES TO OFFENSES.

As to parties in prosecutions for homicide. see post, HOMICIDE.

§ 33. Principals, Aiders, Abettors, and Accomplices in General.

An "accomplice" is an associate in crime, a partner or partaker in guilt, and includes all particeps criminis. *Darden v. State*, 12 Ala. App. 165, 68 So. 550.

IV. JURISDICTION.

As jurisdiction being an element of former jeopardy, see post, "Jurisdiction of Court," § 84. As to jurisdiction of preliminary proceedings, see post, "Jurisdiction of Preliminary Proceedings," § 115.

As to appellate jurisdiction, see post, "Appellate Jurisdiction," § 669. As to necessity of showing in record on appeal, see post, "Jurisdiction of Lower Court," § 708 (2).

§ 37. Constitutional and Statutory Provisions.

§ 37 (½) In General.

The creation of the inferior criminal court by Loc. Acts 1915, p. 381, approved September 16, 1915, shows intent to thus modify the consolidation of court of record into the circuit court by Acts 1915, p. 279, approved August 16, 1915. *State v. Hawkins* (Ala.), 74 So. 237.

§ 37 (5) Effect of Statute Conferring Jurisdiction on Another Court.

Since the inferior criminal court created by Inferior Criminal Court Act does not occupy the same field as the county court, re-established by the County Court Act, § 6, repealing all laws in conflict therewith, does not repeal the Inferior Criminal Court Act. *State v. Hawkins* (Ala.), 74 So. 237.

§ 40. Jurisdiction of Justices of the Peace, Police Justices, and Other Officers.

§ 40 (1) Criminal Jurisdiction in General.

Code 1907, §§ 7534-7615, are not only the source, but a limitation, of the authority of a justice as to an offense of which he has not final jurisdiction. *State v. Bush*, 12 Ala. App. 309, 68 So. 492.

§ 40 (2) Jurisdiction of Offense.

Application of Code 1907, § 6311.—Jurisdiction of a justice of the peace is limited by Code 1907, § 6733 to offenses named therein, and § 6311, permitting conviction of attempt to commit offenses, does not apply. *Johnson v. State* (Ala. App.), 75 So. 270.

Power to Convict of Attempt to Commit Felony.—Under Code 1907, § 6733, a justice of the peace having no jurisdiction of a felony can not try a defendant for assault with intent to murder and convict of attempt to commit an assault. *Johnson v. State* (Ala. App.), 75 So. 270.

§ 40 (5) Effect of Conferring Jurisdiction on Other Courts of Same Grade.

The express provision of Code 1907, § 6703, that a prosecution at county court

may be begun by affidavit taken before a justice of peace of county and warrant made returnable to the county court is not affected by the fact of the concurrent jurisdiction of the justice and county court. *Ahlrichs v. Rollo* (Ala.), 76 So. 37.

No Conflict between §§ 6703 and 6738, Code 1907.—There is no conflict between Code 1907, § 6703, providing that a prosecution before county court may be begun by affidavit taken before a justice of the peace of county, and warrant made returnable to county court, and § 6738, providing that in all trials before a justice of the peace of causes within his jurisdiction he must determine law and facts without jury and award punishment. *Ahlrichs v. Rollo* (Ala.), 76 So. 37.

§ 41. Jurisdiction of Offense.

§ 42. — In General.

Jurisdiction of the offense and of the person must concur to authorize a court of competent jurisdiction to proceed to final judgment in a criminal prosecution. *Sherrod v. State*, 14 Ala. App. 57, 71 So. 76.

§ 43. — Nature or Grade of Offense.

Offense Charged. — It is the offense charged which determines the grade of the offense, and whether the county judge has jurisdiction to proceed with trial or merely to sit as a committing magistrate. *Graham v. State*, 11 Ala. App. 113, 65 So. 717.

Jurisdiction of County Court. — Under Code 1907, § 6700, giving county court original jurisdiction of misdemeanors, it has final jurisdiction of prosecution for theft of bowl worth \$5, where complaint charges theft of bowl and other household articles, of value aggregating \$36.50, and bowl was stolen at different time from other articles. *Coster v. State* (Ala. App.), 76 So. 475.

§ 47. Mode of Acquiring Jurisdiction.

Circuit Court.—A circuit court's conviction of petit larceny, not based on indictment or appeal from a lower court, is erroneous. *Russau v. State* (Ala. App.), 72 So. 596.

The circuit court's jurisdiction attaches in petit larceny cases only by indictment

of grand jury of that court or by appeal from some court over which the circuit court exercises appellate jurisdiction. *Russau v. State* (Ala. App.), 72 So. 596.

Sufficiency of Bail Bond Requiring Appearance.—A bail bond requiring accused to appear in the circuit court to answer the charge of violating the prohibition law was sufficient to give the circuit court jurisdiction to try the case. *Lee v. State*, 10 Ala. App. 191, 64 So. 637.

Under Code 1907, § 7350.—Where complaint was made against the accused and warrant of arrest issued, and the defendant was arrested and admitted to bail, and return of the warrant made to the city court, its jurisdiction over the offense and the person was complete, under Code 1907, § 7350, providing that a prosecution may be commenced by finding an indictment, issuing a warrant or binding over the defendant. *Sherrod v. State*, 14 Ala. App. 57, 71 So. 76.

§ 48. Exercise of Jurisdiction in General.

Priority of Jurisdiction—"Taking Cognizance."—"Taking cognizance," as between courts of concurrent jurisdiction, means that the first court must have acquired jurisdiction of the person in personal and criminal actions before the rule of exclusion of jurisdiction of another court applies. *Sherrod v. State*, 197 Ala. 286, 72 So. 540.

Same—Effect of First Taking Cognizance.—Where two courts have concurrent jurisdiction, that which first takes cognizance of the case may retain it to the exclusion of the other, and no other court can interfere. *Sherrod v. State*, 14 Ala. App. 57, 71 So. 76.

Same — Jurisdiction of the Person.—Though as between courts of concurrent jurisdiction the first to take cognizance of an offense acquires jurisdiction which it may retain to the exclusion of the other, where one issues process in a personal or criminal action and the other arrests the person, that having jurisdiction of the person, though acquired by arrest without warrant, may proceed to judgment, and its judgment is a complete bar to prosecution in the other for the same offense. *Sherrod v. State*, 197 Ala. 286, 72 So. 540.

Same—Burden of Proof.—Where com-

plete jurisdiction appears in the city court, the burden is then on the defendant, who seeks to oust its jurisdiction, to show the jurisdiction of the offense in another court prior to the attaching of the jurisdiction of the city court. *Sherrod v. State*, 14 Ala. App. 57, 71 So. 76.

Same—Arrest by Police before Process from City Court.—That the accused was not arrested under process of the city court until after he had been arrested by city police and had given bond for his appearance before the recorder, does not, in the absence of proof of filing of formal accusation in the recorder's court, deprive the city court of jurisdiction. *Sherrod v. State*, 14 Ala. App. 57, 71 So. 76.

Same—Conflict between City and Recorder's Courts.—Where the defendant's pleas in the city court show that no formal complaint or charge was made in the recorder's court, and that he was not called to appear, nor to plead until after he had been arrested and admitted to bond in the city court, the recorder's court had no jurisdiction, and his remedy was to plead therein the pendency of the prosecution in the city court. *Sherrod v. State*, 14 Ala. App. 57, 71 So. 76.

Courts of Concurrent Jurisdiction.—*Harmon v. State*, 9 Ala. App. 311, 62 So. 438. See the title CRIMINAL LAW, § 48, vol. 4, p. 56.

Arrests without Warrant—Jurisdiction of Recorder's Court.—That city police officers were authorized by statute or ordinance to arrest offenders without warrant and commit them to jail does not, in the absence of a formal accusation, constitute exercise of the jurisdiction of the recorder's court over the offense prior to his appearance and pleading, whether the offense be denounced by statute or ordinance. *Sherrod v. State*, 14 Ala. App. 57, 71 So. 76.

§ 49. Transfer of Causes.

§ 49 (1) Where Jurisdiction of City and County Court Concurrent.

Failure to Transfer Cause—Validity of Judgment.—*Harmon v. State*, 9 Ala. App. 311, 62 So. 438. See the title CRIMINAL LAW, § 49 (1), vol. 4, p. 56.

Right to Transfer Case by Defendant.—*Harmon v. State*, 8 Ala. App. 311, 62 So. 438. See the title CRIMINAL LAW, § 49 (1), vol. 4, p. 56.

§ 49 (3) Transfer by Creation of New Court.

Though, when the indictment was returned to the circuit court, accused's consent to a transfer was necessary, accused could not (Local Act Feb. 11, 1915, having gone into effect before trial) complain that the prosecution was transferred to the law and equity court of Marengo county. *Banks v. State*, 13 Ala. App. 41, 69 So. 242.

V. VENUE.

(B) CHANGE OF VENUE.

§ 62. Ground for Change.

§ 63. — Local Prejudice.

Necessary Showing—Statutes.—*Adams v. State*, 181 Ala. 58, 61 So. 352. See the title CRIMINAL LAW, § 63, vol. 4, p. 63.

§ 64. Application.

§ 67. — Affidavits and Other Proofs.

§ 67 (1) In General.

Burden of Proof.—*Godau v. State*, 179 Ala. 27, 60 So. 908. See the title CRIMINAL LAW, § 67 (1), vol. 4, p. 64.

§ 67 (3) Weight and Effect of Opposing Affidavits or Other Evidence.

Sufficiency of Evidence.—*McClain v. State*, 182 Ala. 67, 62 So. 241. See the title CRIMINAL LAW, § 67 (3), vol. 4, p. 65.

Denial of Change of Venue on Second Trial Not Erroneous.—*Adams v. State*, 181 Ala. 58, 61 So. 352. See the title CRIMINAL LAW, § 67 (3), vol. 4, p. 65.

VI. LIMITATIONS OF PROSECUTIONS.

§ 76. Limitations Applicable.

Prosecution for larceny from the person is barred unless the indictment is found within three years from commission of offense. *Lane v. State*, 14 Ala. App. 40, 70 So. 982.

§ 78. Commencement of Prosecution.

§ 80. — New Proceedings after Dismissal or Failure of Original Prosecution.

Record of Entry—Bench Notes of

Judge.—Under Code 1907, § 7351, as to suspension of limitations when another indictment is ordered to be preferred in place of one quashed, and § 7160, requiring record entry thereof, bench notes of judge disposing of first indictment were insufficient as record. *De Bardeleben v. State* (Ala. App.), 77 So. 979.

Same—Clerk's Entry after Adjournment without Order of Court.—Under Code 1907, § 7351, as to suspension of limitations when another indictment is ordered to be preferred in place of one quashed, and § 7160, requiring record entry thereof, entry by clerk on minute books purporting to be an order quashing the first indictment and holding defendant to await finding of another indictment, made after adjournment and without order of court therefor, was insufficient. *De Bardeleben v. State* (Ala. App.), 77 So. 979.

VII. FORMER JEOPARDY.

§ 81. Constitutional and Statutory Provisions.

Defendant's conviction in recorder's or mayor's court of the city of violating prohibition law was not bar to prosecution for same offense in state court; Code 1907, § 1222, making judgment in recorder's court bar to prosecution in state court, having been amended, by Acts 1915, p. 724, to eliminate such provision. *Bell v. State* (Ala. App.), 75 So. 181, certiorari denied in *Ex parte Bell* (Ala.), 76 So. 1.

§ 82. Elements of Former Jeopardy.

§ 84 — Jurisdiction of Court.

Arrangement before Recorder — Subsequent Prosecution in County Court. — Petitioner charged before the recorder with offenses denounced by Code 1907, §§ 6418, 6470, misdemeanors under § 6756, held entitled to discharge from custody, under § 1221, upon being subsequently prosecuted for the same offense in the county court. *Hazelton v. State*, 13 Ala. App. 243, 68 So. 715; *Jackson v. State*, 13 Ala. App. 684, 68 So. 1021.

Conviction of Misdemeanor before Recorder as Defense to Felony.—Under Code 1907, § 1221, conviction of a misdemeanor in a recorder's court held not pleadable as a defense to an indictment

charging a felony. *Tarver v. State*, 9 Ala. App. 17, 64 So. 161.

§ 86. — Fraudulent or Collusive Prosecution.

A conviction in a municipal court, having been procured by fraud and misrepresentation or collusion of defendant, does not bar prosecution by the state. *Toney v. State* (Ala. App.), 72 So. 508.

§ 88. — Jury and Oath.

See post, "Discharge of Jury without Verdict," § 94.

An agreement between counsel that a particular jury shall try the case does not amount to the selection of a jury so as to place accused in jeopardy, unless the agreement has been called to the attention of the court and approved. *Curtis v. State*, 9 Ala. App. 36, 63 So. 743.

§ 90. Effect of Proceedings before Jeopardy Attaches.

§ 91. — Preliminary or Summary Proceedings.

Proceedings before Court without Jurisdiction.—*Marberry v. State*, 7 Ala. App. 58, 60 So. 949. See the title CRIMINAL LAW, § 91, vol. 4, p. 74.

Binding Over by County Judge to Grand Jury.—Where accused, upon an affidavit charging assault with intent to murder, was bound over by the county judge to await the action of the grand jury, and upon trial on subsequent indictment was convicted in the circuit court only of assault and battery, held that the hearing in the county court could not be set up in arrest as former jeopardy. *Graham v. State*, 11 Ala. App. 113, 65 So. 717, cited in note in L. R. A. 1917A, 1236.

Binding Over by Magistrate to Grand Jury.—An order of a committing magistrate binding petitioner over to the grand jury of the law and equity court did not bar the circuit court of co-ordinate jurisdiction to entertain jurisdiction of a further prosecution for the same offense. *Ex parte Ross*, 187 Ala. 16, 65 So. 782.

§ 91½. — Motion, Demurrer, or Plea in Abatement.

Effect of Sustained Plea in Abatement for Misnomer.—Sustaining plea in abatement alleging a misnomer is no bar to defendant's trial upon the merits upon

a proper indictment or affidavit charging him by his correct name. *Hayes v. State* (Ala. App.), 72 So. 577.

Indictment Quashed on Defendant's Motion.—One who has been arraigned and pleaded not guilty to the indictment, which after the jury was sworn was on his motion quashed, has not been put in jeopardy, and may be prosecuted for the same offense. *Curtis v. State*, 9 Ala. App. 36, 63 So. 743.

§ 94. Discharge of Jury without Verdict.

§ 96. — Consent or Fault of Accused.

As to time or stage of prosecution at which jeopardy attaches, see ante, "Effect of Proceedings before Jeopardy Attaches," § 90.

Where a panel was quashed and a jury discharged on defendant's own motion, after he had pleaded not guilty and the jury sworn, it was no bar to a subsequent prosecution. *Pierce v. State*, 8 Ala. App. 359, 63 So. 33, cited in notes in L. R. A. 1916E, 1273, Ann. Cas. 1914B, 775.

§ 102. Judgment Reversed.

§ 103. — In General.

Where a former conviction was annulled at defendant's instance, his plea of former jeopardy was without merit. *Savage v. State*, 12 Ala. App. 116, 68 So. 498.

Though accused has served part of a void sentence, the appellate court may when it affirms a conviction, void as to the sentence, correct the judgment and direct the trial court to impose proper sentence. *State v. Gunter*, 11 Ala. App. 399, 66 So. 844; S. C., 11 Ala. App. 679, 66 So. 846.

Illegal Sentence.—Where a sentence was illegal, but there was no error in the record prior thereto, the court of appeals properly reversed as to the sentence and remanded, so that a proper sentence could be pronounced; it not putting defendant twice in jeopardy for the same offense. *Ex parte Adams*, 187 Ala. 10, 65 So. 514, cited in note in L. R. A. 1915A, 527, denying certiorari *Adams v. State*, 9 Ala. App. 89, 64 So. 371; *Ex parte Minto*, 187 Ala. 671, 65 So. 516, cited in note in L. R. A. 1915A, 527.

§ 104½. Discharge on Habeas Corpus.

Application to Judgment.—Code 1907, § 7035, prohibiting reimprisonment where

one has been discharged on habeas corpus, applies only to a legal judgment, and not to a void one, which can be collaterally attacked. *State v. Gunter*, 11 Ala. App. 399, 66 So. 844; S. C., 11 Ala. App. 679, 66 So. 846.

Authorization to Impose Proper Sentence. — Judge of city court, under whose void sentence to penitentiary defendants had suffered imprisonment before their discharge on habeas corpus, where the continuity of the prosecution had been preserved, held authorized to impose proper sentence. *Ex parte Gunter*, 193 Ala. 486, 69 So. 442.

Unauthorized Sentence to Penitentiary. — A discharge on habeas corpus from an unauthorized sentence to the penitentiary upon a conviction permitting a sentence only to hard labor for county was a discharge merely from custody under void sentence, and not from the penalty attached by law for the offense of which defendant had been legally convicted. *Ex parte Gunter*, 193 Ala. 486, 69 So. 442.

Reimprisonment under Valid Sentence. — Notwithstanding, under Code 1907, § 7035, accused was released on habeas corpus from an illegal sentence, he may be reimprisoned under a valid sentence. *State v. Gunter*, 11 Ala. App. 399, 66 So. 844; S. C., 11 Ala. App. 679, 66 So. 846.

§ 105. Conviction of Lower as Acquittal of Higher Grade or Degree of Offense Charged.

Conviction of Manslaughter.—*Rigell v. State*, 8 Ala. App. 46, 62 So. 977. See the title CRIMINAL LAW, § 105, vol. 4, p. 79.

Where the jury without instructions found defendant guilty of manslaughter in the second degree, refusal to receive the verdict and compelling the jury to retire and consider the higher degrees was a violation of Const. 1901, § 9, relating to former jeopardy. *Hall v. State*, 12 Ala. App. 42, 67 So. 739.

A conviction or acquittal of petit larceny, which is a misdemeanor under Code 1907, § 7335, would be a bar to a subsequent prosecution for grand larceny which is a felony under § 7324 based on the same act. *Buchanan v. State*, 10 Ala. App. 103, 65 So. 203.

Effect of Reversal on Appeal.—*Roberson v. State*, 183 Ala. 43, 62 So. 837. See the title CRIMINAL LAW, § 105, vol. 4, p. 79.

§ 106. Identity of Offenses.

§ 107. — In General.

Meaning of Same Offense.—Under Const. 1901, § 9, declaring that no person shall, for the same offense, be twice put in jeopardy, accused, to plead former jeopardy, must show that the offense charged in the two prosecutions is the same in law and in fact, for the words "same offense" mean the same identical act and crime. *Johns v. State*, 13 Ala. App. 283, 69 So. 259.

Necessity of Identity of Offenses.—In a prosecution for violation of motor vehicle law in failing to stop and give name, etc., plea of former jeopardy, alleging conviction of violation of a city ordinance for reckless driving, held bad since offenses were not the same either in law or fact. *Woods v. State* (Ala. App.), 73 So. 129.

Same—Former Improper Introduction of Evidence Supporting Present Charge.—To have been in former jeopardy a defendant must have been put upon trial for the same offense, or one of the same species, supportable by the same evidence, or else the one crime must be an essential ingredient of the other, and the improper introduction on former trial of evidence now used to support the present charge does not constitute a former jeopardy. *Brown v. Tuscaloosa*, 196 Ala. 475, 71 So. 672.

§ 108. — Sufficiency of Facts Charged in Second Prosecution to Sustain Former Prosecution.

A former acquittal is no bar to a subsequent prosecution, unless defendant could have been convicted upon the first indictment upon proof of the facts averred in the second. *Brown v. Tuscaloosa*, 196 Ala. 475, 71 So. 672.

§ 110. — Different Offenses in Same Act or Transaction.

§ 110 (1) In General.

See ante, "In General," § 107.

Splitting Up or Subdividing Single Crime. — A single crime can not be split

up or subdivided into two or more indictable offenses, and if the state elects to prosecute a crime in one of its phases, it can not afterwards prosecute the same criminal act under color of another name. *Everage v. State*, 14 Ala. App. 106, 71 So. 983.

Bigamy and Unlawful Cohabitation. — Under Code 1907, § 6389, previous acquittal on prosecution for bigamous marriage celebrated in Georgia was no bar to prosecution for unlawful cohabitation with the bigamous wife upon returning to Alabama. *Phillips v. State*, 13 Ala. App. 325, 69 So. 356.

§ 110 (2) Assault and Other Offenses.

Assault and Battery and Assault with Intent to Kill. — Under Code 1907, §§ 1221, 1222, a conviction in a recorder's court on a complaint charging assault and battery was a bar to a subsequent prosecution under a complaint alleging the same facts and charging defendant with assault with intent to kill; the judgment in the first prosecution being a judicial determination that the crime was not a felony. *Ex parte Ratley*, 188 Ala. 107, 66 So. 147, reversing judgment *Ratley v. State*, 11 Ala. App. 104, 65 So. 682.

Previous Conviction of Carrying Pistol.

— A conviction for assault with intent to murder is not precluded by a previous conviction for carrying a pistol concealed about accused's person or on premises not his own, on theory that defendant had previously been placed in jeopardy. *Cooper v. State* (Ala. App.), 75 So. 624.

§ 110 (7) Crimes against Different Persons.

Where a man kills two men in quick succession with a formed design as to each, there are two offenses, but where the killing is pursuant to, and a continuation of, the assault, and done under the impulse of the same design, it is but one act. *Moss v. State* (Ala. App.), 75 So. 179.

§ 111. — Offenses against Different Sovereignities in Same Act or Transaction.

State and Municipality — Under Code. — Under Code 1907, §§ 1221, 1222, a conviction in a municipal court for quar-

reling, using profane language, or acting in a disorderly manner, in violation of an ordinance, properly pleaded and shown to have been based on the same conduct, barred a prosecution by the state for insulting or obscene language in the presence of a woman in violation of Code 1907, § 6217. *Cast v. State*, 11 Ala. App. 177, 65 So. 718.

A conviction for the violation of a municipal ordinance is a bar to a subsequent prosecution for the commission of a felony based upon the same act. *Ex parte Ratley*, 188 Ala. 107, 66 So. 147, reversing judgment *Ratley v. State*, 11 Ala. App. 104, 65 So. 682.

Same — State Court First Acquiring Jurisdiction. — Conviction or acquittal of violation of municipal ordinance held not to bar a prosecution in a state court under Code 1907, § 1222, where such prosecution was pending when the prosecution in the municipal court was instituted. *Gustin v. State*, 10 Ala. App. 171, 65 So. 302, certiorari denied in *Ex parte Gustin*, 191 Ala. 662, 66 So. 1008.

Same — Under Amended Code. — Conviction in municipal court for violation of ordinance is not pleadable in defense to a prosecution for the same offense in state court, in view of Acts 1915, p. 724, amending Code 1907, § 1222, eliminating the clause in the former law, providing that a judgment in recorder's court is a bar to a prosecution for the same offense in a state court, since the same act may constitute an offense both against the state and the municipal corporation, each of which may punish it without violation of any constitutional principle. *Ex parte Bell* (Ala.), 76 So. 1.

§ 111½. — Particular Classes of Offenses.

Selling and Keeping for Sale Intoxicating Liquor. — Notwithstanding Code 1907, § 1222, providing that when any one has been tried by any municipal court for a misdemeanor or for violation of an ordinance, the judgment shall bar a prosecution for the same, or substantially the same, offense in the state courts, an acquittal on a charge of selling intoxicating liquor in violation of a town ordinance is not a bar to a subsequent prosecution of accused on the charge of keeping or

having in his possession for sale intoxicating liquors in violation of state law, where a conviction on the subsequent charge is sought on the same, or substantially the same, evidence, which was insufficient to warrant a conviction of selling intoxicating liquor. *Johns v. State*, 13 Ala. App. 283, 69 So. 259.

Justice's Failure to Keep Docket and Embezzlement. — Conviction of justice under Code 1907, § 7488, providing fines for justice's failure to keep docket and make settlement, is no bar to his prosecution for embezzlement under § 6838. *Corbin v. State* (Ala. App.), 74 So. 729.

Larceny and Other Offenses. — A former prosecution for bringing a stolen automobile into the state is unavailable as a plea of former jeopardy in a prosecution for bringing a different stolen automobile into the state, although in fact both the acts occurred in execution of a conspiracy to bring stolen automobiles into the state. *Whitehead v. State* (Ala. App.), 78 So. 467.

VIII. PRELIMINARY COMPLAINT, AFFIDAVIT, WARRANT, EXAMINATION, COMMITMENT, AND SUMMARY TRIAL.

§ 115. Jurisdiction of Preliminary Proceedings.

As to preliminary or summary proceedings affecting former jeopardy, see ante, "Jurisdiction of Offense," § 41.

Judge of the inferior court of Bessemer, as expressly provided by Loc. Acts 1915, p. 134, was authorized to issue warrant for offense of carrying concealed weapons returnable before circuit court. *Reese v. State* (Ala. App.), 78 So. 460.

§ 116. Preliminary Complaint or Affidavit.

As to complaint or affidavit on summary trial, see post, "Complaint or Information and Plea," § 137.

§ 117. — Requisites and Sufficiency.

§ 117 (1) In General.

Necessity of Setting Out Facts with Particularity. — Under Code, § 6703, an affidavit attempting to set out the facts constituting a misdemeanor must do so with the same particularity as is required in an indictment. *Mazett v. State*, 11 Ala. App. 317, 66 So. 871.

Necessity to Allege Company as Corporation or Partnership. — An affidavit for receiving stolen goods, averring ownership in the Seaboard Railroad Company, is insufficient, where it is not alleged that it is a corporation or a partnership, in which latter case the names of the partner should also be alleged. *Mazett v. State*, 11 Ala. App. 317, 66 So. 871.

Offense Designated by Name Only. — Though an affidavit for warrant in a prosecution before a justice of the peace would have been insufficient as an indictment, it was sufficient if the offense was designated by name only or by words from which it might be inferred. *Nolen v. Jones* (Ala.), 76 So. 935.

§ 117 (2) Verification, Signature, and Jurat.

Amended Affidavit—Necessity of Reverification.—Where an affidavit charged two offenses in the alternative, an amendment, striking one alternative, did not result in the institution of a new prosecution so as to require a reverification of the amended affidavit. *Nelson v. State* (Ala. App.), 72 So. 510, certiorari denied in *Ex parte Nelson* (Ala.), 73 So. 1001.

Where an affidavit charged two offenses in the alternative as authorized under Code 1907, § 7151, but the second alternative is stricken by leave of court, a reverification is unnecessary. *Nelson v. State* (Ala. App.), 72 So. 510, certiorari denied in *Ex parte Nelson* (Ala.), 73 So. 1001.

Clerical Misprision.—The court of appeals takes judicial cognizance that the name of the Ensley court is the inferior court of Ensley (Loc. Laws 1903, p. 698), and of its jurisdiction and judge, and that it is the one court of that name in Jefferson county. Hence in signature of a jurat of affidavit and warrant by one as "Judge of the Inferior Court of Ensley County, Alabama," the failure to write the word "Jefferson" before the word "county" was clerical misprision wholly unimportant. *Mitchell v. State* (Ala. App.), 72 So. 507.

§ 117 (4) Charging Particular Offenses.

Vagrancy. — An affidavit charging vagrancy in the language of the statute was sufficient. *Brannon v. State* (Ala. App.), 76 So. 991.

A motion for a bill of particulars in a prosecution for vagrancy, charged in the language of the statute, was properly overruled. *Brannon v. State* (Ala. App.), 76 So. 991.

Petty Larceny.—Under Cr. Code 1907, p. 480, form 1, an affidavit that complainant has probable cause for believing and does believe that petty larceny has been committed in a certain county within 12 months, and that defendant was guilty thereof, is fatally defective. *Ex parte Mooneyham* (Ala. App.), 73 So. 990.

§ 118. — Defects and Objections.

Defects in the original warrant and affidavit in the preliminary proceedings are not available on the final trial under an indictment regular in form. *Toney v. State* (Ala. App.), 72 So. 508.

§ 119. — Amendment or Substitution.

Adding "Alias" after Defendant's Name.—In a prohibition case, the allowance of an amended affidavit verified by the person who verified the original, adding the word "alias" after the defendant's name, was not error. *Crawley v. State* (Ala. App.), 73 So. 222.

Allowing the state to strike the second alternative of an affidavit charging defendant with carrying weapons concealed about him, or upon premises not his own, is proper, under Code 1907, § 6723. *Nelson v. State* (Ala. App.), 72 So. 510, certiorari denied in *Ex parte Nelson* (Ala.), 73 So. 1001.

§ 120. Preliminary Warrant or Other Process.

§ 123. — Requisites and Sufficiency.

Warrant before Justice—Offense Designated by Name Only.—Though a warrant in a prosecution before a justice would have been insufficient as an indictment, it was sufficient if the offense was designated by name only, or by words from which it might be inferred. *Nolen v. Jones* (Ala.), 76 So. 925.

§ 124. — Defects and Objections.

Defects in the original warrant and affidavit in the preliminary proceedings are not available on the final trial under an indictment regular in form. *Toney v. State* (Ala. App.), 72 So. 508.

§ 127½. — Right of Accused to Examination.

A justice's warrant of arrest returnable to the circuit court, instead of before him, as required by Code 1907, § 7588, thus depriving accused of his right, under §§ 7593-7615, to a preliminary trial, is void. *State v. Bush*, 12 Ala. App. 309, 68 So. 492.

§ 135. Summary Trial and Conviction.

§ 137. — Complaint or Information and Plea.

§ 137 (1) In General.

Probable Cause—Conversion into Trial of Affiant's Good Faith. — Question whether probable cause is shown by affidavit or sworn complaint charging petit larceny is addressed to committing magistrate, and trial can not be converted into trial of good faith of affiant, nor can inquiry be made whether he had probable cause. *Jackson v. State*, 14 Ala. App. 99, 71 So. 977.

Trial without Affidavit.—That accused was arrested and tried without affidavit does not render the judgment in the recorder's court void for want of jurisdiction. *Sherrod v. State*, 197 Ala. 286, 72 So. 540, reversing judgment 14 Ala. App. 57, 71 So. 76.

§ 137 (3) Requisites and Sufficiency of Accusation.

Name of Accused.—*White v. State*, 7 Ala. App. 69, 61 So. 463. See the title CRIMINAL LAW, § 137 (3), vol. 4, p. 96.

"In Opinion of Affiant." — Complaint charging that J. B. did in opinion of complainant commit on him assault and battery with a deadly weapon, knucks, was wholly insufficient to sustain a judgment of conviction, or further proceedings against defendant. *Bice v. State* (Ala. App.), 78 So. 410.

Averment in an affidavit or sworn complaint, that, in opinion of affiant, he has probable cause for believing, is faulty. *Jackson v. State*, 14 Ala. App. 99, 71 So. 977.

Petit Larceny—Following Language of Statute.—Under Code 1907, § 6703, affidavit or sworn complaint, charging petit larceny, setting forth that affiant has

probable cause to believe, and does believe, following language of statute, is sufficient. *Jackson v. State*, 14 Ala. App. 99, 71 So. 977.

Misnomer of Accused.—*White v. State*, 7 Ala. App. 69, 61 So. 463. See the title CRIMINAL LAW, § 137 (3), vol. 4, p. 96.

Speaking Demurrer.—*White v. State*, 7 Ala. App. 69, 61 So. 463. See the title CRIMINAL LAW, § 137 (3), vol. 4, p. 96.

§ 144. — Appeal and Trial De Novo.

§ 144 (2) Proper Mode of Review.

Rules Governing Appeals under Fuller Bill.—Under the Fuller Bill (Acts 1909, p. 92), § 32, upon appeal to the circuit court, in a prosecution for violating the prohibition law, the appeal is subject to the rules governing appeals under the Code from justices' or county courts, except as the section otherwise provides. *Lee v. State*, 10 Ala. App. 191, 64 So. 637.

Time for Amendment. — Before impaneling of the jury, complaint filed by state's counsel, on appeal to circuit court from the county court, where prosecution was begun by affidavit, may be amended for clearness. *Askew v. State*, 11 Ala. App. 293, 66 So. 852.

§ 144 (3) Courts Invested with Appellate Jurisdiction.

In view of Code 1907, § 1217, appeal from city court in prosecution for violating ordinance, will be dismissed; that court having no original jurisdiction and the record not sufficiently showing that it was exercising appellate jurisdiction. *Doyle v. Mobile*, 12 Ala. App. 622, 68 So. 494.

§ 144 (4) Proceedings for Review.

Arrest of Defendant after Forfeiture of Bond—Recorder's Court. — Under Code 1907, §§ 6284, 6287, and in view of Code 1907, §§ 1217, 1218, 1451, 6354-6360, and Code 1907, § 6354, the criminal court of Birmingham on appeal from recorder's court held to have power after final forfeiture of the appeal bond to award an alias or a pluries writ to secure the presence of defendant. *State v. Fort*, 12 Ala. App. 632, 67 So. 734.

Same — Criminal Court of Jefferson County.—Under Code 1907, §§ 1218, 1451, 6287, 6728, 6744, criminal court of Jefferson county, after entering forfeiture of the bond of one appealing from a conviction in the recorder's court, may issue warrant for his arrest. *Moore v. Birmingham*, 12 Ala. App. 619, 68 So. 540.

§ 144 (7½) Assignment or Presentation of Errors.

Upon appeal from justice to circuit court for trial de novo, objections to proceedings including jurisdiction must be made before justice, and can not be made for the first time in circuit court. *Edmunds v. State (Ala.)*, 74 So. 965.

§ 144 (8) Review.

Conclusion of Trial Court.—The general rule is that, when the evidence is ore tenus and the trial court has the advantage of seeing and hearing the witness, the appellate court will not disturb the conclusion of the trial court, unless it is plainly and palpably contrary to the weight of the evidence. *Williams v. State (Ala. App.)*, 77 So. 923.

§ 144 (9) Trial De Novo.

Under the Fuller Bill (Acts 1909, p. 92), § 32, authorizing prosecution for violating the prohibition law to be begun by affidavit and so continued in all trial courts, in absence of objection in the circuit court to the failure to file a brief statement of the cause of complaint, as required by Code 1907, § 6730, when trial in that court is de novo, the filing of such statement was not necessary to give jurisdiction. *Captain v. State*, 10 Ala. App. 167, 64 So. 639.

IX. ARRAIGNMENT AND PLEAS, AND NOLLE PROSEQUI OR DISCONTINUANCE.

§ 145½. Requisites and Sufficiency of Arraignment.

According to Present Prevailing Practice.—*Harmon v. State*, 8 Ala. App. 311, 62 So. 438. See the title CRIMINAL LAW, § 145½, vol. 4, p. 101.

§ 146. Pleas in General.

§ 146½. — In General.

Necessity of Demurrer to Insufficient Pleas.—If pleas are insufficient, the de-

fect should be suggested by demurrer, and not by motion to strike. *Sherrod v. State*, 197 Ala. 286, 72 So. 540, reversing judgment 14 Ala. App. 57, 71 So. 76.

Propriety of Excluding Evidence of Corporate Existence.—In prosecution for obtaining goods by false pretenses, exclusion of evidence disputing corporate existence of company defrauded was proper; such question not being in issue under Code 1907, § 6876, in absence of sworn plea. *Dennis v. State* (Ala. App.), 75 So. 707.

§ 149. — Requisites and Sufficiency.

Where indictment charged that defendant's name was M. P., "to the grand jury otherwise unknown," defendant's plea of misnomer was demurrable, where it did not controvert allegation that defendant's name was unknown; Code 1907, § 7142, permitting such an allegation. *Putnam v. State* (Ala. App.), 76 So. 408.

§ 154. Pleas in Abatement.

§ 155. — Nature and Necessity.

§ 155 (1) In General.

Misnomer.—Where the name "Chester Weyms, alias Chester Weims," was given in an indictment as the name of accused, and his name was "Chesley Wymys," the misnomer is available by plea in abatement. *Weyms v. State*, 13 Ala. App. 297, 69 So. 310.

Substantial misnomer of either Christian name or surname of accused is good matter for plea in abatement to the indictment. *Weyms v. State*, 13 Ala. App. 297, 69 So. 310.

§ 155 (2) Defects and Irregularities as to Grand Jury.

As to requisites and sufficiency, see post, "Defects and Irregularities as to Grand Jury," § 157 (2). Also see post, GRAND JURY; INDICTMENT AND INFORMATION.

§ 155 (2a) Defects in Drawing and Impaneling Grand Jury and Disqualifications of Jurors.

Failure of Clerk to Give Notice.—*Newell v. State*, 8 Ala. App. 182, 62 So. 968. See the title CRIMINAL LAW, § 155 (2a), vol. 4, p. 103.

Not Drawn by or in Presence of Circuit Judge.—Under Jury Law, § 23, a plea that the jury were not drawn by the judge of the circuit court or in his presence, not showing that they were not drawn by a certain officer authorized by law, held demurrable. *Mizell v. State*, 184 Ala. 16, 63 So. 1000.

Not Householder, and Convicted of Embezzlement.—Under Code 1907, § 7572, a plea in abatement that a grand juror was disqualified because he was not a householder, and because he had been convicted of embezzlement, held demurrable. *Curtis v. State*, 9 Ala. App. 36, 63 So. 745.

Availability of Other Objections.—Under provision of the Jury Law, Acts 1909, Sp. Sess., p. 315, § 23, objections against validity of an indictment set up in a plea in abatement other than that jurors finding the indictment were not drawn by officers designated by law were not available. *White v. State* (Ala. App.), 72 So. 771.

§ 156. — Time and Order of Pleading.

As to withdrawal of plea of not guilty to interpose plea in abatement, see post, "Withdrawal," § 176.

Ordinarily a plea in abatement is waived by a plea in bar. *Hayes v. State* (Ala. App.), 72 So. 577.

Plea Not Filed until Succeeding Term.

—Under Acts Sp. Sess. 1909, p. 315, § 23, prescribing the time for filing a plea in abatement to an indictment, held, that defendant's plea not filed until the succeeding term of the court in which he was indicted was not timely, and would be stricken. *Howell v. State*, 10 Ala. App. 1, 64 So. 522.

§ 157. — Requisites and Sufficiency.

§ 157 (2) Defects and Irregularities as to Grand Jury.

As to nature and necessity of plea, see ante, "Defects and Irregularities as to Grand Jury," § 155 (2).

Demurrability of Amendment.—Under Acts Sp. Sess. 1909, p. 315, § 23, a plea in abatement so amended as to strike out the claim that grand jurors were not drawn by the person authorized by law is demurrable. *Rector v. State*, 11 Ala. App. 333, 66 So. 857.

Indictment Found at Unauthorized Time.—In prosecution for murder, pleas in abatement merely stating in general terms, as if by conclusion, that the grand jury found the indictment at a time when it was not authorized by law to do so, were demurrable. *White v. State* (Ala.), 78 So. 449.

In view of Acts Sp. Sess. 1909, p. 45, and page 305, § 23, plea in abatement to indictment that it was found at an improper time in that the court on August 9th, when there was no grand jury in session, adjourned until the fourth Monday in August, and that the indictment was then found, was of no avail. *White v. State* (Ala.), 78 So. 449.

§ 157 (3½) Another Indictment Pending.

The pendency of a prosecution in a state court for a misdemeanor based upon the same act might have been pleaded in a prosecution in a municipal court for a violation of an ordinance. *Gustin v. State*, 10 Ala. App. 171, 65 So. 303, certiorari denied in *Ex parte Gustin*, 191 Ala. 662, 66 So. 1008.

§ 157 (3) Misnomer.

As to nature and necessity of plea, see ante, "In General," § 155 (1).

True Name Unknown to Grand Jury.—Under Code 1907, § 7142, plea of misnomer to indictment for violation of liquor law alleging that defendant's true name was unknown to the grand jury, and that he was known only by the name of "Rich Oliveri," held defective. *Oliveri v. State*, 13 Ala. App. 348, 69 So. 359.

Pleading Alias as True Name.—A plea that accused's "name is not Arthur Thomas, alias Buddie, as charged in the affidavit, nor has he ever been known or called by such name, as charged, but that his true name is Buddie Thomas, and is called by the alias name of Arthur Thomas," does not negative the fact that accused was named and called by the name of Arthur Thomas, which was employed in the affidavit and indictment. *Thomas v. State*, 9 Ala. App. 67, 64 So. 192.

Where no demurrer is filed to defendant's plea of misnomer, or where, de-

murrer being filed, the grounds of insufficiency of the plea stated are specific, and also inapt, it is error to hold the plea bad. *Oliveri v. State*, 13 Ala. App. 348, 69 So. 359.

§ 158. — Demurrer to Plea.

Code 1907, § 5340, providing no demurrer in pleading can be allowed but to specified matters of substance, has no application to criminal prosecutions. *Oliveri v. State*, 13 Ala. App. 348, 69 So. 359.

§ 162. Special Pleas in Bar in General.

As to necessity of pleading former jeopardy specially, see post, "Nature and Necessity," § 165.

Pleading Defense Available under Plea of Not Guilty.—Special pleas that defendant was engaged in interstate commerce, and therefore not amenable to the state statutes, state a defense available under the plea of not guilty, and it was not error to strike them. *Moragne v. State* (Ala. App.), 74 So. 862.

Plea of Insanity.—Allowing plea of insanity after the time provided in Code 1907, § 7176, only on condition of affidavit of merit, held matter of discretion. *Goodman v. State* (Ala. App.), 72 So. 687.

Excluding Question as to Mental Condition.—The trial court properly excluded a question put to a physician as to defendant's mental condition, in the absence of a special plea of insanity as provided by Code 1907, § 7176. *Savage v. State* (Ala. App.), 72 So. 694.

§ 164. Plea of Former Jeopardy or Former Acquittal or Conviction.

§ 165. — Nature and Necessity.

Necessity of Specially Pleading.—*Roberson v. State*, 183 Ala. 43, 62 So. 837, cited in notes in L. R. A. 1917A, 1233, 1236; Ann. Cas. 1917C, 766. See the title CRIMINAL LAW, § 165, vol. 4, p. 108.

Former jeopardy must be specially pleaded. *Graham v. State*, 11 Ala. App. 113, 65 So. 717, cited in notes in Ann. Cas. 1917C, 766; L. R. A. 1917A, 1233.

§ 166. — Time and Order of Pleading.

As to order of trial when pleaded with plea of not guilty, see post, "Trial and Determination," § 171.

Where defendant is acquitted on one count in inferior court, on appeal to circuit court from conviction on another count, he must specially plead former jeopardy before his plea of "not guilty," or he waives such defense as to such count. *Branch v. State* (Ala. App.), 78 So. 411.

§ 167. — Requisites and Sufficiency.

§ 167 (½) In General.

Prior Conviction in Justice Court.—In prosecution for assault with weapon, held, defendant's plea of former jeopardy by reason of conviction in justice court was sufficient on demurrer; connivance of defendant in securing conviction being matter for state to set up by replication. *Robertson v. State* (Ala. App.), 76 So. 479.

Evidence Sustaining Insufficient Pleas.—In a criminal case, where defendant's special pleas averred that he had been formerly put in jeopardy and tried for the same offense now charged, he was not entitled to discharge on the ground that, though the pleas were insufficient in their averments, the evidence sustained them as framed, so that the defendant was entitled to judgment. *Brown v. Tuscaloosa*, 196 Ala. 475, 71 So. 672.

Plea Failing to Show Verdict Rendered.—A plea of former jeopardy, which alleges that for the same or substantially the same offense alleged to have been committed on the same date and testified to by the same witnesses, on an indictment charging the same offense, accused was put on trial in a court of competent jurisdiction, and a jury selected, impaneled, and sworn to try him on the charge, is demurrable under Code 1907, § 7314, declaring that no person shall gain any advantage by the discharge of the jury without giving a verdict. *Stadt v. State*, 13 Ala. App. 275, 69 So. 254.

§ 167 (1) Averments as to Identity of Person and Offense, and Setting Out Record.

Failure to Show Identity of Offense.—On trial for violating prohibition law, plea of former jeopardy held not to show sufficiently that the offense for which defendant was tried in a municipal court

was the same as that with which he was charged in the state court. *Gustin v. State*, 10 Ala. App. 171, 65 So. 302, certiorari denied in *Ex parte Gustin*, 191 Ala. 662, 66 So. 1008.

Failure to Show Former Trial Violation of Statute or Ordinance.—A plea of former jeopardy failing to show whether the former trial was held for violation of a statute or a municipal ordinance is insufficient. *Cunningham v. State* (Ala. App.), 75 So. 816.

§ 168. — Demurrer to Plea.

Acquittal of "Same Offense" in Another County.—A plea of former acquittal of "the same offense" in another county shows on its face a transaction occurring in another county, and is demurrable as showing acquittal of another offense than that charged. *Gibson v. State* (Ala. App.), 72 So. 569.

Necessity of Resolving Doubtful Intendments against Pleader.—On demurrer to pleas of former jeopardy, all doubtful intendments arising from the averments must be resolved against the pleader. *Whitehead v. State* (Ala. App.), 78 So. 467.

§ 170. — Evidence.

Burden of Proof.—On a plea of former jeopardy, the burden of proof is on the defendant to reasonably satisfy the jury of the truth of his plea. *Moss v. State* (Ala. App.), 75 So. 179.

Admissibility of Parol Evidence.—*Parsons v. State*, 179 Ala. 23, 60 So. 864. See the title CRIMINAL LAW, § 170, vol. 4, p. 111.

Identity of Former Charge and Acquittal.—In prosecution for murder, where defendant claimed that he shot deceased in the course of the difficulty with another, and while shooting at the other, without intention to harm deceased, who was an innocent bystander, and that he had been tried for the murder of the other and acquitted, evidence fixing the identity of the former charge and the acquittal should have been admitted. *Moss v. State* (Ala. App.), 75 So. 179.

§ 171. — Trial and Determination.

Directing Verdict.—*Parsons v. State*,

179 Ala. 23, 60 So. 864. See the title CRIMINAL LAW, § 171, vol. 4, p. 112.

Necessity of Drawing New Jurors for Other Issues.—Defendant, in prosecution for murder, is entitled to separate trial on his plea of former jeopardy, but, having had a separate trial, it was not necessary that a new jury should be drawn to pass upon the other issues. *Moss v. State* (Ala. App.), 75 So. 179.

Order of Trial When Pleaded with Not Guilty.—*Parsons v. State*, 179 Ala. 23, 60 So. 864. See the title CRIMINAL LAW, § 171, vol. 4, p. 112.

Same — Waiver of Objections.—Defendant in misdemeanor waives irregularity of plea of former jeopardy not being first disposed of, where, without objection, he goes to trial at the same time on that plea and one of not guilty. *James v. State* (Ala. App.), 78 So. 316.

A special plea of former conviction should be first passed upon before a trial under the plea of not guilty, though, if accused, in a misdemeanor case, proceeds to trial on both pleas, he waives the irregularity of not having the plea of former jeopardy first disposed of. *Toney v. State*, 10 Ala. App. 220, 65 So. 92.

§ 174. Plea of Not Guilty.

§ 175. — In General.

Necessity of Specially Pleading Justification or Excuse. — *Roberson v. State*, 183 Ala. 43, 62 So. 837, cited in notes in L. R. A. 1917A, 1233, 1236. See the title CRIMINAL LAW, § 175, vol. 4, p. 112.

§ 176. — Withdrawal.

Discretion to Allow Interposition of Plea of Misnomer.—In a prosecution for homicide, it was not an abuse of discretion for the court to refuse to permit defendant to withdraw a plea of not guilty to interpose a plea of misnomer. *Ragland v. State*, 187 Ala. 5, 65 So. 776.

Power to Permit Interposition of Plea in Abatement. — Under Acts Sp. Sess. 1909, p. 315, § 23, requiring plea in abatement to be filed at first term after indictment found, and before plea to merits, a trial court has no power to permit a defendant to withdraw a plea of not guilty and file a plea in abatement. *Morgan v. State*, 8 Ala. App. 172, 63 So. 21.

§ 177. Nolle Prosequi.

The time of the taking of a nol. pros. to a count of an indictment affected only the question of former jeopardy in case defendant should ever be again indicted for the offense there charged. *Norman v. State*, 13 Ala. App. 337, 69 So. 362.

§ 178. Discontinuance.

Where one accused of a violation of a municipal ordinance, which was also a violation of the state law, was discharged in a prosecution instituted by the city because limitations had run, he can not plead that discharge as a conviction barring prosecution under the state law. *Birmingham v. Brown*, 13 Ala. App. 654, 69 So. 263.

X. EVIDENCE.

As to evidence on application for change of venue, see ante, "Affidavits and Other Proofs," § 67. As to evidence on trial of plea of former jeopardy, see ante, "Evidence," § 170. As to absence of evidence being a ground for continuance, see post, "Absence of Witness or Evidence in General," § 391. As to comment of counsel on evidence, see post, "Comments on Evidence or Witnesses," § 476. As to comments of counsel on failure to produce evidence, see post, "Comments on Failure to Produce Witnesses or Evidence," § 478. As to comments of judge on evidence, see post, "Comments on Evidence or Witnesses," § 428; "Effect of Failure to Object or Except," § 463. As to instructions being applicable to evidence, see post, "Application of Instructions to Case," § 553. As to instructions as to rules of evidence, see post, "Presumptions and Burden of Proof," § 526; "Reasonable Doubt," § 537. As to request for instructions, see post, "Requests for Instructions," § 567-578. As to motion to strike out evidence, see post, "Motion to Strike Out," § 461. As to objections to evidence, see post, "Objections to Evidence, Motions to Strike Out, and Exceptions," §§ 458-463. As to want of proof, see post, "Offer of Proof," § 437. As to evidence being question of fact for jury, see post, "Province of Court and Jury in General," §§ 488-516½. As to reception of evidence at trial, see post,

"Reception of Evidence," § 431-453. As to exceptions on review, see post, "Review of Rulings on Evidence," § 696. As to suspension of trial to procure evidence, see post, "Adjournments Pending Trial," § 422. As to waiver and correction of errors in rulings as to admissibility of evidence, see post, "By Jury," § 609.

(A) JUDICIAL NOTICE, PRESUMPTIONS, AND BURDEN OF PROOF.

§ 179. Judicial Notice.

§ 179 (½) In General.

Where a recorder's court is established in a city by statute, the court will take judicial notice that no other municipal court can exist therein. *Thomas v. State*, 13 Ala. App. 421, 69 So. 413.

Officers of Private Corporation.—While courts will take judicial notice of a public office, they can not know, as matter of law, what offices attach, appertain, or belong to a private corporation, and can ascertain only as a jury might. *Ex parte State* (Ala.), 77 So. 353.

§ 179 (1) Historical Facts and Matters of Common Knowledge or Belief.

Courts are not supposed to be ignorant of that which everybody knows. *Ex parte Stollenwerck* (Ala.), 78 So. 454.

The Circulating Medium.—Courts will take notice as a historical fact of the circulating medium, the popular language with reference to it, and its value. *Collins v. State*, 14 Ala. App. 54, 70 So. 995.

Difficulty in Eradicating Injurious Impressions from Admitting Illegal Testimony.—It is a matter of general as well as judicial notice that it is very difficult to eradicate from minds of the jury injurious impressions created by admission of illegal testimony. *Willis v. State* (Ala. App.), 73 So. 766.

What Drug Stores Carry in Stock.—It is matter of common knowledge that drug stores are not limited in their stock in trade to drugs only, but that they carry tobacco, cigars, candies, soaps, toilet articles, and the like, as well as medicines and drugs, and that, in ab-

sence of local laws, they are kept open on Sunday to sell articles they carry. *Ex parte Stollenwerck* (Ala.), 78 So. 454.

§ 179 (2) Physiological Facts.

Effects of Habitual Drunkenness.—

The court will take judicial notice that habitual drunkenness tends to dethrone character and to destroy the moral fibre and makeup of a man, and that, persisted in, it will do so. *Lewis v. State*, 13 Ala. App. 31, 68 So. 792, certiorari denied in *Ex parte Lewis*, 193 Ala. 677, 69 So. 1018.

Inheritability of Insanity.—The court judicially knows that many forms of insanity are inheritable. *James v. State*, 193 Ala. 55, 69 So. 569.

In a prosecution for sodomy, the court can not take judicial notice that a cow not in heat would not submit to intercourse with a man. *Tarrant v. State*, 12 Ala. App. 172, 67 So. 626, certiorari denied in *Ex parte Tarrant*, 191 Ala. 664, 67 So. 1018.

§ 179 (3) Language, Words and Phrases and Abbreviations.

Abbreviations of Proper Name.—*White v. State*, 7 Ala. App. 69, 61 So. 463. See the title CRIMINAL LAW, § 179 (3), vol. 4, p. 117.

When the name "Willie" is applied to a male, the court judicially knows it to be used as a corruption of "William." *Walling v. State*, 13 Ala. App. 253, 69 So. 236.

§ 179 (3½) Geographical Facts in General.

That Town Is in a Certain County.—In prosecution for larceny, court will take judicial notice that town where a witness testified the offense was committed is in the county where it was charged to have been committed. *Thomas v. State* (Ala. App.), 72 So. 686.

Navigability of Tennessee River in Alabama.—The court will take judicial notice that the Tennessee river in Alabama is navigable and susceptible of being used in ordinary condition as a highway for commerce. *Pappenburg v. State*, 10 Ala. App. 224, 65 So. 418, certiorari denied in *Ex parte Pappenburg*, 188 Ala. 3, 66 So. 32.

§ 179 (4) Location, Boundaries, and Population of Municipalities.

It is a matter of judicial knowledge that the city of Cullman is in the state of Alabama. *Kramer v. State* (Ala. App.), 78 So. 719.

§ 179 (6) Public and Private Acts and Proclamations.

The courts take judicial notice of the contents of the House and Senate Journals, which by Const. 1901, §§ 63, 64, are required to be kept. *Lovelady v. State* (Ala. App.), 74 So. 734.

State Laws.—The court will take judicial notice of state laws. *Thomas v. State*, 13 Ala. App. 421, 69 So. 413.

§ 179 (8) Ordinances.

Existence of Municipal Ordinances.—Courts will not take judicial notice of the existence of municipal ordinances in the absence of proper averments and proof thereof. *Sherrod v. State*, 14 Ala. App. 57, 71 So. 76.

The court will not take judicial notice of municipal ordinances. *Thomas v. State*, 13 Ala. App. 421, 69 So. 413.

The courts can not take judicial knowledge of municipal ordinances upon appeal from a conviction thereunder. *Bivins v. Montgomery*, 13 Ala. App. 641, 69 So. 224.

Proceedings of Municipal Courts.—While courts take judicial notice of public statutes conferring authority upon municipalities to pass ordinances, they do not take judicial notice of ordinances or proceedings of the municipal court in the exercise of such power. *Glenn v. Prattville*, 14 Ala. App. 621, 71 So. 75.

§ 179 (9) Organization, Sessions, and Terms of Court.

Time of Regular Terms of Circuit Court.—The court may take judicial notice of the times of the regular terms of the circuit court that tried a prosecution for homicide, to determine whether the trial was had at a regular term. *Lewis v. State*, 13 Ala. App. 31, 68 So. 792.

Name of the Ensley Court.—The court of appeals takes judicial cognizance that the name of the Ensley court (Local Acts 1903, p. 698) is the inferior court of Ensley, and that it is the one court of

that name in Jefferson county. *Mitchell v. State* (Ala. App.), 72 So. 507.

§ 179 (10) Territorial Extent of Jurisdiction of Courts.

The court of appeals takes judicial cognizance of the jurisdiction of the inferior court of Ensley. *Mitchell v. State* (Ala. App.), 72 So. 507.

§ 179 (11½) Records.

The court judicially knows where an injunction bond, approved by a special register, was filed. *Everage v. State*, 14 Ala. App. 106, 71 So. 983.

§ 179 (12) Public Officers, and Acts and Signature Thereof.

Presiding Officer of Lower Court.—On appeal judicial notice will be taken as to who is the presiding officer of the court below. *Shiver v. State*, 13 Ala. App. 258, 69 So. 238.

Judge of City Court of Jasper.—The court of appeals takes judicial notice of one's incumbency as judge of the city court of Jasper, created by act approved March 29, 1911, and his authority to issue warrants, that such court is the only one styled "the city" court, so that styling the officer administering oaths to affidavit "judge of the city court in and for said county" would be treated as a clerical misprision. *Kirk v. State*, 14 Ala. App. 44, 70 So. 990.

Judge of Inferior Court of Ensley.—The court of appeals takes judicial cognizance of the judge of the inferior court of Ensley. *Mitchell v. State* (Ala. App.), 72 So. 507.

Rules and Regulations of State Live Stock Sanitary Board.—Court will not take judicial knowledge of rules and regulations of state live stock sanitary board. *Pierson v. State* (Ala. App.), 76 So. 487.

Same — Necessity of Pleading and Proving.—Rules and regulations enacted by state live stock sanitary board are ordinances, and must be pleaded and proved before courts will permit them to become basis for criminal prosecution for failure to comply therewith. *Childs v. State* (Ala. App.), 78 So. 308.

Same—Sufficiency of Indictment Failing to Allege Violation.—Indictment for failing to dip cattle infected with ticks,

which failed to allege that such failure was in violation of the rules and regulations of the sanitary board, held insufficient, as the court can not take judicial notice of such regulations. *Curlee v. State* (Ala. App.), 75 So. 268.

Indictment for failing to dip cattle infected with ticks, under Code 1907, § 758, and § 7083, as amended by Acts 1911, p. 613, without alleging that rules of live stock sanitary board required such dipping, held insufficient, as court can not take judicial notice of such rules. *Powell v. State* (Ala. App.), 75 So. 269.

Notary Public and Ex Officio Justice of County.—In prosecution of justice for embezzlement, court will take judicial notice of fact that defendant was notary public and ex officio justice of that county. *Corbin v. State* (Ala. App.), 74 So. 739.

§ 180. Presumptions.

§ 182. — Innocence.

Continuance during Trial.—*McClain v. State*, 182 Ala. 67, 62 So. 241. See the title CRIMINAL LAW, § 182, vol. 4, p. 119.

The presumption of innocence attends the accused only until his guilt is shown to the satisfaction of the jury beyond reasonable doubt. *Pickett v. State* (Ala. App.), 72 So. 693; *Roberson v. State*, 183 Ala. 43, 62 So. 837. See the title CRIMINAL LAW, § 182, vol. 4, p. 119.

Circumstantial evidence, merely raising a suspicion of guilt, will not overcome the prima facie presumption of innocence. *Perry v. State*, 11 Ala. App. 193, 65 So. 683.

§ 184. — Sanity.

The law presumes that accused, clearly proven to have committed a crime, was sane. *Williams v. State*, 13 Ala. App. 133, 69 So. 376.

Continuance.—*Cogbill v. State*, 8 Ala. App. 223, 62 So. 406. See the title CRIMINAL LAW, § 184, vol. 4, p. 120.

§ 184½. — Intent.

Where a person does an act legally wrong in itself, and the accomplished act is a crime, the law presumes the crim-

inal intent. *Williams v. State*, 13 Ala. App. 133, 69 So. 376.

§ 185. — Continuance of Fact.

Under Code 1907, § 1258, held unnecessary to establish the continuance in force of an ordinance under which a prosecution was instituted. *Lane v. Tuscaloosa*, 12 Ala. App. 599, 67 So. 778.

§ 186. — Failure to Testify or Call Witness.

Presumption of Innocence.—In a prosecution for burglary charging the taking of unfinished state examination papers from an office in the Capitol, state's failure to examine each person having a key thereto to show that defendant had not obtained them through him held to create no presumption of innocence. *Norman v. State*, 13 Ala. App. 337, 69 So. 362.

Witness Accessible to Both Parties.—No unfavorable inference can be drawn from the absence of testimony of a witness equally accessible to both parties. *Forman v. State*, 190 Ala. 22, 67 So. 583.

Last Innocent Possessor of Stolen Property.—Where the person who had last had innocent possession of property claimed to have been stolen could have been called as a witness by the state some sufficient reason why it was not done should be shown. *McMickens v. State* (Ala. App.), 75 So. 626.

§ 187½. — Judicial Proceedings.

Regularity of Indictment.—An indictment duly returned, properly indorsed, and bearing the signature of the foreman is presumed to be regularly found on sufficient evidence. *Holland v. State*, 11 Ala. App. 134, 66 So. 126, certiorari denied in *Ex parte Holland*, 191 Ala. 662, 66 So. 1008.

Regularity of Proceedings of Courts of General Jurisdiction.—A presumption lies in favor of regularity of proceeding of any court of general jurisdiction. *Clayton v. State* (Ala. App.), 78 So. 462.

§ 190. Burden of Proof.

§ 191. — Extent of Burden on Prosecution.

As to presumption of innocence casting on the state the burden of proving

defendant's guilt beyond a reasonable doubt, see ante, "Innocence," § 182.

Necessity of Proving Impossibility of Innocence.—The burden is on the state to prove beyond a reasonable doubt that accused is guilty of the offense charged, but it need not prove the impossibility of his innocence. *Lovelady v. State* (Ala. App.), 74 So. 754.

Necessity to Show Every Fact Necessary to Show Guilt.—*Brooks v. State*, 8 Ala. App. 277, 62 So. 569. See the title CRIMINAL LAW, § 191, vol. 4, p. 121.

§ 192. — Elements of Offense in General.

Necessity of Proving Elements of Offense.—*Roberson v. State*, 183 Ala. 43, 63 So. 837. See the title CRIMINAL LAW, § 192, vol. 4, p. 121.

Venue.—*Parnell v. State*, 9 Ala. App. 673, 62 So. 307. See the title CRIMINAL LAW, § 192, vol. 4, p. 121.

§ 193. — Insanity.

Constitutionality of Statute Placing Burden upon Accused.—*McGhee v. State*, 178 Ala. 4, 59 So. 573, cited in note in 44 L. R. A., N. S., 122. See the title CRIMINAL LAW, § 193, vol. 4, p. 122.

Necessity of State Proving Mental Capacity.—On trial for assault with intent to murder, the state need not prove that accused was mentally capable of forming the intent. *Williams v. State*, 13 Ala. App. 133, 69 So. 376.

§ 194½. — Matters Preliminary to Introduction of Other Evidence.

The burden of proving a witness to be an accomplice is upon the defendant who so alleges for the purpose of invoking the rule requiring corroboration. *Horn v. State* (Ala. App.), 72 So. 768.

§ 195. — Particular Facts.

See ante, "Elements of Offense in General," § 192.

Name of Defendant Unknown to Grand Jury.—*Axelrod v. State*, 7 Ala. App. 61, 60 So. 959. See the title CRIMINAL LAW, § 195, vol. 4, p. 122.

(B) FACTS IN ISSUE AND RELEVANT TO ISSUES, AND RES GESTÆ.

§ 196½. Facts in Issue.

In prosecution for violation of the pro-

hibition law, it is not error to exclude testimony of a witness that certain other witnesses had made an assault upon her; none of such witnesses being upon trial. *McDaniel v. State* (Ala. App.), 75 So. 173.

§ 196. Relevancy in General.

§ 196 (1) In General.

§ 196 (1a) General Rule.

Test of Relevancy.—The same rules govern as to the admissibility of evidence in civil suits and criminal prosecutions, the test of relevancy being whether the testimony conduces to the proof of pertinent act influencing the issue. *Smith v. State*, 13 Ala. App. 411, 69 So. 406.

Test of relevancy of evidence is whether it conduces to proof of a pertinent hypothesis, which, if sustained, would influence the issue. *Martin v. State* (Ala. App.), 78 So. 322.

Propriety of Excluding Irrelevant Evidence.—*Hammock v. State*, 8 Ala. App. 367, 62 So. 322. See the title CRIMINAL LAW, § 196 (1a), vol. 4, p. 122.

That relevant evidence is inconclusive is not ground for excluding it in a criminal case. *Pope v. State*, 188 Ala. 50, 66 So. 25.

Circumstances Not Directly Tending to Prove or Disprove Issues.—In a prosecution for assault with intent to murder, evidence of circumstances which do not directly tend to prove or disprove the matters in issue are properly excluded. *Graham v. State*, 11 Ala. App. 113, 65 So. 717.

§ 196 (1c) Illustration of Rule.

§ 196 (1cb) Evidence Held Irrelevant.

Where the state's evidence showed that the killing was intentional, and accused had offered no testimony that it was an accident, the exclusion of evidence that there was a scar on the door facing where accused stood made by the hammer of the gun, held properly excluded. *Graham v. State*, 11 Ala. App. 113, 65 So. 717.

Mental or Physical Condition of Defendant's Wife.—Where, in a homicide case, there was no issue involving the mental or physical condition of defend-

ant's wife, his testimony in respect thereto was properly excluded. *Langston v. State* (Ala. App.), 75 So. 715.

Reputation of Defendant's Wife for Chastity.—Where, in support of a plea of insanity, the defendant offered evidence having some tendency to prove that he was mentally unbalanced in consequence of information which had come to him of the existence of illicit relations between his wife and the deceased, the admission in rebuttal of evidence as to the reputation of the wife for chastity, she not being a witness, was reversible error. *Brown v. State*, 9 Ala. App. 15, 64 So. 170.

Subsequent Conduct of Third Person.—In a prosecution for a violation of the prohibition law, it was not error to exclude evidence offered by defendant that a detective who did not testify in the case had been talking with the witness for the defendant, who had thereafter left; since such evidence could not affect the issues in the case or the credibility of any witness who testified. *Maxwell v. State*, 12 Ala. App. 212, 67 So. 772.

Defendant's Discharge on Preliminary Trial.—The fact that defendant was discharged on a preliminary trial would have no bearing on any issue in the regular trial, and an objection to a question by defendant's counsel as to that fact was properly sustained. *Boswell v. State*, 9 Ala. App. 23, 64 So. 188.

Character of Footprints Made by Others.—In prosecution of one jointly indicted with others for larceny, evidence as to character of footprints made by such others held inadmissible in absence of evidence showing conspiracy. *White v. State*, 12 Ala. App. 160, 68 So. 521.

Reasons Why Witness' Attention Attracted by Shots.—On trial for homicide, court held to have properly refused to permit witness to give reasons why his attention was attracted by shots. *Hill v. State*, 194 Ala. 11, 69 So. 941.

Former Occupation of Witness.—Question of witness as to what his occupation had been called for immaterial and irrelevant matter. *Butler v. State* (Ala. App.), 77 So. 72.

Witness' Assistance in Striking Juries in Other Cases.—It was not error to

overrule a question whether witness assisted the solicitor to strike juries in all cases in which he made arrests; his custom or interest in other cases being immaterial and irrelevant. *Wright v. State* (Ala. App.), 72 So. 564.

Rape — Conversations between Mother and Brother of Victim.—In a rape case, the court properly refused to permit defendant to prove conversations between the mother and brother of the victim, and an effort by them to get possession of defendant's property just before the prosecution was begun; they not being witnesses and there being nothing to show that either had any connection with the prosecution. *Beiser v. State*, 10 Ala. App. 86, 65 So. 312.

Larceny—Proximity to Scene of Crime of Others' Residence.—In prosecution of one jointly indicted with others for larceny, evidence as to the proximity of the residence of such others to the scene of the crime held inadmissible in absence of showing of conspiracy. *White v. State*, 12 Ala. App. 160, 68 So. 521.

Murder of Second Wife—Cause of First Wife's Death.—Where defendant was on trial for murder of his second wife, his testimony as to the cause of the death of his first wife was irrelevant and properly excluded. *Watts v. State*, 8 Ala. App. 115, 63 So. 15.

Deceased's Offer to Sell Liquor to Witness.—In murder trial, evidence that deceased, while at his house on the night he disappeared, offered to sell liquor to a witness, was properly refused as irrelevant. *Palmer v. State* (Ala. App.), 73 So. 139, certiorari denied in 73 So. 1001.

§ 196 (2) Admissibility of Circumstantial Evidence.

Any fact material to the main fact may be proved as well by circumstantial evidence as by positive evidence. *Thomas v. State*, 11 Ala. App. 85, 65 So. 863.

§ 196 (3) Evidence Relevant in Connection with Offer of Proof or Evidence Already Introduced.

That eight year old girl's private parts were inflamed, swollen, and showed discharge in October, after alleged carnal

knowledge in July, taken in connection with doctor's testimony that it looked like venereal trouble, which could exist for several months, and positive testimony of child and her mother to the criminal act, and defendant's confession, was relevant to go to the jury in prosecution for carnal knowledge of girl under age of consent. *Pool v. State* (Ala. App.), 78 So. 311.

Where the evidence is circumstantial, the state may show facts which, standing alone, are without probative force, but which, when connected by evidence with other facts, are material. *Turney v. State* (Ala. App.), 75 So. 726.

Evidence Made Relevant by Defendant's Admission. — On trial for manslaughter, evidence that defendant was told, if he would tell where deceased was, he would be freed of forgery charge, is made competent by admission, without objection, of defendant's reply that he knew where deceased was, but would not tell. *Lawson v. State* (Ala. App.), 76 So. 411.

§ 196 (4) Evidence as to Acts, Transactions and Occurrences to Which Accused Is Not a Party.

Res Inter Alios Acta. — *Cogbill v. State*, 8 Ala. App. 223, 62 So. 406. See the title CRIMINAL LAW, § 196 (4), vol. 4, p. 126.

Offer of Deceased's Brother to Purchase Pistol.—In manslaughter case, evidence that a brother of deceased offered to purchase a pistol was *res inter alios acta*; there being no proper preliminary proof or predicate of conspiracy. *Tittle v. State* (Ala. App.), 73 So. 142.

Steps Witness Took to Recover Stolen Property.—In a larceny prosecution, testimony regarding what steps the witness took to recover his stolen property is inadmissible because *res inter alios acta*. *King v. State* (Ala. App.), 72 So. 552.

§ 196 (6) Evidence Calculated to Create Prejudice against or Sympathy for Accused.

Refusal to allow accused to show that the prosecution was begun in witness' court by L., who was mad at accused, is not error, where it does not appear that L. was the prosecutor or had testified in

the case. *Miller v. State* (Ala. App.), 74 So. 840; *Smith v. State*, 183 Ala. 10, 62 So. 864. See the title CRIMINAL LAW, § 196 (6), vol. 4, p. 127.

§ 196 (7) Evidence Calculated to Create Prejudice against Witness.

An officer's testimony that he had a warrant and searched for accused's witness is inadmissible, being irrelevant and calculated to discredit the witness. *Brewer v. State* (Ala. App.), 74 So. 764.

§ 197. Identity of Persons or Things.

As to opinion evidence, see post, "Personal Identity and Characteristics," § 292.

Identity of Accused — Training and Qualification of Dogs.—*Allen v. State*, 8 Ala. App. 228, 62 So. 971, cited in note in L. R. A. 1917E, 731. See the title CRIMINAL LAW, § 197 (1c), vol. 4, p. 128.

§ 197½. Nature and Condition of Property or Other Subject Matter of Offense.

Condition of Box from Which Property Was Stolen.—In prosecution under indictment charging burglary, grand larceny and receiving or concealing stolen property, action of trial court in permitting state to show condition of box from which it was claimed property was stolen was proper. *Wade v. State*, 14 Ala. App. 130, 72 So. 269.

Condition of Room in Which Deceased Was Found.—In a prosecution for homicide, evidence as to the condition of the room in which deceased was found, and objects therein, held admissible, though it did not appear that the room and clothing were in the same condition when seen by the witnesses as when the homicide was committed. *Madley v. State*, 192 Ala. 5, 68 So. 864.

§ 197 (½a) Personal Relations.

Feelings existing between persons is fact that may be established by proof. *Butler v. State* (Ala. App.), 77 So. 72.

§ 198. Motive or Absence of Motive.

As to competency of testimony as to motive, see post, "Testimony as to Intent or Motive," § 238. As to evidence of other offenses to show motive, see post, "Acts Showing Intent or Malice or Motive," § 222.

Where a fraudulent intent is necessary to be shown, great latitude is allowed in the range of evidence. *Freeman v. State*, 10 Ala. App. 120, 64 So. 514.

Admissibility of Evidence Tending to Show Motive.—*Cooley v. State*, 7 Ala. App. 163, 62 So. 292. See the title CRIMINAL LAW, § 198, vol. 4, p. 129.

Uncommunicated Motive or Intent of Defendant.—*Granberry v. State*, 182 Ala. 4, 62 So. 52. See the title CRIMINAL LAW, § 198, vol. 4, p. 129.

§ 201. Preparations and Preceding Circumstances.

Accused's Whereabouts before Committing Offense.—*Cooley v. State*, 7 Ala. App. 163, 62 So. 292. See the title CRIMINAL LAW, § 201, vol. 4, p. 129.

§ 204. Subsequent Incriminating or Exculpatory Circumstances.

See post, "Subsequent Condition or Conduct of Accused," § 205.

Where the evidence tended to show that defendant, and a third person were accomplices, evidence that after the larceny they went off and remained together was admissible. *Moye v. State*, 12 Ala. App. 127, 67 So. 716.

Defendant's Presence at Witness' House.—In prosecution for larceny, where it was shown that a state's witness' home was near the scene of the crime, testimony as to whether defendant had been at witness' house about a certain time was competent. *English v. State*, 14 Ala. App. 636, 72 So. 292.

§ 205. Subsequent Condition or Conduct of Accused.

§ 205 (1) In General.

Conduct or Declaration Indicating Consciousness of Guilt.—Any conduct or declaration of accused having relation to the offense charged indicating his consciousness of guilt is admissible. *Palmer v. State* (Ala. App.), 73 So. 139, certiorari denied in 73 So. 1001.

Inquiries Whether His Name Connected with Crime.—*McClain v. State*, 182 Ala. 67, 62 So. 241. See the title CRIMINAL LAW, § 205 (1), vol. 4, p. 130.

Inquiries Whether Woman Could Swear to His Whereabouts.—*McClain v.*

State, 182 Ala. 67, 62 So. 241. See the title CRIMINAL LAW, § 205 (1), vol. 4, p. 130.

Accused Asking Witness to Call Sheriff.—Witness in murder trial was properly not allowed to answer question eliciting testimony that accused asked him to call the sheriff for accused. *James v. State*, 14 Ala. App. 652, 72 So. 299.

Accused's Whereabouts after Committing Crime.—*Cooley v. State*, 7 Ala. App. 163, 62 So. 292. See the title CRIMINAL LAW, § 205 (1), vol. 4, p. 130.

§ 205 (2) Flight or Refusal to Flee.

See post, "Condition or Conduct of Accused Subsequent to Commission of Crime," § 211 (3).

In a criminal prosecution, the state may always show flight of the defendant; that is, that the defendant absented himself from the community of the crime, out of the sense of guilt, through fear of, or to avoid, arrest. *Goforth v. State*, 183 Ala. 66, 63 So. 8; *McConnell v. State*, 13 Ala. App. 79, 69 So. 333; *Richardson v. State*, 191 Ala. 21, 68 So. 57.

Question for Jury.—Inculpatory statements and conduct of defendant tending to show flight as a consciousness of guilt are admissible, though weak and inconclusive in themselves; their weight being for the jury. *Palmer v. State* (Ala. App.), 73 So. 139, certiorari denied in 73 So. 1001.

Coming to County Seat and Surrendering to Sheriff.—In a homicide case, it was not error to refuse to permit defendant to prove that after the difficulty he came to the county seat and surrendered himself to the sheriff, where the state did not prove, or attempt to prove, flight. *Phillips v. State*, 11 Ala. App. 15, 65 So. 444.

Valise Containing Implements of Defendant's Vocation.—It was permissible to prove, as a fact connected with the flight of defendant, that the valise found in his possession when he was arrested contained working clothes and implements suited to his vocation. *Beiser v. State*, 10 Ala. App. 86, 65 So. 312.

Propriety of Showing Defendant Had Left State.—On the question of flight it was proper to show that defendant had

left the state, as well as the neighborhood. *McConnell v. State*, 13 Ala. App. 79, 69 So. 333.

Statements of accused showing he contemplated flight were competent in connection with proof of his flight. *Palmer v. State* (Ala. App.), 73 So. 139, certiorari denied in 73 So. 1001.

Running into House on Seeing Officer.—Evidence that accused, when he saw an officer coming to arrest him, ran into the house, is admissible. *James v. State*, 14 Ala. App. 652, 72 So. 299.

Propriety of Defendants Proving No Attempt to Escape.—It was proper to refuse to allow defendants to show that they made no attempt to evade arrest where state introduced no proof tending to show flight. *Hendley v. State* (Ala.), 76 So. 904.

§ 205 (3) Resisting or Avoiding Arrest. Evidence that accused evaded, or attempted to evade, arrest, is admissible. *Jackson v. State*, 11 Ala. App. 303, 66 So. 877.

§ 205 (5) Subornation of Witnesses or Jurors, and Fabrication of Evidence.

Attempts to Suppress Truth.—Defendant's statements during his efforts to get witnesses to testify in his favor capable of construction as an effort to suppress the truth were admissible in connection with any explanation he might offer of an innocent meaning or intention on his part. *Dempsey v. State* (Ala. App.), 72 So. 773.

Same.—*Smith v. State*, 183 Ala. 10, 62 So. 864. See the title CRIMINAL LAW, § 205 (5), vol. 4, p. 132.

Declarations Concerning Stolen Property—Threats about Witness Testifying.—On a larceny trial it is proper for the state to ask its witness if defendant made any statements to him about the stolen property or made any threats about the witness testifying in the case. *Bufford v. State*, 14 Ala. App. 69, 71 So. 614.

Where defendant admitted giving a letter to a witness and the witness identified the letter, which was an attempt to suppress evidence, it was admissible. *McDaniel v. State* (Ala. App.), 75 So. 173.

Efforts to See Accomplice and Their Conversations.—Where there was evidence tending to show that a prisoner was an accomplice of defendant, evidence of repeated efforts by defendant to see the prisoner and the conversations between them was admissible; it showing effort to manufacture evidence. *Britton v. State* (Ala. App.), 74 So. 721.

§ 205 (6) Escape, Attempts to Escape, and Opportunity to Escape Declined.

Though accused was unlawfully arrested without a warrant, his attempt to escape is admissible to show consciousness of guilt. *Hicks v. State*, 11 Ala. App. 290, 66 So. 873.

§ 206. Insanity.

As to burden of proof of insanity, see ante, "Insanity," § 193.

Great latitude is allowed in admitting evidence having any tendency to throw light on mental condition of defendant, whose insanity is in issue. *Winford v. State* (Ala. App.), 75 So. 819.

A physician examining accused while in jail awaiting trial may testify as to his sanity, as against the objection that it related to the mind of accused after the offense. *Brown v. State*, 11 Ala. App. 321, 66 So. 829.

Loss of Home Prior to Crime.—Where accused had not offered evidence of insanity, exclusion of evidence that before the crime he had lost his home was not erroneous. *Brown v. State*, 11 Ala. App. 321, 66 So. 829.

§ 207. Intoxication.

As to opinion evidence, see post, "Intoxication and Intoxicants," § 296.

Evidence Properly Stricken as Immaterial.—*Hammock v. State*, 7 Ala. App. 112, 61 So. 471. See the title CRIMINAL LAW, § 207, vol. 4, pp. 133, 134.

§ 209. Incriminating Others.

§ 209 (1) To Exculpate Accused.

Where Evidence against Prisoner Circumstantial.—*Davis v. State*, 8 Ala. App. 211, 62 So. 382. See the title CRIMINAL LAW, § 209 (1), vol. 4, p. 134.

Evidence Held Competent to Corroborate Defendant's Theory Exculpating Him.—*Sellers v. State*, 7 Ala. App. 75,

61 So. 485. See the title CRIMINAL LAW, § 209 (1), vol. 4, p. 134.

Flight of Another Accused of Same Crime.—Proof that another, who had been charged with the crime, had fled the country is inadmissible. *Ward v. State* (Ala. App.), 72 So. 754.

Flight of Third Party.—As part of the *res gestæ* of the difficulty of H. with deceased, claimed by defendant to have inflicted the wound, held defendant could show that H. immediately left. *Terry v. State*, 13 Ala. App. 115, 69 So. 370.

Defendant's Right to Prove Another Accused of Crime.—Accused is not entitled to introduce testimony that another had been accused of the crime for which he was being tried. *Ward v. State* (Ala. App.), 72 So. 754.

Proof of Commission of Crime by Third Person.—*Davis v. State*, 8 Ala. App. 211, 62 So. 382. See the title CRIMINAL LAW, § 209 (1), vol. 4, p. 134.

Where Evidence Relates to Res Gestæ.—*Tennison v. State*, 183 Ala. 1, 62 So. 780. See the title CRIMINAL LAW, § 209 (1), vol. 4, p. 134.

§ 209 (2) To Establish Guilt of Accused.

Rebuttal of Another's Guilt.—Testimony of the mother of a man, who had been suspected of committing the murder with which defendant was charged, that he was in his room at the time of the crime was admissible, though her son was in jail charged with the crime when she testified; such fact affecting only the value of her testimony. *Pope v. State*, 188 Ala. 50, 66 So. 25.

Where, in a homicide case, the evidence of the identity of the guilty person was circumstantial and tended to show that the crime was committed either by defendant or by a certain other person, evidence that the other person was in his room at the time of the crime and could not have been present thereat, was admissible. *Pope v. State*, 188 Ala. 50, 66 So. 25.

§ 211. Matters Explanatory of Facts in Evidence or of Inferences Therefrom.

§ 211 (1) In General.

Whether Witness Asked Defendants

about Deceased. — Where witness in murder case testified that he met defendants, and one of them said that deceased was below the old house with his head in the ditch, there was no error in overruling an objection as to whether the witness asked about the deceased. *Hendley v. State* (Ala.), 76 So. 904.

That Decedent Was a Constable. — *Perry v. State*, 8 Ala. App. 7, 62 So. 392. See the title CRIMINAL LAW, § 211 (1), vol. 4, p. 136.

Right to Rebut Irrelevant Testimony. — Where, in a prosecution against a landlord for killing his tenant, the tenant's widow irrelevantly testified that at the time of the killing they had nothing to live on but dry bread, defendant was not entitled to show that he had given the tenant orders on a grocer, and that, if they were without provisions, it was not his fault. *Maxwell v. State*, 11 Ala. App. 53, 65 So. 732.

Another's Flight—Propriety of Showing His Failure to Return.—As explanation of the immediate leaving by H., claimed by defendant to have killed deceased, and to make out flight, defendant could show he did not return; though only the leaving was part of the *res gestæ* of H.'s difficulty with deceased. *Terry v. State*, 13 Ala. App. 115, 69 So. 370.

Defendant's Flight — Returning in Overalls.—That the immediate leaving by defendant of the scene of the difficulty with deceased was on the invitation of friends has no tendency to explain why, when he returned, soon afterwards, he had overalls on. *Terry v. State*, 13 Ala. App. 115, 69 So. 370.

Same—Others' Knowledge of Leaving. — In a rape case, where the state proved flight of defendant, the court properly refused to permit defendant to show that others knew of his leaving. *Beiser v. State*, 10 Ala. App. 86, 65 So. 312.

§ 211 (3) Condition or Conduct of Accused Subsequent to Commission of Crime.

Motives in Leaving Community. — Where the state has offered evidence of the defendant's flight, either the state or

the defendant may show all the circumstances attending it, to show the defendant's motive in leaving the community. *Goforth v. State*, 183 Ala. 66, 63 So. 8.

How Long Accused Remained at a Certain Place.—*Cooley v. State*, 7 Ala. App. 163, 62 So. 292. See the title CRIMINAL LAW, § 211 (3), vol. 4, p. 136.

Reason for Acts Shown.—Where on trial for wife murder the state introduced evidence of intimate relations between accused and a young lady, evidence that she and accused's brother had some trouble, and that he was carrying her away by request of his brother when seen with her, held improperly excluded, but the details of the brother's trouble with her were properly excluded. *Spicer v. State*, 188 Ala. 9, 65 So. 972.

Contents of Postal Cards Written by Defendant.—Where the flight of the accused was in evidence, it was reversible error to exclude from the jury the contents of postal cards written by him, in which he stated where he was going and what he intended to do. *Goforth v. State*, 183 Ala. 66, 63 So. 8.

While a defendant can not introduce self-serving declarations, he may show his acts and words which are so connected with the flight as to give character to it. *Goforth v. State*, 183 Ala. 66, 63 So. 8.

§ 211 (4) Confessions.

During quasi confession, what third party says is admissible if necessary for purpose of connecting and rendering intelligible defendant's statement, and also if statement involves such accusation against one of several defendants as to call for denial. *Hendley v. State (Ala.)*, 76 So. 904.

§ 213. Res Gestæ.

§ 214. — Relation to Offense in General.

§ 214 (1) In General.

The Rule.—Acts or declarations, to be admissible as part of the *res gestæ*, must have been done or made at the time of the occurrence of the main fact, must have a tendency to elucidate it, and must so harmonize with it as to obviously

constitute one transaction. *Hardeman v. State*, 14 Ala. App. 35, 70 So. 979.

Acts or declarations, to be admissible under the principle of *res gestæ*, must be substantially contemporaneous with the main fact under consideration, and so closely connected with it as to illustrate its character. *Dudley v. State*, 185 Ala. 27, 68 So. 309.

Previous Altercations between Deceased and Defendant.—In a prosecution for murder in the first degree, altercations between the deceased and defendant on the same night, the last of which was about 15 minutes before the homicide, were not admissible as part of the *res gestæ* of the homicide. *Moss v. State*, 190 Ala. 14, 67 So. 431.

Declaration Accompanying Act Which Is Admissible.—*Harris v. State*, 177 Ala. 17, 59 So. 205. See the title CRIMINAL LAW, § 214 (1), vol. 4, p. 137.

§ 214 (2) What Constitutes.

In prosecution for violation of prohibition law, testimony of officer that, when he and others were searching defendant's premises, man was in defendant's house, who had a full quart of gin in his pocket, was admissible as part of *res gestæ*. *Bell v. State (Ala. App.)*, 75 So. 181, certiorari denied in *Ex parte Bell (Ala.)*, 76 So. 1.

Acts on Day before Murder.—Acts of participants on day previous to day of murder are not admissible as part of *res gestæ*. *Hendley v. State (Ala.)*, 76 So. 904.

Difficulty between Accused's Father and Officer.—If evidence tends to show that particulars of a difficulty between an officer and accused's father were of the *res gestæ* of the major fact in the case against accused who shot the officer, all that was said and done at the time of such difficulty is competent. *Dickey v. State (Ala. App.)*, 72 So. 608, certiorari denied in 197 Ala. 610, 73 So. 72.

Difficulty Leading up to Killing.—Testimony as to a difficulty leading up to the killing held admissible as part of the *res gestæ*. *Minor v. State (Ala. App.)*, 74 So. 98.

Difficulty with Another Two Hours before Killing.—In the prosecution for murder of a married woman, evidence of

the details of a difficulty between P. and defendant, alleged rivals for the attentions of deceased, which occurred two hours before the killing held not a part of the *res gestæ*. *Wise v. State*, 11 Ala. App. 72, 66 So. 128.

State's Right to Show Particulars of Previous Difficulty.—Where, shortly before the killing, accused and deceased had a difficulty, and accused left the place, not returning for some minutes, the state, while entitled to show the happening of the difficulty, can not show the particulars; the difficulty not being part of the *res gestæ*. *Wells v. State*, 187 Ala. 1, 65 So. 950.

Defendant "Using" House Where Crime Committed.—*Parsons v. State*, 179 Ala. 23, 60 So. 864. See the title CRIMINAL LAW, § 214 (2), vol. 4, p. 138.

Assaulted Party's Testimony Concerning Circumstances of Assault.—In prosecution for an assault with intent to murder, testimony of assaulted party as to the circumstances of assault, a part of one continuous transaction, held admissible as a part of the *res gestæ*. *Henderson v. State* (Ala. App.), 72 So. 590.

Defendant's Physical Condition.—In a murder case, the physical condition of deceased held admissible as part of the *res gestæ* and to aid the jury in fixing the grade of punishment. *Morris v. State*, 193 Ala. 1, 68 So. 1003.

On Trial for Assault with Intent to Murder.—*Chestnut v. State*, 7 Ala. App. 72, 61 So. 609. See the title CRIMINAL LAW, § 214 (2), vol. 4, p. 139.

Interval of Time.—*Bishop v. State*, 181 Ala. 85, 61 So. 820. See the title CRIMINAL LAW, § 214 (2), vol. 4, p. 138.

Evidence as to how one was wounded, and his position, held admissible, in a trial for homicide, as descriptive of part of the occurrence, the relative positions of defendant and the deceased, and the direction of the shots. *Howell v. State*, 10 Ala. App. 1, 64 So. 522.

Conversation between Victim and Accused.—In a murder trial, conversation between victim and accused immediately after firing of fatal shot was admissible to show accused's hostile state of mind at the time. *Walling v. State* (Ala.

App.), 73 So. 216, certiorari denied in *Ex parte Walling* (Ala.), 73 So. 1003.

Conversation between defendant and deceased after he had shot her in the house, and they had gone out doors, was not admissible as part of the *res gestæ*. *Pinson v. State* (Ala.), 78 So. 876.

§ 215. — Acts and Statements of Accused.

§ 215 (1) Contemporaneous with Commission of Crime.

In a prosecution for carrying a concealed pistol, court did not err in admitting evidence that at time and place where defendant was seen with pistol concealed he was under influence of whisky and fired pistol; such facts being part of *res gestæ*. *Adkins v. State* (Ala. App.), 76 So. 465.

Accused's Acts Hour and a Half before Killing.—*Harris v. State*, 8 Ala. App. 33, 62 So. 477. See the title CRIMINAL LAW, § 215 (1), vol. 4, p. 140.

Resisting Arrest.—*Finley v. State*, 7 Ala. App. 161, 62 So. 265. See the title CRIMINAL LAW, § 215 (1), vol. 4, p. 140.

Calling to Wife to Bring His Gun.—Evidence that defendant during or just after the difficulty called to his wife to bring his gun; that he had killed one man and was going to kill another—was admissible as a part of the *res gestæ*. *Dempsey v. State* (Ala. App.), 72 So. 773.

Telling Bystander to Knock H—l Out of Deceased.—It is permissible to prove, as a part of the *res gestæ*, that, while the difficulty was going on, accused told a bystander to "knock h—l" out of the deceased. *Tiller v. State* (Ala. App.), 64 So. 653.

Person Accused of Rape.—Story *v. State*, 178 Ala. 98, 59 So. 480. See the title CRIMINAL LAW, § 215 (1), vol. 4, p. 140.

§ 215 (2) Before Commission of Crime.

See post, "Length of Time Elapsed as Affecting Admissibility," § 215 (4).

Conversations of Accused and Third Person.—It was not error to exclude evidence as to conversations between defendant and a third person while going

to the scene of the crime, wherein the third person suggested going to see deceased, as to working for defendant. *Ingram v. State*, 13 Ala. App. 147, 69 So. 976.

Statement of Accused Just before Fatal Encounter.—A statement by accused, just before the encounter with decedent, that he would go to where decedent and his brother were wrestling a short distance away, was a part of the *res gestæ*. *Rector v. State*, 11 Ala. App. 333, 66 So. 857.

Declarations made by defendant, after being shot at and while he was procuring the gun with which he killed deceased, held properly admitted in homicide case to show his mental attitude and purposes. *Dudley v. State*, 185 Ala. 27, 64 So. 309.

Defendants' Request to Ride with Prosecuting Witness.—Where the prosecuting witness contended that accused and another negro whom he allowed to ride in his wagon robbed him at the point of a pistol, testimony as to the request by the negroes for permission to ride is admissible as part of the *res gestæ*. *Doby v. State* (Ala. App.), 74 So. 724.

In prosecution for carnal knowledge of a girl under 12 years of age, testimony that defendant's announced purpose on setting out was to inspect a cart, held admissible as part of *res gestæ*. *Mayo v. State* (Ala. App.), 73 So. 141.

That Person Robbed Exhibited Money before Defendant.—In a prosecution for robbery, evidence that within an hour before the robbery the person robbed, in paying for whisky, which defendant had suggested that they get, exhibited the money of which he was afterwards robbed, held admissible as part of the *res gestæ*. *Hardeman v. State*, 14 Ala. App. 35, 70 So. 979.

A note read to defendant, to the effect that it was a violation of law, under the circumstances, for him not to release a servant in his employ under written contract to serve another, whereupon he still refused to release the servant from his employ, held admissible as part of the *res gestæ* of the refusal. *Lambert v. State*, 13 Ala. App. 289, 69 So. 261.

§ 215 (3) After Commission of Crime in General.

See post, "Length of Time Elapsed as Affecting Admissibility," § 215 (4).

Acts and statements of one accused of murder immediately after killing and constituting *res gestæ* are admissible. *Consford v. State* (Ala. App.), 74 So. 740, *certiorari* denied in 75 So. 335.

Statements of Defendant Just after Killing.—There was no error in allowing proof of what defendant was saying just after shooting, as it was part of *res gestæ*. *Reeves v. State* (Ala.), 77 So. 339.

Declarations after Leaving Place of Killing.—A statement by accused with reference to the killing, made a few minutes after the shot and at a time when he had left the place, held not admissible as part of the *res gestæ*. *Hickman v. State*, 12 Ala. App. 22, 67 So. 775.

Accused's Statement He Did Not Mean to Shoot Deceased.—Evidence of accused's statement that he did not mean to shoot deceased held admissible as part of the *res gestæ*. *James v. State*, 12 Ala. App. 16, 67 So. 773.

Conversation of Accused and Another Holding Pistol.—Witness having testified that, immediately after hearing shots, he heard a man holding a pistol speak to some one who responded in the voice of the accused, the entire conversation then had between such persons was admissible as *res gestæ*. *Newsom v. State* (Ala. App.), 72 So. 579, *certiorari* denied in *Ex parte Newsom* (Ala.), 73 So. 1001.

Statements made by accused to officers soon after the commission of the alleged crime are not part of the *res gestæ* but are merely self-serving declarations when offered by accused, but the statements are admissible against him. *Clayton v. State*, 185 Ala. 13, 64 So. 76.

Threat to Kill Witness.—In a prosecution of a convict for murder, declarations of defendant to another convict "if you go down and tell him, I will kill you when you come back," held admissible as part of the *res gestæ*. *Johnson v. State*, 183 Ala. 79, 63 So. 163, cited in note in *L. R. A.* 1915E, 205.

Defendant's Request to Sleep with Witness.—Accused was properly not allowed to show as part of *res gestæ* that he asked witness to be allowed to sleep with him the night of the murder. *James v. State*, 14 Ala. App. 652, 72 So. 299.

What occurred after the shooting between defendant and deceased's wife, who was some distance away when the shooting occurred, was not part of the *res gestæ*. *Madry v. State* (Ala.), 78 So. 866.

Acts of Accused at Time of Arrest.—Where the state did not show flight, testimony of an officer as to what accused was doing at the time of his arrest was properly excluded, as not a part of the *res gestæ*. *Brown v. State*, 11 Ala. App. 321, 66 So. 829.

Prosecution for Homicide.—*Livingston v. State*, 7 Ala. App. 43, 61 So. 54, judgment reversed in *Ex parte State*, 181 Ala. 4, 61 So. 53. See the title CRIMINAL LAW, § 215 (3), vol. 4, p. 141.

A question, "What was she saying after she shot?" was proper in a homicide case. *Pruitt v. State* (Ala. App.), 77 So. 916.

§ 215 (3a) Incriminating Conduct and Statements after Commission of Offense.

Threat to Kill Witness.—*Bone v. State*, 8 Ala. App. 59, 62 So. 455. See the title CRIMINAL LAW, § 215 (3a), vol. 4, p. 142.

Following and Attempting to Shoot Deceased Again.—That wife after shooting her husband followed him, and attempted to shoot him again before he died, was part of the *res gestæ*. *Pruitt v. State* (Ala. App.), 77 So. 916.

Nervousness of Defendant When Arrested.—The state was properly permitted to show by the arresting officer that accused appeared nervous when arrested; it being a part of the *res gestæ*. *Thomas v. State*, 11 Ala. App. 85, 65 So. 863.

Defendant's Answer to State's Witness' Statement.—In prosecution for murder, defendant's statement, in answer to statement of state's witness, that he did not care if he had killed deceased and another held not admissible as a part of the *res*

gestæ. *Allsup v. State* (Ala. App.), 72 So. 599.

Defendant's Conduct in Going to Another.—In prosecution for assault with intent to murder, conduct of defendant in going to another, with whom she was associated, immediately after he was shot in the affray in question was part of *res gestæ*. *Rowlan v. State*, 14 Ala. App. 17, 70 So. 953.

§ 215 (3b) Exculpatory Conduct and Statements after Commission of Offense.

Statements in Defendant's Favor Hours after Killing.—Statements made by defendant in his own favor to a witness a few hours after the fatal difficulty, not being part of the *res gestæ*, were properly excluded. *Langston v. State* (Ala. App.), 75 So. 715.

Defendant's Crying—No Intention to Kill Wife.—*Simon v. State*, 181 Ala. 90, 61 So. 801. See the title CRIMINAL LAW, § 215 (3b), vol. 4, p. 142.

Acts of Defendant after Killing Wrong Man.—When the defense was that deceased was killed under the mistaken belief that he was another person, the court properly refused to permit defendant to show what he did after he discovered he had killed deceased; it not being a part of the *res gestæ*. *Vinson v. State*, 10 Ala. App. 61, 64 So. 639.

Statements by accused, some time after his shooting decedent, explaining and exonerating his act, are not a part of the *res gestæ*, but are self-serving. *Francis v. State*, 188 Ala. 39, 65 So. 969.

Attending Funeral with Deceased's Relatives.—In a prosecution for homicide, where a witness had testified that accused attended the funeral of deceased, evidence that he did so in company with deceased's relatives is properly excluded, as it forms no part of the *res gestæ*. *Campbell v. State*, 13 Ala. App. 70, 69 So. 322.

Defendant Sending for Doctor to Attend Deceased.—In a prosecution for homicide, evidence that after the difficulty accused sent for a doctor to attend deceased was no part of the *res gestæ*. *Maxwell v. State*, 11 Ala. App. 53, 65 So. 732.

§ 215 (4) Length of Time Elapsed as Affecting Admissibility.

Ten Minutes after Commission of Crime.—*Smith v. State*, 183 Ala. 10, 62 So. 864. See the title CRIMINAL LAW, § 215 (4), vol. 4, p. 143.

After Giving Up Pistol and Getting Over Fence.—*Powell v. State*, 7 Ala. App. 17, 60 So. 967. See the title CRIMINAL LAW, § 215 (4), vol. 4, p. 143.

§ 216. — Other Offense Part of Same Transaction.**§ 216 (1) In General.**

Two Murders Part of One Transaction.—*Kennedy v. State*, 182 Ala. 10, 62 So. 49. See the title CRIMINAL LAW, § 216 (1), vol. 4, p. 144. *Granberry v. State*, 182 Ala. 4, 62 So. 52. See the title CRIMINAL LAW, § 216 (1), vol. 4, p. 144.

§ 216 (2) Prior Offenses.

Previous Difficulty between Accused and Prosecutor.—While the details of a former difficulty between accused and the prosecuting witness can not be inquired into it is otherwise where the previous difficulty was part of a continuous transaction culminating in accused's subsequent assault. *Wilson v. State*, 12 Ala. App. 97, 68 So. 543.

§ 216 (3) Subsequent Offenses.

Identity of Accused.—*Conwill v. State*, 8 Ala. App. 82, 62 So. 1006. See the title CRIMINAL LAW, § 216 (3), vol. 4, p. 145.

Pointing Pistol at Mother and Sister of Deceased.—Where the evidence showed that accused fired two shots at deceased, who immediately engaged him in a tussle, and that deceased's sister and mother intervened, whereupon accused ran a few steps and pointed his pistol at the two women, the evidence thereof was admissible as part of the *res gestæ*. *Culliver v. State* (Ala. App.), 73 So. 556.

Shooting at Another after Killing Deceased.—In a prosecution for homicide, evidence that after killing deceased accused turned his pistol upon another and shot at him is admissible as part of the *res gestæ*. *Wells v. State*, 187 Ala. 1, 65 So. 950.

§ 217. — Acts and Statements of Person Injured.

As to dying declarations, see post, HOMICIDE.

§ 217 (1) In General.

That "They Got Him from Behind Barrel."—The statement of deceased at the time of the shooting that "they got [him] from behind the barrel" is admissible in a prosecution for murder as *res gestæ*. *White v. State*, 195 Ala. 681, 71 So. 452.

Cries and Prayers of Deceased.—In a prosecution for second degree manslaughter by negligently running over a pedestrian with an automobile, where the killing of decedent was undisputed, and intent was not in issue, the admission of evidence of decedent's cries and prayers at the time as part of the *res gestæ* was highly prejudicial. *Bently v. State*, 12 Ala. App. 39, 67 So. 620.

Possession of Road in Dispute.—*Kennedy v. State*, 182 Ala. 10, 62 So. 49. See the title CRIMINAL LAW, § 217 (1), vol. 4, p. 145.

§ 217 (2) Before Commission of Crime.

Evidence that defendant and his family were in his house when accused used highly insulting, threatening, and obscene language near the house just prior to the homicide held part of the *res gestæ*. *Bailey v. State*, 11 Ala. App. 8, 65 So. 422.

What deceased "or some one else" said about defendant when within 100 yards of his house before killing was not part of *res gestæ*. *Butler v. State* (Ala. App.), 77 So. 72.

§ 217 (3) Subsequent to Commission of Crime in General.

See post, "Statements as to and Expressions of Personal Injury or Suffering," § 218.

Deceased Going into House and Reloading Pistol.—Defendant could not under *res gestæ* rule show that deceased, after shooting, went into house and reloaded his pistol, in a murder case. *Rogers v. State* (Ala. App.), 75 So. 264.

Deceased's request for help held admissible to show his condition after the shooting and as part of the *res gestæ*.

Carmichael v. State, 197 Ala. 185, 72 So. 405.

Statements of Deceased in Presence of Defendant.—*Aaron v. State*, 181 Ala. 1, 61 So. 812. See the title CRIMINAL LAW, § 217 (3), vol. 4, p. 146.

An exclamation by deceased immediately after he was shot is admissible as a part of the *res gestæ*. *Fowler v. State*, 8 Ala. App. 168, 63 So. 40.

§ 217 (4) Incriminating Accused.

Opinion or Conclusion of Deceased.—

A statement made by deceased a few moments before his death "that they had met him down there to kill him," held inadmissible as a part of the *res gestæ* in a homicide case because not a statement of fact, but merely the opinion or conclusion of deceased. *Norwood v. State*, 11 Ala. App. 30, 65 So. 851.

Where deceased called to a man half block distant to stop accused, and that accused had struck him, the declaration was admissible as part of the *res gestæ*. *Hutchinson v. State* (Ala. App.), 72 So. 572.

§ 217 (5) Length of Time Elapsed as Affecting Admissibility.

That Deceased Brought on the Trouble.

—In trial for murder by stabbing from which death resulted about a month afterwards, evidence offered by accused that the victim two days after the stabbing stated that he brought on the trouble was inadmissible. *Chappell v. State* (Ala. App.), 73 So. 134.

Fall from Wagon When Drinking or Drunk.—Where deceased lived for some months after shooting, evidence that he was drinking or drunk when he fell out of a wagon subsequent to the shooting and several weeks before his death held no part of the *res gestæ* and irrelevant. *Hooten v. State*, 9 Ala. App. 9, 64 So. 200.

§ 218. — Statements as to and Expressions of Personal Injury or Suffering.

A statement to bystanders by deceased after receiving a fatal wound from defendant, "Boys, see how bad he has cut me," held admissible as part of the *res gestæ*. *Harris v. State*, 13 Ala. App. 89, 69 So. 344.

§ 219. — Acts and Statements of Third Persons.

§ 219 (1) In General.

Declaration of Party Defendant Was Holding.—In prosecution for violation of ordinance by hindering a marshal in making an arrest, testimony that while party who had been fighting and whom defendant was holding, was struggling to get loose, he was saying: "Just turn me loose. I will give you \$50 to let me get to him"—held admissible. *Gray v. Clanton*, 14 Ala. App. 631, 72 So. 209.

Declaration and Acts of Bystanders During Fight.—In manslaughter trial, where killing occurred during a fight, what was said and done by the bystanders while the fight was in progress was a part of the *res gestæ*. *Tittle v. State* (Ala. App.), 73 So. 142.

Remarks Accused Heard During Difficulty.—Evidence that during the progress of the difficulty accused heard some one say, "Give it to him over the head," was admissible as *res gestæ* of the killing. *Parker v. State*, 10 Ala. App. 53, 65 So. 90.

Where two brothers were jointly indicted for murder, but separately tried, an epithet used by one during the difficulty was admissible against the other as a part of the *res gestæ*. *Morgan v. State*, 8 Ala. App. 172, 63 So. 21.

Attendant Circumstances. — *Givens v. State*, 8 Ala. App. 122, 62 So. 1020. See the title CRIMINAL LAW, § 219 (1), vol. 4, p. 147.

§ 219 (2) Before Commission of Crime.

All that was said by those present at the place of difficulty immediately before the killing held part of the *res gestæ*. *Rector v. State*, 11 Ala. App. 333, 66 So. 857.

Declarations of Son of Defendant During Difficulty.—Where it is contention of state in homicide case that defendant's son was engaged with him in difficulty, it was proper to admit what son said during difficulty as part of *res gestæ*. *Butler v. State* (Ala. App.), 77 So. 72.

Warning of Grand Jurors.—In a prosecution for perjury, evidence that members of the grand jury reminded defendant that he was under oath, and liable

for penalty for false swearing, held admissible as part of the *res gestæ*. *Mullens v. State*, 12 Ala. App. 206, 68 So. 533.

What Wife Said to Defendant Two Hours before Killing.—Evidence as to whether wife of defendant in homicide case told deceased not to come back to house two hours before killing was not part of *res gestæ*. *Butler v. State* (Ala. App.), 77 So. 72.

Question whether defendant and deceased were carrying guns for each other was properly excluded as not a part of the *res gestæ*. *Jones v. State* (Ala. App.), 74 So. 843, certiorari denied in 75 So. 1003.

§ 219 (3) Subsequent to Commission of Crime.

Remarks Witness Heard Immediately after Shots.—Testimony that witness, immediately after shots were fired, saw accused being carried away and heard some one remark, "There is the scoundrel that done it; don't let him get away"—is admissible as of the *res gestæ*. *Newsom v. State* (Ala. App.), 72 So. 579, certiorari denied in *Ex parte Newsom* (Ala.), 73 So. 1001.

Exclamations of Bystanders.—Exclamations of bystanders: "Don't shoot him any more!" "Don't do that!" etc.—while defendant had his pistol aimed at his adversary, whom he had shot and who was lying on the ground, were part of the *res gestæ*, and so intimately connected with defendant's conduct as to characterize and explain it, to shed light on his purpose manifested by his again aiming at his adversary, and to show how he was influenced to refrain from further shooting, so that evidence thereof was admissible. *Hall v. State*, 11 Ala. App. 95, 65 So. 427.

Exclamation of defendant's wife, if coincident with firing of shot that caused death of deceased, and if produced by and instinctive upon occurrence, rather than a retrospective narrative, although she was not immediately present, was of *res gestæ* and properly admitted. *Cole v. State* (Ala. App.), 75 So. 261.

Res Inter Alios Acta.—In a prosecution for manslaughter, it was improper to permit the father of deceased to testify that

the next day after the cutting, flesh was protruding from the wound, and that he or some one cut off this protruding flesh, since it was not part of *res gestæ* and was *res inter alios acta*. *Phillips v. State*, 11 Ala. App. 15, 65 So. 444.

(C) OTHER OFFENSES, AND CHARACTER OF ACCUSED.

§ 220. Other Offenses as Evidence of Offense Charged in General.

§ 220 (1) In General.

General Rule.—Proof of other similar offenses by accused is generally inadmissible, except to show intent or motive, establish identity, complete *res gestæ*, or make out a chain of circumstantial evidence of guilt. *Gibson v. State*, 14 Ala. App. 111, 72 So. 210; *Moore v. State*, 10 Ala. App. 179, 64 So. 520.

Prosecution for Defamation.—In a prosecution for defamation, under Code 1907, § 7340, evidence of other distinctly defamatory offenses is not admissible in aggravation of the fine. *Cooper v. State* (Ala. App.), 74 So. 753.

In a prosecution for defamation, evidence of other distinct offenses is inadmissible, not falling within the exceptions allowing evidence of other offenses. *Cooper v. State* (Ala. App.), 74 So. 753.

Where accused was not indicted for violation of Code 1907, § 6419, requiring butchers to keep a record of every cow killed, it is error to allow the solicitor on cross-examination of accused over his objection to show the latter did not keep such record. *Lewis v. State*, 14 Ala. App. 72, 71 So. 617.

Exceptions to Rule.—Other offenses part of *res gestæ*, see ante, "Other Offenses Part of Same Transaction," § 216; post, "Evidence Relevant to Offense, Also Relating to Other Offenses in General," § 220 (2); "Acts Showing Knowledge," § 221; "Acts Showing Intent or Malice or Motive," § 222.

§ 220 (2) Evidence Relevant to Offense, Also Relating to Other Offenses in General.

Testimony as to acts of accused in the transaction in question is admissible, al-

though showing that he had violated a statute for which violation he was not being tried. *Lewis v. State*, 14 Ala. App. 72, 71 So. 617.

§ 220 (3) In Prosecutions for Homicide.

On a trial for homicide, evidence that defendant had been accused of selling liquor and that three indictments were pending against him for running a still, or selling liquor, was properly excluded. *Hill v. State*, 194 Ala. 11, 69 So. 941.

§ 220 (4) In Prosecutions for Embezzlement and Larceny.

Prosecution in Federal Courts for Making Liquor.—In prosecution for larceny, it was error to admit testimony that defendant had been prosecuted in federal courts for making liquor. *Sims v. State* (Ala. App.), 75 So. 276.

Other Sales of Scrap Brass.—In a prosecution for larceny of scrap brass sold by defendant, evidence was admissible to show other sales of such brass by defendant. *McMickens v. State* (Ala. App.), 75 So. 626.

Conspiracy.—In prosecution for bringing into the state an automobile stolen elsewhere, evidence of a conspiracy to engage in the business of bringing such automobile into the state was admissible. *Whitehead v. State* (Ala. App.), 78 So. 467.

§ 220 (5) In Prosecutions for Offenses against Liquor Laws.

Other Sales.—In a prosecution for the wrongful sale of liquor, where the state proved by direct evidence certain specified sales, it was error to permit evidence of other sales, nor was the admission of such evidence cured by an attempt to limit it to proof of the sales elected. *Moore v. State*, 10 Ala. App. 179, 64 So. 520.

Right to Prove More than One Sale.

—On indictment for violation of the prohibition law charging defendant with selling, keeping for sale, or disposing of prohibited liquors, the state may show more than one sale. *Studdard v. State*, 14 Ala. App. 33, 70 So. 978.

Sale on Another Day.—The trial being on an affidavit containing a single count

charging a sale of liquor, and witnesses having testified positively to a sale on certain day, evidence of a sale on another day is inadmissible. *Hyde v. State*, 13 Ala. App. 189, 68 So. 673.

Sale at Different Time and Place.—

Where accused was charged in one count with a violation of the prohibition laws and the state showed a single sale of whisky by accused, evidence of another sale at a different time and place was improper. *Hill v. Prattville*, 13 Ala. App. 643, 69 So. 227.

Sale of Whisky in Another County.—

In a prosecution for violating the prohibition law, testimony that defendant had stated in a conversation that he had sold whisky in another county five years before and thought they were going to bill him for it, which was why he came to the county of prosecution, was inadmissible. *Studdard v. State*, 14 Ala. App. 33, 70 So. 978.

Another Sale for which Defendant Already Prosecuted.—*Hammock v. State*, 8 Ala. App. 367, 62 So. 322. See the title CRIMINAL LAW, § 220 (5), vol. 4, p. 151.

Former Conviction for Similar Offense.—In prosecution for the unlawful sale of intoxicating liquor, it was error to compel accused on cross-examination to answer that he had been convicted of a similar offense the previous year; such conviction being only relevant to the question of punishment, under Acts Sp. Sess. 1909, p. 10, § 3. *Willingham v. State*, 10 Ala. App. 161, 64 So. 544.

State's Witnesses Playing Cards Near Place of Sale.—In a prosecution for violation of the prohibition law, evidence that the state's witnesses and others were engaged in a game of cards at or near the place of the alleged illegal sale of liquor was inadmissible. *Studdard v. State*, 14 Ala. App. 33, 70 So. 978.

In trial for illegal sale of liquor, when the state has introduced evidence of a specific act constituting the crime, evidence of a keeping for sale is inadmissible. *Gibson v. State*, 14 Ala. App. 111, 72 So. 210.

§ 221. Acts Showing Knowledge.

Where accused's servant sold intoxi-

cants from accused's store, evidence of other sales by accused was admissible to show knowledge. *Rash v. State*, 13 Ala. App. 262, 69 So. 239.

§ 222. Acts Showing Intent or Malice or Motive.

§ 222 (1) Intent in General.

In trial for blackmail under Code 1907, § 6391, defendant admitting receipt of money, evidence of his similar transactions held admissible to show his intent. *Brown v. State* (Ala. App.), 72 So. 757, writ of certiorari denied in 73 So. 999.

§ 222 (2½) In Prosecutions for Homicide.

Illegal Sale of Liquor and Threats against Police.—In prosecution for murder of police officer engaged in securing evidence of accused's alleged illegal sale of intoxicating liquors, evidence of such illegal sales, and of accused's threats against police officers for interfering with his business, was admissible as tending to show motive. *Hodge v. State* (Ala.), 74 So. 373.

§ 222 (4½) In Prosecutions for Violation of Liquor Laws.

Previous Sale.—In prosecution for keeping or selling liquors, evidence of previous sale held admissible to show intent. *Lane v. Tuscaloosa*, 12 Ala. App. 599, 67 So. 778; *Taggett v. Tuscaloosa*, 12 Ala. App. 617, 67 So. 780.

Other Sales.—Where accused's servant sold intoxicants from accused's store, evidence of other sales by accused was admissible to show guilty intent. *Rash v. State*, 13 Ala. App. 262, 69 So. 239.

§ 222½. Acts Part of Series Showing System or Habit.

Offenses against Liquor Laws.—In a prosecution for the sale and keeping for sale of intoxicating liquor, testimony that a witness had sent the purchaser for the whisky on the particular occasion, and the same and other purchasers on other occasions, is admissible. *Spigener v. State*, 11 Ala. App. 296, 66 So. 896.

In prosecution for unlawful possession of intoxicating liquors, evidence tending to show that defendant and another were coconspirators, engaging in the unlawful traffic of prohibited liquors, was admis-

sible. *Campbell v. State* (Ala. App.), 78 So. 715.

Larceny of Automobiles.—In prosecution for bringing into the state an automobile stolen elsewhere, it was permissible to show that defendant and his confederates stole other automobiles and brought them into the state, as giving character to defendant's acts. *Whitehead v. State* (Ala. App.), 78 So. 467.

§ 225. Character or Reputation of Accused.

As to comments of counsel on failure to introduce evidence of character, see post, "Comments of Failure to Produce Witnesses of Evidence," § 478. As to comments of counsel on character of accused, see post, "Comments on Character or Conduct of Accused or Prosecutor," § 479. As to instructions as to character, see post, "Character," § 523.

§ 226. — As Evidence of Offense Charged in General.

At common law, a defendant's general character was not subject to attack until he himself put it in issue. *Forman v. State*, 190 Ala. 22, 67 So. 583.

Evidence tending to show the bad character of defendant is not proper unless accompanied by other evidence in support of the charge. *Lackner v. State* (Ala. App.), 72 So. 506.

§ 227. — Good Character as Evidence for Defense.

Evidence of general good character of accused is admissible, but should be directed to particular traits involved in charge. *Mitchell v. State*, 14 Ala. App. 46, 70 So. 991.

While in Jail after Commission of Crime.—Evidence of the good character of the accused must be confined to the time of and prior to the alleged commission of the crime, and testimony as to the character of the accused while she was confined in jail, subsequent to the commission of the crime, is inadmissible. *Smith v. State*, 197 Ala. 193, 72 So. 316.

§ 228. — Rebuttal of Evidence of Good Character.

That a character witness on cross-examination stated that he knew defend-

ant and M. had a lawsuit held not to entitle the defendant in rebuttal to show that the suit was submitted to arbitration and determined in his favor. *Maxwell v. State*, 11 Ala. App. 53, 65 So. 732.

Reports Since of Acts before Crime.—In rebutting evidence of good character of accused it is error to permit testimony as to reports since the crime of acts of accused before the crime. *Mitchell v. State*, 14 Ala. App. 46, 70 So. 991.

State's Rights to Show General Bad Character.—Where accused has offered proof of good character the state may offer evidence of general bad character, or on cross-examination show derogatory reports. *Mitchell v. State*, 14 Ala. App. 46, 70 So. 991.

Where a defendant introduced testimony of his general good character, and that he did not have the general reputation of a liquor seller, the state could show his reputation in these respects was bad. *Johnson v. State* (Ala. App.), 72 So. 561, judgment reversed in *Ex parte State* (Ala.), 74 So. 366.

§ 229. — General Reputation.

See post, "Particular Acts," § 230.

Showing Reputation for Drunkenness by Defendant's Witnesses.—In a prosecution for homicide, to impeach defendant's character witnesses, it was competent for the state to show by them that defendant's general reputation was that of a drunkard; that is, not one who occasionally gets drunk, but one who habitually drinks strong liquors immoderately; one whose habit is to get drunk; a toper; a sot. *Lewis v. State*, 13 Ala. App. 31, 68 So. 792.

What May Be Asked Witness on Cross-Examination. — On cross-examination of a character witness he may be asked whether he has not heard of certain acts showing that the party's character is not good, so long as the questions and answers concern reputation only, and do not involve the witness' personal knowledge. *Lewis v. State*, 13 Ala. App. 31, 68 So. 792.

§ 230. — Particular Acts.

"General character" is the reputation of a person in the community in which

he lives, and can not be shown by proof of particular acts of good or bad conduct. *Maxwell v. State*, 11 Ala. App. 53, 65 So. 732.

The party offering witness to character of accused is limited to showing his general good character. *Stout v. State* (Ala. App.), 72 So. 762, writ of certiorari denied in 73 So. 1002.

Reputation with Law-Abiding People.—*Watson v. State*, 181 Ala. 53, 61 So. 334. See the title CRIMINAL LAW, § 230, vol. 4, p. 158.

Accused Never Previously Arrested.—Accused may not prove his good character by testifying that he had never been previously arrested. *Patton v. State*, 197 Ala. 180, 72 So. 401.

Right to Go into Particulars.—On direct examination accused who has put his general character for peace and quiet in issue may not go into particulars. *Sexton v. State*, 13 Ala. App. 84, 69 So. 341.

Evidence that a defendant occasionally gets intoxicated is not evidence that his character is bad, and so does not impeach testimony of a witness as to his good character. *Lewis v. State*, 13 Ala. App. 31, 68 So. 792.

Employed in Position of Trust.—Evidence of general good character of accused was competent, but such character can not be shown by specific facts, as that he was employed in a position of trust. *James v. State*, 14 Ala. App. 652, 72 So. 299.

Character for Peace and Quiet.—*Watson v. State*, 181 Ala. 53, 61 So. 334. See the title CRIMINAL LAW, § 230, vol. 4, p. 157.

Propriety of Witness Stating Defendant Got Drunk.—In a prosecution for homicide, answer of character witness for defendant on cross-examination, when asked as to defendant's reputation for sobriety, that he got drunk, held improper as a statement of particular acts. *Lewis v. State*, 13 Ala. App. 31, 68 So. 792.

§ 231. — Weight and Effect of Evidence.

An instruction that proof of good character of defendant alone may be sufficient to generate in the minds of the jury such

doubt of the guilt of defendant as to authorize an acquittal is properly refused. *Peters v. State*, 12 Ala. App. 133, 67 So. 723.

(D) MATERIALITY AND COMPETENCY IN GENERAL.

§ 232. Materiality in General.

See post, "Importance or Certainty of Evidence," § 233.

A question whether accused apprehended an attack from another other than deceased was immaterial, and, if permitted, would have injected a collateral issue. *Ward v. State* (Ala. App.), 74 So. 733.

That State Summoned a Physician. — Accused having defended against a charge of forgery on the ground that he was insane, the court properly refused to allow him to show that a physician was summoned in behalf of the state; it being wholly immaterial by whom he was summoned. *Turner v. State* (Ala. App.), 72 So. 574.

That Defendant Had Been Arrested and Turned Loose. — Evidence that C. had arrested accused and turned him loose prior to his arrest by a witness, stating that when arrested accused stated that he had previously been arrested by M., but turned loose, was properly excluded. *Washington v. State*, 188 Ala. 101, 66 So. 34.

That Witnesses Saw Liquor Delivered at Defendant's Place. — Witnesses on a prosecution for sale of liquor having testified positively thereto, their testimony that shortly before they saw liquor delivered at defendant's place is immaterial. *Hyde v. State*, 13 Ala. App. 189, 68 So. 673.

§ 233. Importance or Certainty of Evidence.

See ante, "Materiality in General," § 232.

Where the evidence was circumstantial, the state was properly permitted to show facts which, though standing alone, were without probative force, yet when connected by evidence with other facts were material. *Thomas v. State*, 11 Ala. App. 85, 65 So. 863.

Where self-defense was issue, court did not err in refusing to allow witness to testify that she "expected trouble." *Hendley v. State* (Ala.), 76 So. 904.

Probative Force for Jury. — That a certain circumstance in evidence may have been so explained as to destroy its probative force does not affect its admissibility, the probative force being for the jury. *Newsom v. State* (Ala. App.), 72 So. 579, certiorari denied in *Ex parte Newsom* (Ala.), 73 So. 1001.

§ 235. Competency in General.

Wherever evidence is pertinent and tends to prove the issue, it is competent. *Quinn v. State* (Ala. App.), 74 So. 743.

§ 236. Nature and Source of Evidence.

As to preliminary evidence to show capacity of dogs to follow trail, see ante, "Identity of Persons or Things," § 197.

Day of Month. — In a prosecution for murder, a motion to exclude the answer of a witness that he did not remember the day of the month, but remembered the day they said it was, was properly overruled. *Rikard v. State* (Ala. App.), 73 So. 992.

What Witnesses Had Sworn in Unrelated Case. — In prosecution for assault with intent to murder, questions to injured party as to what witnesses had sworn to in another unrelated case, held properly rejected. *Pillar v. State* (Ala. App.), 74 So. 398.

Telephone Conversations. — *Brooks v. State*, 8 Ala. App. 277, 62 So. 569, cited in note in *Ann. Cas.* 1916E, 977. See the title CRIMINAL LAW, § 236, vol. 4, p. 160.

§ 237. Experiments.

Weight of Bullets. — In a homicide case depending on circumstantial evidence, where a witness had testified that the bullets extracted from deceased's body weighed 99¼ grains, the state was properly permitted to show that the pistol, which the evidence tended to show belonged to accused and was found in his possession next morning, was fired into a plank, and the bullet extracted weighed 96¼ grains; it tending to connect accused with the commission of the crime.

Thomas v. State, 11 Ala. App. 85, 65 So. 863.

Witness testifying as to wounds of deceased was properly not allowed to testify as to results of experiment with arms of deceased. *Butler v. State* (Ala. App.), 77 So. 72.

§ 238. Testimony as to Intent or Motive.

As to relevancy of evidence as to motive, see ante, "Motive or Absence of Motive," § 198.

Uncommunicated Intention or Motive.—Accused may not testify to his uncommunicated motives. *Brown v. State*, 11 Ala. App. 321, 66 So. 829.

The uncommunicated motive of a witness is generally inadmissible on direct examination. *Patton v. State*, 197 Ala. 180, 72 So. 401.

Testimony by accused in a homicide case that he did not get out of a buggy for the purpose of fighting deceased was inadmissible. *Autrey v. State*, 190 Ala. 10, 67 So. 237.

In a prosecution for using obscene or insulting language to a woman, accused can not testify that he meant nothing offensive; that going to his mental state, which is to be determined by the jury in the light of all the circumstances. *Tally v. State*, 12 Ala. App. 314, 68 So. 567.

Accused can not give direct testimony as to his secret and uncommunicated intention of leaving home. *Moton v. State*, 13 Ala. App. 43, 69 So. 235.

A witness, in a prosecution for murder, can not testify as to his undisclosed motives or intentions. *Bullington v. State*, 13 Ala. App. 61, 69 So. 319.

The question addressed to a witness as to why he went into the certain shop is objectionable as calling for the undisclosed intent of the witness. *Harbin v. State* (Ala. App.), 72 So. 594.

Objection to the question to accused, "Were you carrying that pistol for deceased?" as calling for the undisclosed intention of the witness, was proper. *Ward v. State* (Ala. App.), 74 So. 733. *Harris v. State*, 8 Ala. App. 33, 62 So. 477. See the title CRIMINAL LAW, § 238, vol. 4, p. 161.

There was no error in not permitting

accused to state that at time of killing he was about to arrest deceased; it being an uncommunicated intent of accused. *Hornsby v. State* (Ala. App.), 75 So. 637.

Testimony as to defendant's undisclosed purpose or motive in ordering deceased's wife to stay away from the body, that it was his desire to have deceased's knife on the ground identified before, the body was moved, is inadmissible. *Madry v. State* (Ala.), 78 So. 866.

Accused can not testify that he did not shoot deceased on purpose; that relating to his undisclosed intention. *Campbell v. State*, 13 Ala. App. 70, 69 So. 322.

The question on cross-examination to the person assaulted, why he did not go to defendant and tell him the circumstances of his taking defendant's skiff, was objectionable, as calling for his statement of his uncommunicated motive or purpose. *Hardin v. State*, 8 Ala. App. 215, 63 So. 18.

Objection to question calling for motive of witness in going to her brother's house was properly sustained. *Mitchell v. State*, 14 Ala. App. 46, 70 So. 991.

Buying Shells and Borrowing Gun.—In a prosecution for assault with intent to murder a peace officer, the refusal of the court to allow the defendant to state his uncommunicated purpose in buying shells and borrowing the gun with which he shot the officer was proper. *Ezzell v. State*, 13 Ala. App. 156, 68 So. 578.

Facts Calculated to Produce Motive.—*Brown v. State*, 7 Ala. App. 26, 61 So. 12. See the title CRIMINAL LAW, § 238, vol. 4, p. 161.

Abandonment by Husband.—*Grantland v. State*, 8 Ala. App. 319, 62 So. 470. See the title CRIMINAL LAW, § 238, vol. 4, p. 161.

Seduction—Prosecutrix, Statement She Had Loved Him.—In a seduction case, after the woman had testified that the defendant had sexual intercourse with her, after saying to her that he thought she ought to permit him to do so if she loved him as she said, the admission of her statement that she had loved him held error. *Holland v. State*, 11 Ala. App. 134, 66 So. 126, certiorari denied in Ex parte Holland, 191 Ala. 662, 66 So. 1008.

Inconsistent Intention. — *Brown v. State*, 7 Ala. App. 26, 61 So. 12. See the title CRIMINAL LAW, § 238, vol. 4, p. 161.

Propriety of Witness' Answers. — Where defendant sought to show deceased's alleged relations with his daughter, where counsel stated that if a witness was permitted to answer he would state that deceased 'carried the daughter to a house of ill fame, and intended to keep her there for an immoral purpose, answer was properly excluded. *Consford v. State* (Ala. App.), 74 So. 740, certiorari denied in 75 So. 335.

§ 239. Excuse for Failure to Call Witnesses.

The court properly declined to permit accused to make proof to the jury that he had made every effort to subpoena a desired witness, but was unable to find him. *Barber v. State*, 11 Ala. App. 118, 65 So. 842.

§ 240. Compelling Accused to Criminate Himself.

§ 240 (1) In General.

Constitutionality of Gen. Acts 1911, p. 645, § 28.—Gen. Acts 1911, p. 645, § 28, making it a misdemeanor for persons operating motor vehicle to fail to stop and give name, etc., on causing injury, held not violative of Bill of Rights, Const. § 6, regarding self-incrimination. *Woods v. State* (Ala. App.), 73 So. 129.

Voluntary Statement Out of Court. — Acts 1915, pp. 23, 24, § 22, subd. 13, approved January 23d, providing that in a trial of proceedings to condemn liquor, one who answers claiming interest in liquors seized shall be excused from attending and testifying in court on ground that testimony may tend to convict him of crime does not apply to voluntary statement out of court. *Phelps v. State* (Ala. App.), 75 So. 877.

§ 240 (3) Comparison of Accused's Shoes with Footprints at Scene of Offense.

In a criminal prosecution where the identity of the offender was in issue, evidence that accused's feet fitted the tracks made by the offender is admissible, where accused voluntarily submitted to

the comparison. *Webb v. State*, 11 Ala. App. 123, 65 So. 845, cited in note in Ann. Cas. 1917D, 237.

§ 241. Evidence Wrongfully Obtained in General.

Finding Liquor on Illegally Executed Warrant.—Testimony of officer in regard to finding of 13 quarts of whisky and gin in defendant's house was not inadmissible, because warrant was illegally executed. *Bell v. State* (Ala. App.), 75 So. 181, certiorari denied in *Ex parte Bell* (Ala.), 76 So. 1.

Admissibility of Evidence Obtained by Illegal Search. — Evidence of offense, state or municipal, that is obtained by illegal and unauthorized search, is admissible to establish guilt of person searched. *Robertson v. Montgomery* (Ala.), 77 So. 724.

§ 243. Evidence Admissible by Reason of Admission of Similar Evidence of Adverse Party.

§ 243 (1) In General.

Prosecution for Vagrancy.—*Bartlett v. State*, 7 Ala. App. 85, 60 So. 958. See the title CRIMINAL LAW, § 243 (1), vol. 4, p. 164.

Defendant having testified deceased had pistol and had on jumper and attacked with pistol, rebuttal testimony that deceased was in shirt sleeves and that witness did not see pistol on him was admissible. *McMillan v. State* (Ala. App.), 75 So. 824.

On a Trial for Homicide.—*Boyett v. State*, 8 Ala. App. 93, 62 So. 984. See the title CRIMINAL LAW, § 243 (1), vol. 4, p. 163.

Admission of Similar Evidence.—*Smith v. State*, 183 Ala. 10, 62 So. 864. See the title CRIMINAL LAW, § 243 (1), vol. 4, p. 164.

Conversation between Accused and Sheriff.—Where the state introduced part of the conversation between accused and the sheriff who raided his place for illegally selling liquor, accused could introduce the remainder of the conversation. *Johnson v. State* (Ala. App.), 72 So. 561, judgment reversed in *Ex parte State* (Ala.), 74 So. 366.

§ 243 (2) Admission of Whole Conversation, Transaction, or Instrument because of Admission of Part or Reference Thereto.

General Rule.—*Brooks v. State*, 8 Ala. App. 277, 62 So. 569. See the title CRIMINAL LAW, § 243 (2), vol. 4, p. 165.

(E) BEST AND SECONDARY AND DEMONSTRATIVE EVIDENCE

§ 244. Necessity and Admissibility of Best Evidence in Criminal Prosecutions.

§ 244 (1) In General.

As to record or other writing as best evidence, see post, "Record or Other Writing as Best Evidence," § 245.

In collateral inquiry to show bias by proof of contributions to convict accused made by the town council, best evidence is not requisite, so that the record of the resolution is not essential. *Dickey v. State* (Ala. App.), 72 So. 608, certiorari denied in 197 Ala. 610, 73 So. 72.

§ 244 (2) Admissibility of Secondary Evidence.

See post, "In General," § 246.

Larceny—Necessity of Direct Proof of Nonconsent.—In a prosecution for larceny, where nonconsent is essential, there must be direct proof from the person whose nonconsent is necessary. *McMickens v. State* (Ala. App.), 75 So. 626.

Ownership of Property. — *Savage v. State*, 8 Ala. App. 334, 62 So. 999. See the title CRIMINAL LAW, § 244 (2), vol. 4, p. 166.

§ 245. Record or Other Writing as Best Evidence.

§ 246. — In General.

§ 246 (1) Judicial Acts, Proceedings, and Records.

Warrants and capias held the best evidence that accused was in jail charged with killing a person other than his wife, for whose murder he was on trial when he stated that he expected to tell the truth if it broke his neck. *Spicer v. State*, 188 Ala. 9, 65 So. 972.

§ 246 (2) Official Acts, Proceedings, and Records.

Certified Transcript of Official Stenog-

rapher's Notes.—In prosecution for perjury, duly certified transcript of official stenographer's notes by Act Aug. 26, 1909 (Acts Sp. Sess. 1909, p. 266) § 7, made prima facie evidence of the proceedings in such trial held admissible as the best evidence. *Todd v. State*, 13 Ala. App. 301, 69 So. 325.

§ 246 (3) Unofficial Records in General.

Receipts, signed to copies of waybills, the original waybills after such copying and delivery of the freight to the consignee having been returned to headquarters, and the copies with the receipts attached retained in the local office, were originals and admissible as such. *Hodge v. State*, 11 Ala. App. 185, 65 So. 676.

§ 246 (4) Conveyances, Contracts, and Other Instruments.

In a prosecution for sale of mortgaged property, evidence of statement of alleged mortgagee that he had a mortgage on the mule was incompetent; secondary evidence of a written instrument being inadmissible until its absence has been accounted for. *Wiley v. State* (Ala. App.), 75 So. 641.

§ 246 (5) Books of Account.

In prosecution for larceny by stealing meat, objection to question to employee of company from which meat was stolen whether he could tell from stock list if any meat had been missed and, if so, how, should have been sustained, where list was not introduced. *Jackson v. State*, 14 Ala. App. 99, 71 So. 977.

§ 247. — Writings Collateral to Issues.

Witness Stating Bank Was Corporation.—In view of Code 1907, § 6876, making it unnecessary to prove incorporation in criminal cases, unless such fact is denied under oath, testimony of witness that a bank mentioned in the indictment was a corporation was not secondary evidence. *Foster v. State* (Ala. App.), 78 So. 721.

Probate Records Showing Insanity of Defendant's Relations.—In murder case, where insanity was a defense, probate records showing insanity of blood relations should have been admitted, although not the best evidence; the matter

being collateral. *Russell v. State* (Ala.), 78 So. 916.

Ticket with Price Mark.—In a prosecution for larceny, parol evidence that a ticket found on the prisoner looked like one missing from a dress stolen and that each bore the price mark, \$35, held admissible. *Benjamin v. State*, 12 Ala. App. 148, 67 So. 792.

What the Warrant Accused Deceased of.—It is not error to permit a witness to say what the warrant he had for deceased accused him of, since that merely calls for evidence of a collateral fact, and not proof of contents of a written instrument. *Wright v. State* (Ala. App.), 72 So. 564.

Contents of Order Left in House Robbed by Defendant.—Where a house has been robbed and a ticket or order purporting to have been given to defendant was found in the house, contents of such order was collateral matter which could have been shown by parol evidence without accounting for the absence of the order. *Johnson v. State* (Ala. App.), 78 So. 716.

§ 248. Preliminaries to Admission of Secondary Evidence.

Where the original verdict is shown to be lost, its contents may be proved by parol. *Lewis v. State*, 10 Ala. App. 31, 64 So. 337, cited in note in Ann. Cas. 1916D, 252.

§ 249. Demonstrative Evidence.

As to use of demonstrative evidence by counsel in argument, see post, "Exhibits and Illustrations," § 471. As to taking exhibits to jury room, see post, "Taking Papers or Articles to Jury Room," § 586.

§ 249 (1) Exhibition of Person or Object in General.

Seduction—Visual Inspection of Prosecutrix's Child.—Visual inspection may be had by the jury of the child, the paternity of which prosecutrix in seduction attributes to defendant. *Watts v. State*, 8 Ala. App. 264, 63 So. 18.

Shell shown to have been loaded by defendant, which had some tendency to show preparation for offense charged, was properly admissible, even though not loaded with shot like those with which deceased was killed. *Reeves v. State* (Ala.), 77 So. 339.

§ 249 (2) Matters Explanatory of Offense.

See post, "Articles Subject of or Connected with Offenses," § 249 (4).

§ 249 (3) Instruments, and Devices Used in Commission of Crime.

Similar Gaming Table.—Where, in a prosecution for keeping a gaming table, there was evidence that accused and others used a table in a certain room for gaming, it was permissible to show the jury another table of a kind commonly used in games of chance, found in the room. *Adams v. State*, 9 Ala. App. 89, 64 So. 371, certiorari denied in *Ex parte Adams*, 187 Ala. 10, 65 So. 514.

Pistol.—*McGuffin v. State*, 178 Ala. 40, 59 So. 635. See the title CRIMINAL LAW, § 249 (3), vol. 4, p. 172.

§ 249 (4) Articles Subject of or Connected with Offenses.

Bottle of Beer.—In prosecution for selling liquor, bottle of beer previously sold to witness held admissible. *Taggett v. Tuscaloosa*, 12 Ala. App. 617, 67 So. 780.

Bottle of Whiskey.—In a prosecution for violating the liquor law, it was not error to admit a bottle of whisky, identified by a witness as purchased from defendant, and by the sheriff as the one delivered to him by the witnesses who testified as to the purchase, though the bottle bore a label containing written memoranda as to such purchase, but of which there was independent evidence. *Harris v. State*, 9 Ala. App. 87, 64 So. 352, certiorari denied in *Ex parte Harris*, 187 Ala. 670, 65 So. 1033.

Intoxicants Found in Defendant's Store.—In a prosecution for violating the liquor law, intoxicants found in defendant's place of business, a store, were admissible in evidence. *Thomas v. State*, 13 Ala. App. 246, 68 So. 799.

Clothing of Accused.—Refusal of a motion directing the production of accused's clothing in court held proper, where accused offered no evidence that the clothes, if obtained, would be material evidence. *Robbins v. State*, 13 Ala. App. 167, 69 So. 297.

Demonstration as to Appearance and Condition of Deceased's Clothing.—*Smith v. State*, 182 Ala. 38, 62 So. 864. See the title CRIMINAL LAW, § 249 (4), vol. 4, p. 173.

Clothing of Deceased.—Admission in evidence of clothes worn by decedent at the time he was fatally shot was not erroneous. *Richardson v. State*, 191 Ala. 21, 68 So. 57.

Same—Showing Location of Wound.—*Smith v. State*, 183 Ala. 10, 62 So. 864. See the title CRIMINAL LAW, § 249 (4), vol. 4, p. 173.

In prosecution for assault with intent to murder, clothing worn by the injured party at the time of the difficulty is admissible in evidence. *Cranford v. State* (Ala. App.), 75 So. 274.

Shirt worn by deceased and showing perforation of bullets, but which had been laundered before the trial, held admissible. *Ragsdale v. State*, 12 Ala. App. 1, 67 So. 783.

In a prosecution for murder, properly identified clothing worn by deceased at the time of his death is admissible. *Fuller v. State* (Ala. App.), 75 So. 879.

§ 249 (5) Writings Submitted for Comparison.

Comparison of Handwriting.—Under Laws, 1915, p. 134, regulating the admission of evidence concerning disputed writings, the court, in a prosecution for forgery, properly permitted a comparison of the writing in a letter and the alleged forged signature. *Everage v. State*, 14 Ala. App. 106, 71 So. 983; *King v. State*, 8 Ala. App. 239, 62 So. 374. See the title CRIMINAL LAW, § 249 (5), vol. 4, p. 173.

Defendant's Writing and Unsigned Letter Denied by Defendant.—Where in a prosecution for adultery, a witness testified that he received an unsigned letter by mail referring to the charge against defendant and defendant denied writing the letter, but wrote at the trial some of the same words, both the letter and the writing at the trial were properly submitted to the jury for comparison. *Stone v. State*, 11 Ala. App. 141, 65 So. 693.

Witness Writing His Name before Jury.—*King v. State*, 8 Ala. App. 239, 62 So. 374. See the title CRIMINAL LAW, § 249 (5), vol. 4, p. 174.

(F) ADMISSIONS, DECLARATIONS, AND HEARSAY.

As to admissions to prevent continu-

ance, see post, "Admission to Prevent Continuance," § 396. As to instructions as to admissions, see post, "Admissions and Confessions," § 529. As to questions for jury, see post, "Confessions, Admissions, and Declarations," § 495 (2).

§ 250. Admissions by Accused.

§ 251. — In General.

§ 251 (1) Admissibility in General.

Statements Indicating Desire and Effort to Conceal Crime.—Statements of accused to a witness, though not amounting to a confession, indicating a desire and effort to conceal the crime, are inculpatory admissions, and admissible under the law governing direct confessions. *Wasserleben v. State*, 184 Ala. 2, 63 So. 520.

Inculpatory Admissions of Collateral Facts.—There is a well-defined distinction between inculpatory admissions by a defendant of collateral facts and confessions or admissions in the nature of confessions of actual guilt. *Read v. State*, 195 Ala. 671, 71 So. 96.

A note written by defendant containing inculpatory matter and given to witness with a request that he deliver it to another, who was implicated with defendant in the killing, was admissible. *Parker v. State*, 10 Ala. App. 53, 65 So. 90.

§ 251 (2) Admissibility as Affected by Manner of Making in General.

In prosecution for larceny of cow, inculpatory statement voluntarily made by defendant was admissible. *Cauley v. State*, 14 Ala. App. 133, 72 So. 271.

§ 251 (3) Voluntary Character of Admissions.

See post, "Proof and Effect," § 254.

Inculpatory Admissions Directly Relating to Main Facts.—The rule of exclusion of confessions not shown to be voluntary applies, not only to confessions, but to inculpatory admissions, directly relating to the facts or circumstances of the agreement and connecting defendant therewith. *Whitehead v. State* (Ala. App.), 78 So. 467.

Inculpatory admissions as to collateral facts, however incriminating, not in the nature of a confession, are not within the rule of exclusion of confessions not

shown to be voluntary. *Whitehead v. State* (Ala. App.), 78 So. 467.

Defendant's inculpatory statements, made with reference to the shooting of deceased, which were shown to have been voluntarily made, were admissible in evidence. *Pearce v. State*, 14 Ala. App. 120, 72 So. 213.

Statement Explanatory of Defendant's Conduct.—Statement of defendant after shooting, shown to be prima facie voluntary, and tending to illustrate and give color to his conduct, held admissible as quasi confession or declaration against interest. *Allsup v. State* (Ala. App.), 72 So. 599.

§ 251 (4) Judicial Admissions.

Voluntary incriminating testimony of defendant before grand jury against other party charged with the crime held admissible against defendant. *Coplon v. State* (Ala. App.), 73 So. 225, certiorari denied in 74 So. 1005.

Defendant's Claim Affidavit.—In a prosecution for a violation of the liquor law, defendant's claim affidavit, though made in a proceeding based on the issuance of an insufficient affidavit for a search warrant, and though it had lost its character as a valid sworn instrument, held a written statement against interest, admissible as any other written statement containing the same matter. *Coleman v. State*, 10 Ala. App. 164, 64 So. 529.

§ 251 (5) Admissibility as Affected by Subject Matter of Declaration in *Patterson v. State*, 8 Ala. App. 420, 62 So. 1023. See the title CRIMINAL LAW, § 251 (5), vol. 4, p. 176.

§ 252. — Acquiescence or Silence.

§ 252 (1) In General.

General Rule.—*Simmons v. State*, 7 Ala. App. 107, 61 So. 466. See the title CRIMINAL LAW, § 252 (1), vol. 4, p. 178.

Evidence of defendant's silence, when, he having said he would not have shot her for anything, she replied that he did shoot her for nothing, held admissible on issue of intentional shooting. *Pinson v. State* (Ala.), 78 So. 876.

§ 252 (2) Opportunity for and Necessity of Denying Statements.

Necessity That Statement Be Made in

Accused's Presence.—*Simmons v. State*, 7 Ala. App. 107, 61 So. 466. See the title CRIMINAL LAW, § 252 (2), vol. 4, p. 180.

Necessity of Showing Defendant Heard and Understood Charge.—To render admissible evidence of silence of defendant when accused of crime, it must be shown that she heard and understood the charge. *Rowlan v. State*, 14 Ala. App. 17, 70 So. 953.

Statements in Defendant's Presence by His Wife.—It was error to permit a witness to testify as to statements by defendant's wife in the presence of defendant directly after the homicide, where they did not call for a reply by defendant, as they were not admissions by him. *Vinson v. State*, 10 Ala. App. 61, 64 So. 639.

Silence in the face of accusation of crime partakes of the nature of confession, and is admissible as a circumstance to show guilt. *Doby v. State* (Ala. App.), 74 So. 724.

Statement of Sheriff Denied by Defendant.—In murder trial, that sheriff told accused when he was arrested that he was charged with killing deceased was inadmissible, where accused replied, denying killing her, since 'only where one so charged remains silent is it construed as an admission against him. *Cain v. State* (Ala. App.), 77 So. 453.

Statements of Victim, Victim's Parents and Witness.—In prosecution for assault to rape, statements of the victim and of the victim's parents and of the witness, made at the time of the assault in the presence of defendant, were admissible. *Pearson v. State* (Ala. App.), 75 So. 700.

Statements Calling for Denial.—*Simmons v. State*, 7 Ala. App. 107, 61 So. 466. See the title CRIMINAL LAW, § 252 (2), vol. 4, p. 111.

Effect of Accused's Being in Custody.—*Simmons v. State*, 7 Ala. App. 107, 61 So. 466. See the title CRIMINAL LAW, § 252 (2), vol. 4, p. 111.

§ 253. — Negotiations for Compromise.

Offers of compromise or to make restitution of property which has been the subject of a crime, made by accused, are not admissible in evidence for or against him. *Spinks v. State*, 14 Ala. App. 75, 71 So. 623.

§ 254. — Proof and Effect.

Necessity of Showing Voluntary Character of Statements.—*Macon v. State*, 179 Ala. 6, 60 So. 312. See the title CRIMINAL LAW, § 254, vol. 4, p. 181.

Declaration against Interest—Burden of Proof.—The state, offering evidence in the nature of a quasi confession or declaration against interest, has the burden of showing that such confession was voluntary and admissible. *Allsup v. State* (Ala. App.), 72 So. 599.

Statements Made under Arrest and in Custody.—Admissions or statements made by accused while he was under arrest and in custody must be shown to have been voluntarily made, in order to be admissible on his subsequent trial. *Wise v. State*, 11 Ala. App. 72, 66 So. 128.

Defendant's conversations with the state's witnesses who were introduced against him, and which were in the nature of inculpatory admissions of collateral facts, and not confessions of guilt, prima facie voluntary, were admissible without a predicate of voluntariness. *Read v. State*, 195 Ala. 671, 71 So. 96.

Voluntary Statements Shortly after Homicide.—*Underwood v. State*, 179 Ala. 9, 60 So. 842. See the title CRIMINAL LAW, § 254, vol. 4, p. 181.

Testimony before Grand Jury to Collateral Matter.—In a prosecution for crime, defendant's testimony before the grand jury as to a collateral matter, not in any sense a confession of guilt, was admissible without first showing it was voluntarily made. *Coplon v. State* (Ala. App.), 73 So. 225, certiorari denied in 74 So. 1005.

§ 256. Declarations by Accused.

See ante, "Admissions by Accused," § 250.

§ 257. — In General.

§ 257 (1) Admissibility in General.

Necessity of Declaration Amounting to Confession.—To authorize proof of defendant's declaration after the offense, the declaration need not amount to a confession, but only be self-disserving and of such a character as, when considered with the other evidence, reasonably affords an

inference of guilt. *Jones v. State*, 13 Ala. App. 10, 68 So. 690.

Declarations against Interest.—On a prosecution under prohibition law admission of defendant's declarations against interest held not error. *Ogden v. State* (Ala. App.), 72 So. 587.

Declarations by defendant, both before and after the commission of the homicide with which he is charged, tending to connect him with it, are admissible as evidence against him. *Brindley v. State*, 193 Ala. 43, 69 So. 536.

In prosecution for larceny, defendant's statements in nature of declarations against interest and contradictions thereof by third person connected with the crime made in same conversation held admissible. *Moye v. State*, 12 Ala. App. 127, 67 So. 716.

In a prosecution for murder, defendant's statement to one who informed him that a warrant was out for his arrest to the effect that he was going home and was then going to leave held admissible as affording an inference that it was prompted by a consciousness of guilt. *Jones v. State*, 13 Ala. App. 10, 68 So. 690.

Conversations Heard through Detectaphone.—Conversation of defendant, heard through detectaphone installed in room of jail, held admissible, when accompanied by witness' exhibit of it and his explanation of its operation. *Brindley v. State*, 193 Ala. 43, 69 So. 536.

§ 257 (1½) Admissibility as Affected by Time, Place or Manner of Making.

Insanity—Playing Crazy to Be Sent to Asylum.—As tending to show that defendant's insanity was merely pretended, one may testify to a conversation, heard by him, between defendant and a doctor, as to playing crazy that he might be sent to an asylum, the fact, if it be one, that this was after interposition of the plea of insanity merely affecting the probative force of the testimony. *Granberry v. State*, 184 Ala. 5, 63 So. 975, cited in note in Ann. Cas. 1916E, 425.

Declaration a Year before Offense.—In prosecution for vagrancy by keeping a disorderly house, declaration by accused about a year before the alleged offense that she had been ruined, and that respectable people would not associate with her,

was too remote in point of time to be admissible in evidence for any other purpose than possibly to show the bad character of defendant. *Lackner v. State* (Ala. App.), 72 So. 506.

§ 257 (2) Admissibility as Affected by Subject Matter of Declaration in General.

Threat to Kill Witness.—Evidence that after the defendant came out of the building where the homicide occurred he stated that if the witness said anything he would kill him is admissible as an admission. *Bone v. State*, 8 Ala. App. 59, 62 So. 455.

Who Gave Him Pistol.—In homicide case, a statement by accused that, if called to testify, he would tell who gave him the pistol to do the killing, is admissible in evidence as a voluntary incriminatory declaration. *Moton v. State*, 13 Ala. App. 43, 69 So. 235.

Accused Called Victim "Williams."—In prosecution for murder, refusal to exclude testimony that witness had heard accused call victim "Williams" was proper. *Hornsbey v. State* (Ala. App.), 75 So. 637.

Deceased Stole Clothes and Pistol from Accused.—It is not error to permit the question whether accused had told witness that deceased stole a suit of clothes and pistol from him, such evidence tending to shed light on the question of motive and intent. *Wright v. State* (Ala. App.), 72 So. 564.

§ 258. — Self-Serving Declarations.

§ 258 (1) Admissibility in General.

§ 258 (1a) General Rule and Illustrations Thereof.

See ante, "Res Gestæ," § 213; post, "Conduct of Accused," § 258 (1b).

General Rule.—*Jones v. State*, 181 Ala. 63, 61 So. 434. See the title CRIMINAL LAW, § 258 (1a), vol. 4, p. 183.

A self-serving declaration by accused, not part of the res gestæ, is not admissible in evidence. *Scott v. State* (Ala. App.), 73 So. 212.

A declaration by accused to his wife that he was going to the store where the killing occurred to settle his account is not inadmissible as a self-serving declaration. *Davis v. State*, 188 Ala. 59, 66 So. 67, overruling *Jones v. State*, 174 Ala. 53, 57 So. 31.

Court held to have properly excluded, as self-serving, defendant's testimony as to his intention to give up, that he told other parties about the killing, etc. *Hill v. State*, 194 Ala. 11, 69 So. 941.

Declarations Not Part of Res Gestæ.—*German v. State*, 181 Ala. 11, 61 So. 326. See the title CRIMINAL LAW, § 258 (1a), vol. 4, p. 183.

Statement of Accused in Jail.—*Key v. State*, 8 Ala. App. 2, 62 So. 335. See the title CRIMINAL LAW, § 258 (1a), vol. 4, p. 183.

Told Witness He Killed Deceased, But Had to.—Where accused, a few minutes after firing the fatal shot, told a witness that he had killed deceased, but that he had to, the statement, while a confession, was not admissible for the defense, being self-serving. *Hickman v. State*, 12 Ala. App. 22, 67 So. 775.

Did Not Intend to Shoot Deceased.—A statement by accused, immediately after the shooting, that he did not intend to shoot deceased, is inadmissible as being a self-serving declaration, unless so closely connected with the shooting as to be part of the res gestæ. *James v. State*, 12 Ala. App. 16, 67 So. 773.

Where the conversation was not touched upon by the state, a witness recalled and examined as accused's witness can not testify to a self-serving declaration made by accused after the killing, which was not part of the res gestæ. *Pollard v. State*, 12 Ala. App. 82, 68 So. 494.

§ 258 (1b) Conduct of Accused.

§ 258 (1ba) General Rule.

Accused's acts and declarations before the offense are not admissible in his favor unless part of the res gestæ. *Johnson v. State* (Ala. App.), 72 So. 561, judgment reversed in *Ex parte State* (Ala.), 74 So. 366.

§ 258 (1bc) Conduct Prior to Offense.

Trying to Divorce Wife to Marry Deceased.—*Olden v. State*, 176 Ala. 6, 58 So. 307. See the title CRIMINAL LAW, § 258 (1bc), vol. 4, p. 184.

Statement of Defendant Not in Deceased's Presence.—Where defendant, in a prosecution for homicide, introduced

evidence of an alleged conditional threat made by deceased, evidence of a subsequent statement, made by defendant in deceased's absence, that defendant, to avoid trouble, would yield to deceased's wishes held inadmissible, unless so closely connected with the threat as to constitute part of the *res gestæ*. *Maxwell v. State*, 11 Ala. App. 53, 65 So. 732.

Peace Proceedings against Deceased.—Evidence of peace proceedings and contents of the affidavit sworn out by defendant, accused of murder, against the deceased, is self-serving and inadmissible. *Donald v. State*, 12 Ala. App. 61, 67 So. 624.

§ 259½. — Proof and Effect.

Statements as to Money Deceased Had in Pockets.—Statements by the accused, shortly before the crime, as to the money deceased had in his pockets, and as to other collateral matters, which statements are in no sense confessions of guilt, held admissible, without first laying a predicate therefor. *Smith v. State*, 197 Ala. 193, 72 So. 316.

Admissions by the defendant, who spoke only broken English, are admissible, even though the witness who testified to them could understand only a part of the conversation in which they were made, since one testifying to an admission need not detail the entire conversation. *Descrippo v. State*, 8 Ala. App. 85, 62 So. 1004.

§ 259. Declarations by Persons Injured.

As to declarations of persons injured as part of *res gestæ*, see ante, "Acts and Statements of Person Injured," § 217.

§ 259 (1) Admissibility in General.

Admissibility of Statements to Prove Conspiracy.—In a homicide case, a statement made by deceased a few moments before his death "that they had met him down there to kill him without a cause," and "just had made it up with each other to do so," was not admissible to prove a conspiracy among defendants. *Norwood v. State*, 11 Ala. App. 30, 65 So. 851.

Did Not Desire to Prosecute Accused.—Declaration by decedent, not a part of the *res gestæ*, that he did not desire to prosecute accused, was inadmissible. *Recitor v. State*, 11 Ala. App. 333, 66 So. 857.

§ 259 (6) Admissibility as Affected by Presence or Nonpresence of Accused.

Declarations of deceased just before homicide deposed to by witness to effect that deceased was going home because he did not want to have trouble with defendant and his brother, held acts indicating present purpose and intention, and properly admitted whether heard by defendant or not. *Rogers v. State* (Ala. App.), 75 So. 264.

§ 260. Declarations by Third Persons.

See post, "Hearsay in General," § 263.

As to declarations by third persons as part of *res gestæ*, see ante, "Acts and Statements of Third Persons," § 219.

§ 261. — In General.

§ 261 (1) Admissibility in General.

The question whether witness heard a party other than deceased or defendant make any statement as to where he was going is irrelevant. *Wright v. State* (Ala. App.), 72 So. 564.

§ 261 (2) Declarations Not Made in Presence or within Hearing of Accused.

Admissibility.—Testimony as to conversation had by witness with third person when defendant was absent was inadmissible where no part of *res gestæ*. *Edelman v. Gadsden* (Ala. App.), 77 So. 914.

Statement of third person to state's witness, not made in defendant's presence, held inadmissible. *Benjamin v. State*, 12 Ala. App. 148, 67 So. 792.

In prosecution for maintaining an unlawful drinking place, statements by persons in accused's absence that they had been getting beer before at accused's place was inadmissible as hearsay. *Martin v. State* (Ala. App.), 78 So. 322.

§ 261 (10) Statements Corroborating or Impeaching Testimony of Witness.

Where the state introduced evidence that accused, who claimed that deceased had assaulted him with a knife, dropped a knife near the body after the killing, a witness for accused can not testify that one H., who had left the country, attempted to induce him to testify to the same effect; the evidence being admissible only to impeach H., who was not a

witness. *Davis v. State*, 188 Ala. 59, 66 So. 67.

§ 263. Hearsay in General.

As to declarations of persons being hearsay, see ante, "Declarations by Persons Injured," § 259.

§ 263 (1) Nature of Hearsay Evidence and Admissibility in General.

Instances of Evidence Held Hearsay.—*Farlow v. State*, 7 Ala. App. 137, 61 So. 474. See the title CRIMINAL LAW, § 263 (1), vol. 4, p. 192.

Testimony, "They say H. didn't have much sense," is hearsay. *Lambert v. State*, 13 Ala. App. 289, 69 So. 261.

Evidence as to what a third person told a witness about having intercourse with the prosecutrix is inadmissible in a seduction case. *Smith v. State*, 13 Ala. App. 399, 69 So. 402.

In prosecution for larceny of gin belt, court properly overruled objection to question asked witness if he did not hear of loss of belt after he met defendants and another on road to owner's place, for purpose of identifying time of occurrence, and aiding recollection of witness. *Grant-ham v. State* (Ala. App.), 75 So. 183.

In prosecution for murder, exclusion of testimony as to statement by third person that he shot decedent by mistake, intending to shoot defendant, was not error. *Spicer v. State* (Ala.), 73 So. 396.

In a larceny prosecution, testimony whether the complaining witness secured information of the stolen property's location is inadmissible because hearsay. *King v. State* (Ala. App.), 72 So. 552.

In prosecution for maliciously throwing missiles at locomotive, etc., testimony as to statements made by fireman that engineer was hit with a rock held inadmissible as hearsay. *Posey v. State*, 12 Ala. App. 193, 67 So. 737.

Testimony that witness heard third person say something about accused having a pistol held inadmissible as hearsay on a trial for carrying a concealed pistol. *McNaron v. State*, 7 Ala. App. 170, 62 So. 302.

Statement of Person as He Approached Deceased's Body.—*Macon v. State*, 179 Ala. 6, 60 So. 312. See the title CRIMINAL LAW, § 263 (1), vol. 4, p. 193.

Motive of Accused in Going to Place of Difficulty.—A witness' testimony to the motive of accused in going to the place of the difficulty would be either hearsay or matter not within witness' knowledge. *Scott v. State* (Ala. App.), 73 So. 212.

What Witness' Brother Had Come to Testify.—In a prosecution for assault with intent to murder, a question as to what witness' brother had come to testify held properly excluded as calling for hearsay evidence. *Tarver v. State*, 9 Ala. App. 17, 64 So. 161.

Label on Box as Evidence of Contents.—A label, placed on a box in the ordinary way to indicate its nature and contents, is competent evidence thereof, at least against one having the box in his possession or handing it to another, and the inference of contents corresponding to the label is for the jury. *Kennedy v. State*, 182 Ala. 10, 62 So. 49.

Labels on boxes and barrels received by defendant from a common carrier were some evidence of the contents thereof. *Hodge v. State*, 11 Ala. App. 185, 65 So. 676.

Shipments Labeled "Whisky."—As Act of Congress of March 4, 1909, § 240, requires packages containing intoxicating liquors shipped in interstate commerce to be marked as such on the outside, evidence that accused, who was charged with a violation of the laws with respect to intoxicating liquor, received interstate shipments labeled "whisky" is admissible. *Jackson v. State*, 11 Ala. App. 193, 65 So. 708.

Evidence that packages delivered by an express company to defendant were billed and marked "whisky" held some evidence that they contained whisky. *Herring v. State*, 11 Ala. App. 202, 65 So. 707.

§ 263 (4) Oral Statements in General.

It was not error to exclude testimony of a witness that deceased told him he was at defendants' house, that being hearsay. *Lee v. State* (Ala. App.), 75 So. 282.

Statements by Defendant's Wife Not Calling for Reply.—It was error to permit a witness to testify as to statements by defendant's wife in the presence of

defendant directly after the homicide, where they did not call for a reply by defendant, as they were mere hearsay. *Vinson v. State*, 10 Ala. App. 61, 64 So. 639.

§ 263 (4½) Conversations with Third Persons.

In prosecution for receiving stolen goods, evidence held properly excluded as hearsay. *Coplon v. State* (Ala. App.), 75 So. 184.

Witnesses' Conversations Not in Presence of Defendant.—Testimony that witnesses had tried to buy cattle from decedent and he had refused, the conversations being in absence of defendant, was hearsay. *Rikard v. State* (Ala. App.), 73 So. 992.

Conversation of Defendant's Employer with Third Person.—In a prosecution for larceny of a cow, where defendant claimed he had been instructed by his employer to take the cow, his employer thinking it belonged to him and not to the prosecuting witness, testimony as to a conversation of the employer with a third person as to another cow purchased by the employer was hearsay. *Robinson v. State*, 14 Ala. App. 25, 70 So. 960.

§ 263 (5) Written Statements.

It was not error to refuse to strike testimony of a witness for the prosecution that he knew that whiskey was in defendant's house, because the sheriff got a note that it was there, on the ground that such testimony was hearsay. *Harwell v. State*, 12 Ala. App. 265, 68 So. 500, certiorari denied in *State v. Harwell* (Ala.), 68 So. 1019.

§ 264. — Evidence Founded on Hearsay.

§ 264 (1) Matters Provable by Reputation or Hearsay in General.

On the question whether the homicide was committed within a quarter of a mile of the line between two counties, so as, under Code 1907, § 7229, to give either jurisdiction, a witness may testify to what was for years generally known and considered as the line. *Granberry v. State*, 184 Ala. 5, 63 So. 975, cited in note in Ann. Cas. 1915D, 338.

§ 264 (4) Insanity.

Knowledge of Others of a Transaction.

—It is proper to refuse to allow witness to testify as to knowledge of others of a transaction, if the questions called for hearsay testimony of the mental status or cognation of another. *Turner v. State* (Ala. App.), 72 So. 574.

A question asked of a witness on an issue of defendant's sanity held objectionable as subject to a construction of calling for hearsay testimony. *Harris v. State*, 8 Ala. App. 33, 62 So. 477.

(G) ACTS AND DECLARATIONS OF CONSPIRATORS AND CODEFENDANTS.

As to testimony of accomplices and codefendants, see post, "Testimony of Accomplices and Codefendants," §§ 331-337.

§ 265. Grounds of Admissibility in General.

§ 265 (1) In General.

Witness having testified that immediately after hearing shots he heard a man holding a pistol speak to some one, who responded in the voice of the accused, such conversation was admissible, the relation of the man with the pistol not being otherwise explained, as being that of defendant's coadjutor in crime. *Newsom v. State* (Ala. App.), 72 So. 579, certiorari denied in *Ex parte Newsom* (Ala.), 73 So. 1001.

§ 265 (2½) Prior to Conspiracy.

In trial for blackmail, where defendant conspired with another in the commission of the crime, evidence of other similar transactions of coconspirator are admissible, under Code 1907, § 6219, to show the character of the business of which defendant became a partner, although defendant was not connected directly with such transactions. *Howle v. State* (Ala. App.), 72 So. 759, writ of certiorari denied in 73 So. 1000.

§ 266. Furtherance or Execution of Common Purpose.

As to evidence at preliminary trial of former proceedings, see post, "Evidence for or against Codefendants," § 363.

§ 266 (1) In General.

The Rule.—Where conspiracy is established, any act or declaration of conspirator, made or done in furtherance of com-

mon design, is admissible in evidence against coconspirator. *Consford v. State* (Ala. App.), 74 So. 740, certiorari denied in 75 So. 335.

Where two or more persons enter into a conspiracy to accomplish some unlawful act, any act done by any one of them in pursuance of the original conspiracy is, in contemplation of law, the act of all. *Crawley v. State* (Ala. App.), 73 So. 222.

Conspiracy Shown — Admissibility of Third Person's Acts.—*Kennedy v. State*, 182 Ala. 10, 62 So. 49. See the title CRIMINAL LAW, § 261 (1), vol. 4, p. 196.

Going in Direction of Homicide.—*McClain v. State*, 182 Ala. 67, 62 So. 241. See the title CRIMINAL LAW, § 266 (1), vol. 4, p. 196.

§ 266 (2) Absence of Coconspirators.

Statements as to measures taken in execution of common purpose are not relevant as such, as against any conspirators except those by whom or in whose presence they were made. *De Bardeleben v. State* (Ala. App.), 77 So. 979.

§ 266 (5) Acts and Declarations during Actual Commission of Crime.

Res Gestæ.—*Redden v. State*, 7 Ala. App. 33, 60 So. 992. See the title CRIMINAL LAW, § 266 (5), vol. 4, p. 197.

§ 267. After Accomplishment of Object.

§ 267 (1) Acts, Declarations, and Confessions in General.

The declarations of a codefendant and alleged conspirator, together with his manner and appearance after the homicide, did not constitute evidence against defendant. *Brindley v. State*, 193 Ala. 43, 69 So. 536.

§ 267 (3) In Absence of Coconspirator or Codefendant.

In absence of proof of conspiracy, confession of alleged participant in crime, made in absence of defendant, was inadmissible against defendant on trial alone, for purpose of showing corpus delicti or guilty participation in crime charged. *Willis v. State* (Ala. App.), 73 So. 766.

§ 269. Preliminary Evidence as to Conspiracy or Common Purpose.

§ 269 (1) Necessity in General.

Satisfaction of Judge that Prima Facie Grounds Exist.—Evidence of acts or statements deemed to be relevant to show conspiracy may not be given until trial judge is satisfied that, apart from them, there are prima facie grounds for believing in existence of the conspiracy. *De Bardeleben v. State* (Ala. App.), 77 So. 979.

Aliunde Proof.—*Smith v. State*, 8 Ala. App. 187, 62 So. 575. See the title CRIMINAL LAW, § 269 (1), vol. 4, p. 199.

§ 269 (2) Order of Proof.

Admitted without Preliminary Proof.—*Smith v. State*, 8 Ala. App. 187, 62 So. 575. See the title CRIMINAL LAW, § 269 (2), vol. 4, p. 199.

§ 269 (3) Competency.

Details of Previous Difficulty.—*Smith v. State*, 8 Ala. App. 187, 62 So. 575. See the title CRIMINAL LAW, § 269 (3), vol. 4, p. 199.

§ 269 (4) Weight and Sufficiency.

Evidence Held Sufficient.—*Smith v. State*, 8 Ala. App. 187, 62 So. 575. See the title CRIMINAL LAW, § 269 (4), vol. 4, p. 200.

(H) DOCUMENTARY EVIDENCE AND EXCLUSION OF PAROL EVIDENCE THEREBY.

As to record or other writing as best evidence, see ante, "In General," § 246. As to use of documentary evidence by counsel in argument, see post, "Exhibits and Illustrations," § 471. As to right of jury to take documentary evidence to jury room, see post, "Taking Papers or Articles to Jury Room," § 586.

§ 270. Public or Official Acts, Proceedings, Records, and Certificates.

Return on Search Warrant.—*Patterson v. State*, 8 Ala. App. 420, 62 So. 1023. See the title CRIMINAL LAW, § 270 (1), vol. 4, p. 201.

§ 271. Exemplifications, Transcripts, and Certified Copies.

On a trial for violating the prohibition law, a certified copy of a United States

internal revenue license purporting to have been issued to accused was properly admitted. *Gustin v. State*, 10 Ala. App. 171, 65 So. 302, certiorari denied in *Ex parte Gustin*, 191 Ala. 662, 66 So. 1008.

§ 272. Private Writings and Publications.

§ 273. — Admissibility in General.

Checks for Money Received by Defendant.—Upon proper identification and proof that one accused of obtaining money by false pretenses received the money called for by certain checks, they were competent as tending to show when and how the money was obtained. *Foster v. State* (Ala. App.), 78 So. 722.

Check for Animal Sold by Defendant to Third Person.—On a trial for theft of an animal sold by accused to a third person who gave a check therefor, the check held properly received in evidence. *Farrior v. State*, 12 Ala. App. 123, 67 So. 633.

§ 274. — Letters and Telegrams.

A letter properly identified by a witness held properly received in evidence as against the objection that the envelope purported to come from "J. W. T.," while the letter was signed by "O. L. T." *Francis v. State*, 188 Ala. 39, 65 So. 969.

§ 275. — Books and Entries Therein.

A witness can not testify to entries on books or items on statements of account when he has no personal knowledge of their correctness, although such witness could testify that statements had been received from a bank to show the existence of the bank sending them. *Young v. State*, 9 Ala. App. 55, 64 So. 171.

Entry Showing Delivery of Package Marked "Whisky."—Where a witness testified that he had made an entry in the books of an express company showing delivery of a package marked "whisky," that he knew defendant who received it, that he knew the entry to be correct when made, and that he had no recollection of the transaction apart from the entry, the entry was properly admitted in evidence. *Herring v. State*, 11 Ala. App. 202, 65 So. 707.

§ 276. — Maps, Plats, and Diagrams.

See post, "Effect of Documentary Evidence," § 282.

Diagram of Store Where Liquor Was

Found.—In connection with testimony of a witness giving some description of defendant's store, where he testified to finding some liquors, a diagram of the place, drawn by him, may be admitted. *McWhorter v. State*, 9 Ala. App. 70, 64 So. 158.

Diagram of Place Where Homicide Occurred.—*Jones v. State*, 181 Ala. 63, 61 So. 434. See the title CRIMINAL LAW, § 276, vol. 4, p. 203.

§ 279. — Historical and Scientific Books.

Where insanity is a defense, extracts from standard works may be read to the jury. *Russell v. State* (Ala.), 78 So. 916.

§ 280. Proof of Execution of Instruments.

Under Code 1907, §§ 4004-4006, a mortgagor, who could not read or write, can testify to the execution of the mortgage, if, as a witness, she was able to identify her mark. *Addington v. State* (Ala. App.), 74 So. 846.

§ 281. Authentication of Documents.

Communication to Newspaper.—*Jones v. State*, 181 Ala. 63, 61 So. 434. See the title CRIMINAL LAW, § 281, vol. 4, p. 205.

Stock List of Robbed Corporation.—In prosecution for petit larceny by stealing ham, stock list of robbed corporation could not be introduced without correctness of original entries being authenticated by clerk who made them, or his handwriting proved in event of his death, insanity, or absence. *Jackson v. State*, 14 Ala. App. 99, 71 So. 977.

Defendant's Account Book.—Where defendant was accused of furnishing witness liquor to be sold for their mutual benefit, defendant's account book, showing the transactions, was admissible, where witness testified to seeing the identical entries made. *Quinn v. State* (Ala. App.), 74 So. 743.

Chattel Mortgage.—In prosecution for obtaining money by false pretenses, admission of chattel mortgage was error, where accused did not admit having signed the mortgage, and there was no other proof that he had signed it, and the mortgage was not self-proving. *Foster v. State* (Ala. App.), 78 So. 732.

§ 282. Effect of Documentary Evidence.

Consideration of Evidence by Jury.—*Jones v. State*, 181 Ala. 63, 61 So. 434. See the title CRIMINAL LAW, § 282, vol. 4, p. 206.

§ 282. Exclusion of Parol by Documentary Evidence.

Judgment entry, reciting presence in court of defendant when sentenced, can not be varied or impeached by evidence aliunde. *Du Bose v. State* (Ala. App.), 73 So. 121.

(I) OPINION EVIDENCE.

§ 284. Competency of Nonexperts in General.

See post, "In General," § 291 (1).

§ 285. Conclusions and Matters of Opinion or Facts.

§ 285 (1) Admissibility in General.

General Rule.—Defendant, in a prosecution for murder, may not be asked whether, if he had not dodged, deceased would have cut him. *Donald v. State*, 12 Ala. App. 61, 67 So. 624.

The question whether or not defendant did or said anything to bring on a difficulty is objectionable, as seeking the witness' opinion. *McConnell v. State*, 13 Ala. App. 79, 69 So. 333.

In prosecution for selling cotton seed upon which there was unsatisfied mortgage lien, question to servant of defendant held formally objectionable as calling for witness' conclusion. *Wilson v. State*, 14 Ala. App. 87, 71 So. 971.

Facts.—Where a witness describes the report of a firearm, "It went like a rifle," it is not inadmissible as opinion evidence. *Fowler v. State*, 8 Ala. App. 168, 63 So. 40.

An eyewitness to an assault may state that a blow was struck with what "seemed like a knife." *Trailer v. State*, 8 Ala. App. 217, 63 So. 37.

There was no error in allowing a witness to testify as to what he observed as to the condition of the shirt and an arm wound of a third person shortly after the killing, at which time he saw them. *Ingram v. State*, 13 Ala. App. 147, 69 So. 976.

§ 285 (2) Facts Distinguished from Opinions in General.

Held Inadmissible as Opinions or Conclusions.—Evidence as to the probability of a witness being mistaken in his identification of defendant held properly excluded, as calling for a conclusion. *Maxwell v. State*, 12 Ala. App. 212, 67 So. 772. *Grantland v. State*, 8 Ala. App. 319, 62 So. 470. See the title CRIMINAL LAW, § 285 (2), vol. 4, p. 206, 207. *Watson v. State*, 8 Ala. App. 414, 62 So. 997. See the title CRIMINAL LAW, § 285 (2), vol. 4, p. 207. *Smith v. State*, 8 Ala. App. 187, 62 So. 575. See the title CRIMINAL LAW, § 285 (2), vol. 4, p. 207.

Held Admissible as Statement of Facts.—Testimony that a hotel with which defendant was connected was a gambling house was not a conclusion. *Brannon v. State* (Ala. App.), 76 So. 991. Testimony that deceased "was killed in Blount county" is admissible as a statement of fact. *Patton v. State*, 197 Ala. 180, 72 So. 401.

Evidence by a state's witness that immediately before the killing the parties were not engaged in a "scuffle" or "difficulty" was not objectionable as calling for an opinion. *Ingram v. State*, 13 Ala. App. 147, 69 So. 976.

Evidence, elicited in response to a question as to whether defendant had made threats, that the parties were "fussing" was not objectionable as being an opinion or conclusion of the witness. *Ingram v. State*, 13 Ala. App. 147, 69 So. 976.

In a prosecution for wife murder, evidence by a witness for the state that he was on the farm of defendant's father for the purpose of hunting some hogs held not objectionable as a conclusion or intention. *Wilson v. State*, 191 Ala. 7, 67 So. 1010.

Testimony that accused could, from the place he sat in a store, see decedent through a screen door to the street held admissible as a statement of fact. *Brown v. State*, 11 Ala. App. 321, 66 So. 829.

In view of Code 1907, § 6876, making it unnecessary to prove incorporation in criminal cases, unless such fact is denied

under oath, testimony of witness that a bank mentioned in the indictment was a corporation was not a conclusion or opinion of the witness. *Foster v. State* (Ala. App.), 78 So. 721.

§ 285 (3) Evidence as to Intent, Belief, or Feelings of Accused or Other Person.

In a prosecution for assault with intent to murder, it was not error to permit the injured party to say that he suffered great pain from his wound. *Cranford v. State* (Ala. App.), 75 So. 274.

What Witness' Brother Had Come to Testify.—In a prosecution for assault with intent to murder a question as to what witness' brother had come to testify held properly excluded as calling for a conclusion as to the uncommunicated motives or intentions of another. *Tarver v. State*, 9 Ala. App. 17, 64 So. 161.

§ 285 (4) Impressions Concerning Matters Not within the Personal Knowledge of Witness.

Conclusion of Witness.—A question asked witness referring to one of defendants' presence in certain town at certain time, "What was he doing there that day and do you know what he said he was doing there that day?" was objectionable as calling for conclusion of witness. *Grantham v. State* (Ala. App.), 75 So. 183.

Question whether defendant and deceased were carrying guns for each other was properly excluded as calling for conclusion. *Jones v. State* (Ala. App.), 74 So. 843, certiorari denied in 75 So. 1003.

§ 285 (5) Personal Characteristics.

As question asked witness, "Was [deceased] or not of a character in that community that if he made a threat to take the life of a person it would be generally expected that he intended to do it?" called for opinion of witness, and objection thereto was properly sustained. *Smith v. State* (Ala. App.), 75 So. 192.

§ 285 (6) Nature, Condition, Relation, and Identity of Objects and Articles.

Indication of Struggle.—Questions whether a witness noticed any indication of a struggle, and whether the place in-

indicated that deceased had moved around, are not objectionable as calling for opinions, being rather descriptive matter. *Wright v. State* (Ala. App.), 72 So. 564.

Knife Found on Deceased Recently Opened.—Where self-defense was issue, evidence tending to show that knife found on deceased had been recently opened was admissible. *Hendley v. State* (Ala.), 76 So. 904.

§ 285 (7) Opinions as to Tracks and Stains.

Made by Shoe without Heel.—Evidence that the track leading toward the pasture where the stolen cows were chained appeared to have been made by a shoe without a heel was unobjectionable. *Mason v. State* (Ala. App.), 78 So. 321.

Like, Similar, or About the Same as Defendants.—Evidence that tracks near the scene of the crime were like, similar, or about the same as those of defendant held not the statement of the witness' opinion. *Cunningham v. State*, 14 Ala. App. 1, 69 So. 982.

Peculiarities of Tracks Similar to Defendant's.—Evidence in a prosecution for arson of peculiarities in tracks near the scene of the crime similar to stated peculiarities in the tracks of the defendant was not inadmissible as an opinion. *Cunningham v. State*, 14 Ala. App. 1, 69 So. 982.

Certain Shoe Would Have Made Particular Track.—In prosecution for larceny, testimony of witness that a certain foot or shoe could or would have made a particular track held inadmissible; the sole function of the witness being to point out peculiarities by which such track might be distinguished. *White v. State*, 12 Ala. App. 160, 68 So. 521.

§ 285 (8) Mental Condition or Capacity.

That Insanity Runs in Family.—Opinions of witnesses acquainted with the relatives of accused, relying on insanity, that insanity runs in family, held mere conclusions. *James v. State*, 193 Ala. 55, 69 So. 569.

Strength of Defendant's Mind Since He Had Fever.—That accused's mind had not been very strong since he had a fever the year before the offense held

properly excluded as mere opinion. *James v. State*, 193 Ala. 55, 69 So. 569.

§ 285 (9) Manner, Appearance and Conduct of Accused and Others.

Testimony of Witness that Defendant Ran Away.—On trial for burglary, court erred in permitting witness to testify that defendant ran away, since that is conclusion on part of witness. *Condry v. State* (Ala. App.), 76 So. 476.

Whether Decedent Looked as if He Were Looking for Some One.—In a prosecution for murder, question to witness in homicide case as to whether decedent looked as if he were looking for some one considered as not leading, was not objectionable as calling for the conclusion of the witness. *Randall v. State*, 14 Ala. App. 122, 72 So. 214.

Objectionableness of Deceased's Conduct.—Questions as to whether deceased's conduct was objectionable held improper, calling for conclusion of witness. *Suttles v. State* (Ala. App.), 74 So. 400.

Testimony that deceased was cursing defendant's mother and sister just prior to and at the time of the altercation resulting in the homicide held admissible, over the objection that it was a conclusion of the witness. *Johnson v. State* (Ala. App.), 72 So. 766.

Witness Stating "What His Judgment" Was.—In prosecution for an assault with intent to murder, witness for state, who said that he did not know whether the assaulted party was trying to draw a gun, should not have been allowed to state to the jury "what his judgment" on that subject was. *Dobbins v. State* (Ala. App.), 72 So. 692.

§ 285 (10) Opinions as to Meaning and Effect of Words and Acts.

In a prosecution for obtaining goods by false pretenses, a question to a witness as to whether goods were sold to defendant because of latter's statement was inadmissible because calling for a conclusion. *Dennis v. State* (Ala. App.), 75 So. 707.

§ 286. — Matters Directly in Issue.

Defendant's witness could only state the facts, and not give his opinion whether defendant could have turned

and got away from deceased without getting cut; it being for the jury to draw the conclusion. *McConnell v. State*, 13 Ala. App. 79, 69 So. 333.

As to Defendant Being Innocent of the Murder.—It was not error to refuse to permit defendant in a prosecution for murder to ask a witness as to defendant being innocent of the murder so far as the witness knew, as that was a question for the jury. *Eaton v. State*, 8 Ala. App. 136, 63 So. 41.

What Deceased Appeared to Be Doing.—Testimony as to what deceased appeared to be doing at the time he was shot was properly excluded as relating to the very matter in issue. *Mitchell v. State*, 14 Ala. App. 46, 70 So. 991.

One's Mental Capacity to Contract.—Witness can not give a conclusion of the mental capacity of one to contract. *Lambert v. State*, 13 Ala. App. 289, 69 So. 261.

§ 290. — Inferences or Impressions from Collective Facts.

§ 290 (1) In General.

General Rule.—A witness may testify as to his impressions derived from collective facts, as in so doing he is still deposing to facts as contradistinguished from mere opinions, and is giving but a shorthand rendering of the surrounding circumstances, or giving a composite fact. *Dobbins v. State* (Ala. App.), 72 So. 692.

A witness may give his conclusion as to the existence of certain facts, either separately or collectively, where the statement calls for no more than the mere shorthand rendering of collective facts. *Johnson v. State* (Ala. App.), 72 So. 766.

Defendant Did Not Appear Drunk.—In a prosecution for murder, evidence that defendant did not appear drunk, and was transacting business and talking sensibly, was competent. *Sharp v. State*, 193 Ala. 22, 69 So. 122.

Defendant's Mental Incapacity from Intoxication.—It is not competent for witnesses of accused to testify that his intoxication rendered him at the time of the killing incapable of understanding that he was committing a crime. *James*

v. State, 193 Ala. 55, 69 So. 569, cited in note in Ann. Cas. 1917A, 628.

Place Bore Evidence of Having Been Used before.—In a prosecution for the unlawful sale of intoxicating liquor, testimony that the place where liquors were found bore evidence of having been used before is admissible as a statement of a collective fact. *Harwell v. State*, 12 Ala. App. 265, 68 So. 500.

How Lick Sounded.—In a prosecution for robbery, the answer of a witness for the state to a question, "What did the lick sound like?" that the "lick sounded like a noise made by somebody hitting another with a board," was but a shorthand rendering of a physical fact. *Hardeman v. State*, 14 Ala. App. 35, 70 So. 979.

Testimony that a room was furnished as an ordinary gambling room was not a conclusion, but a collective statement of a fact. *Brannon v. State* (Ala. App.), 76 So. 991.

Vagrancy—Defendant's Associates Are Gamblers.—While, on the trial of a person charged with being a gambler, it would not be competent for a witness to testify that he was a gambler, on a trial for vagrancy, it is competent for a witness to testify that defendant's associates are gamblers, though they have never been prosecuted or convicted, as the word "gambler" has a well-defined meaning in common parlance as one who gambles, one given to gambling or playing for a stake, or one who follows or practices games of chance or skill with the expectation or purpose of thereby winning money or other property. *Brannon v. State* (Ala. App.), 76 So. 991.

Noise Was "Right There at Him."—The testimony of a witness on a trial for disturbing religious worship that he thought the noise was "right there at him," referring to accused, was admissible. *Dodson v. State*, 10 Ala. App. 255, 65 So. 206.

Noise as if Somebody Was "Fussing."—Witness may say whether, just before he heard the shots, he heard a noise as if somebody was going by fussing, under the exception to the general rule against conclusions that where a fact can not be reproduced or made apparent to the jury a witness may describe the fact ac-

cording to the effect produced on his mind. *Newsom v. State* (Ala. App.), 73 So. 579, certiorari denied in Ex parte *Newsom* (Ala.), 73 So. 1001.

Seeing Accused "Loitering" Around Places Frequented by Prostitutes.—In prosecution for vagrancy as a prostitute, it was proper to allow the state's witness to testify to having seen accused "loitering" around certain places where prostitutes commonly resorted. *Robinson v. State* (Ala. App.), 72 So. 592.

Seduction—Solicitation of Intercourse and Promise of Marriage.—In a prosecution for seduction, testimony of prosecutrix that when they were coming back from church "he put in to begging me," and he said they would marry, held not a conclusion, but a statement of fact. *Herring v. State*, 14 Ala. App. 93, 71 So. 974.

§ 290 (2) Opinions Based on Facts Brought Out or Capable of Being Brought Out in Evidence.

Looked Like Drunken Man.—*Swain v. State*, 8 Ala. App. 26, 62 So. 446. See the title CRIMINAL LAW, § 290 (2), vol. 4, p. 211.

The answer, "They did not look like overalls" to the question, "Did defendant have on overalls when he left?" is admissible as a shorthand rendering of a collective fact. *Terry v. State*, 13 Ala. App. 115, 69 So. 370.

The answer, "Yes, sir, all that he done was trying to part them," to the question, "Did you see what defendant did when he got out to the boys?" was admissible as the shorthand rendering of a collective fact derived from observation. *Terry v. State*, 13 Ala. App. 115, 69 So. 370.

§ 290 (3) Appearance and Emotions of Persons.

Whether accused, relying on insanity, looked natural or unnatural, may not be shown to prove insanity. *James v. State*, 193 Ala. 55, 69 So. 569.

§ 291. — Special Knowledge as to Subject Matter.

§ 291 (1) In General.

Admissibility of Opinions of Nonexperts.—*Key v. State*, 8 Ala. App. 2, 63

So. 335. See the title CRIMINAL LAW, § 291 (1), vol. 4, p. 212.

Description of Report Made by Gun.

—In a prosecution for murder, a person who had heard the sound of a gun was competent to describe the report made by the gun when deceased was shot. *Bullington v. State*, 13 Ala. App. 61, 69 So. 319.

Number and Caliber of Pistols Fired.

A witness was properly permitted to testify that two pistols were fired from a house and sounded like a 38 and a 44 special. *Rowlan v. State*, 14 Ala. App. 17, 70 So. 953.

Bullet Wounds.—Any one who has often observed and examined bullet wounds is a competent witness to prove characteristic differences between such wounds at the point of entry and exit. *Rohn v. State*, 186 Ala. 5, 65 So. 42.

Whether Decedent Was Living in Adultery.—In a prosecution for uxoricide, the opinion of certain witnesses as to whether decedent was living in adultery shortly before she was killed held properly excluded. *Ragland v. State*, 187 Ala. 5, 65 So. 776.

Illumination of Certain Place on Dark Night.—*Key v. State*, 8 Ala. App. 2, 62 So. 335. See the title CRIMINAL LAW, § 291 (1), vol. 4, p. 312.

Before one can testify as to feelings between other persons, he must be shown to have knowledge thereof, which may be acquired by observation of demeanor and by conversation of parties. *Butler v. State* (Ala. App.), 77 So. 72.

§ 291 (2) Mental Condition or Capacity.

See post, "Mental Condition or Capacity," § 295.

A nonexpert witness' opinion as to sanity to be admissible only requires that it be based on personal knowledge, observation, and acquaintance with the individual about whom he is called upon to testify. *Turner v. State* (Ala. App.), 72 So. 574.

Sound Heard Was Cry of Insane Person.—A witness who did not show himself qualified to distinguish between the cries of a sane and insane person could not testify that the sounds he heard were those of the cry of an insane per-

son. *Jones v. State* (Ala. App.), 75 So. 630.

§ 291 (4) Handwriting.

Forgery—Opinion as to Genuineness of Signature.—In a prosecution for forgery, a witness who had seen the party, whose name was forged, write, or knew his handwriting could express opinion as to genuineness of signature. *King v. State* (Ala. App.), 75 So. 692.

Account Book Was in Defendant's Handwriting.—Witnesses, who had often seen accused write and frequently seen his handwriting, were competent to express opinion that an account book, showing his sales of intoxicating liquors, was in defendant's writing. *Quinn v. State* (Ala. App.), 74 So. 743.

§ 292. — Personal Identity and Characteristics.

Mere opinions of witnesses as to defendant's character for peace and quiet from their personal knowledge are not admissible. *Terry v. State* (Ala. App.), 74 So. 756.

§ 293. — Age.

Where, in a prosecution for homicide, the age of deceased was a material issue, testimony of a neighbor, who knew her and had opportunity to judge of her age, that deceased was "about 25 or 30 years old, about there. She was comparatively young"—was properly admitted. *Wise v. State*, 11 Ala. App. 72, 66 So. 128.

Competency of One Not Qualified by Special Knowledge.—*Smith v. State*, 182 Ala. 38, 62 So. 184. See the title CRIMINAL LAW, § 294, vol. 4, p. 214.

§ 294. — Bodily Appearance or Condition.

That Husband Is an Able-Bodied Person.—*Grantland v. State*, 8 Ala. App. 319, 62 So. 470. See the title CRIMINAL LAW, § 294, vol. 4, p. 214.

Range of Wounds.—*Reid v. State*, 181 Ala. 14, 61 So. 324. See the title CRIMINAL LAW, § 294, vol. 4, p. 214.

§ 295. — Mental Condition or Capacity.

§ 295 (1) General Rule as to Admissibility of Nonexpert Opinion.

A nonexpert can not testify to the

mental condition of a person until it has been shown that he has an intimate acquaintance with such person, and that his association with him is of such duration as to justify the forming of an opinion. *Langston v. State* (Ala. App.), 75 So. 715.

Court held to have acted within its discretion in refusing to allow a nonexpert witness to express an opinion as to defendant's sanity. *Moye v. State*, 12 Ala. App. 127, 67 So. 716.

Considered Accused Mentally Unbalanced at That Time.—A witness, testifying that accused, relying on intoxication, was drinking and acted queerly just before the offense, may not testify that he considered accused mentally unbalanced at that time. *James v. State*, 193 Ala. 55, 69 So. 569, cited in note in Ann. Cas. 1917C, 628.

Insanity.—*Harris v. State*, 8 Ala. App. 33, 62 So. 477. See the title CRIMINAL LAW, § 295 (1), vol. 4, p. 215.

§ 295 (3) Qualifications of Witnesses, Sufficiency of Facts, Knowledge, etc.

Discretion of Court.—*Jones v. State*, 181 Ala. 63, 61 So. 434. See the title CRIMINAL LAW, § 295 (3), vol. 4, pp. 215, 216.

Witnesses Held Incompetent.—*Jones v. State*, 181 Ala. 63, 61 So. 434. See the title CRIMINAL LAW, § 295 (3), vol. 4, p. 216.

§ 296. — Intoxication and Intoxicants.

See ante, "Mental Condition or Capacity," § 295.

A witness may testify that one was drunk, or acted like he was drunk. *Wallace v. State* (Ala. App.), 78 So. 714.

Accused's Reason Dethroned While Drinking.—A witness for accused, relying on defense of insanity by intoxication, may not testify that while accused is drinking his reason is dethroned, or that he then displays acts of insanity. *James v. State*, 193 Ala. 55, 69 So. 569.

§ 296. — Nature, Condition, Relation, and Identity of Objects.

§ 296 (1) Nature, Condition and Relation of Objects.

See ante, "Bodily Appearance or

Condition," § 294; "Intoxication and Intoxicants," § 296.

Character and Size of Bullet Holes.—Witnesses who had experience with pistols of certain caliber might testify as to the character and size of a bullet hole made by bullets from pistols of that caliber at different ranges, and on entering and leaving an object. *Burton v. State*, 194 Ala. 2, 69 So. 913.

Bottles Found in Defendant's House Contained Whisky.—In a prosecution for the unlawful sale of whisky, a witness for the state may testify that the bottles which he found in defendant's house contained whisky without producing the bottles. *Hartwell v. State*, 12 Ala. App. 265, 68 So. 500.

Pasteboard Seen in Defendant's Yard was Knuck Pattern.—In a prosecution for homicide, the court properly refused to permit a witness to give his conclusion that the pasteboard he saw in deceased's yard was a knuck pattern. *Maxwell v. State*, 11 Ala. App. 53, 65 So. 732.

Nature of Instrument Causing Wound.—*Macon v. State*, 179 Ala. 6, 60 So. 312, cited in note in L. R. A. 1915B, 1149. See the title CRIMINAL LAW, § 298 (1), vol. 4, p. 217.

§ 296 (2) Identity of Objects.

§ 296 (2a) In General.

Alcohol.—A witness may testify that he smelled and tasted liquor and that it was alcohol. *Feagin v. Andalusia*, 12 Ala. App. 611, 67 So. 630.

Blood Stains.—No particular skill or experience is required to qualify witness who saw stains of blood to render his evidence with respect thereto admissible. *Bray v. State* (Ala. App.), 78 So. 463; *McClain v. State*, 182 Ala. 67, 62 So. 241. See the title CRIMINAL LAW, § 298 (2a), vol. 4, p. 219.

"Looked Like" Watch Defendant Had.—In a larceny case, a witness could state that a watch shown him "looked like" a watch defendant had. *Taylor v. State* (Ala. App.), 72 So. 557.

§ 296 (2b) Opinion as to Tracks.

Whether Tracks Could Have Been Made by Certain Mule.—*Pope v. State*, 181 Ala. 19, 61 So. 263. See the title

CRIMINAL LAW, § 298 (2b) vol. 4, p. 219.

§ 299. — Value.

Nonexpert witnesses shown to be familiar with the property to be valued are competent to express an opinion as to its value, so that the owner of a cow may testify as to her value. *Robinson v. State*, 14 Ala. App. 25, 70 So. 960.

§ 301. — Cause and Effect.

Any witness familiar by experience with the appearance and treatment of wounds, particularly physicians and surgeons, may give an opinion as to manner in which a wound was probably inflicted and the instrument used. *Wallace v. State* (Ala. App.), 78 So. 714.

§ 303. — Facts Forming Basis of Opinion.

Mental Condition—Necessity of Stating Facts First.—It is not error to refuse to allow witness to say whether accused seemed to him to be in the same mental condition as before the day of the offense, as a nonexpert witness must first state the facts. *Turner v. State* (Ala. App.), 72 So. 574.

A nonexpert witness, testifying to the insanity of accused, must state what acts of accused he has seen, and then give his opinion as to his sanity. *James v. State*, 193 Ala. 55, 69 So. 569, cited in note in *Ann. Cas.* 1917C, 628.

Same—Negation of Unnatural or Peculiar Conduct.—Opinions of nonexpert witnesses affirming the sanity of accused may be based on the negation of unnatural or peculiar conduct without specifying the particular facts upon which such opinion is based. *Turner v. State* (Ala. App.), 72 So. 574.

Opinion As to Sanity — Necessity of Reason Therefor.—One not an expert, who possesses sufficient knowledge of accused to be competent to express an opinion, may testify that accused is, in his opinion, sane, without giving his reasons therefor. *Woods v. State*, 186 Ala. 29, 65 So. 342.

§ 304. — Cross-Examination.

Latitude Allowed.—*Jones v. State*, 181 Ala. 63, 61 So. 434. See the title CRIMINAL LAW, § 304, vol. 4, p. 222.

Insanity of Defendant—Attempt to Incarcerate.—*Jones v. State*, 181 Ala. 63, 61 So. 434. See the title CRIMINAL LAW, § 304, vol. 4, p. 222.

Nature of Discoloration of Ground.—Defendant, who had offered nonexpert witness to prove that discoloration of ground where deceased was found was caused by blood held in no position to object to his testimony of an expert nature concerning the same matter on cross-examination. *Jones v. State*, 13 Ala. App. 10, 68 So. 690.

§ 305. Subjects of Expert Testimony.

§ 308. — Matters of Common Knowledge or Observation.

Range of Bullet or Load of Gun.—In a murder trial, the question of the range of a bullet or load of a gun does not necessarily call for expert knowledge, but may be open to observation by a nonexpert, and testified to as any other fact. *Mathis v. State* (Ala. App.), 73 So. 122.

Appearance of Fresh Blood.—A witness need not be an expert on blood to testify that fresh marks and spots on accused's hands and clothing were made by blood stains, since the appearance of fresh blood is within the common knowledge of mankind. *Lightner v. State*, 195 Ala. 687, 71 So. 469.

Inferences As to Relative Position from Angle of Wound.—In a murder trial, it is not competent for a witness, expert or nonexpert, to draw inferences for the jury from the angle of a gunshot wound as to the relative position of the combatants when the shot was fired. *Mathis v. State* (Ala. App.), 73 So. 122.

Deductions from Nature of Wound as to Relative Positions.—In murder trial, held error to allow physicians as expert to testify to relative positions of deceased and slayer as deduced from the nature and direction of the wound. *Noble v. State*, 14 Ala. App. 9, 70 So. 187.

§ 310. — Bodily Condition.

See post, "Medical Experts," § 316.

Range of Bullet.—In a trial for homicide, a medical man, well acquainted with the human anatomy and with gun wounds, called for the state, might state, from his examination of the wounds of deceased, his conclusion that the bullet

entered at the back to the left of the spinal column and made its exit through the heart in front. *Rohn v. State*, 186 Ala. 5, 65 So. 44.

Fracturing Inner without Fracturing Outer Lining of Skull. — *Roberson v. State*, 183 Ala. 43, 62 So. 837. See the title CRIMINAL LAW, § 310, vol. 4, p. 223.

§ 312. — Nature, Condition, and Relation of Objects.

Relative Position at Time of Shot. — *Rigell v. State*, 8 Ala. App. 46, 62 So. 977. See the title CRIMINAL LAW, § 312, vol. 4, p. 323.

The opinions of a medical expert are not admissible to show the position of the injured person at the time of infliction of the wound. *Roden v. State*, 13 Ala. App. 105, 69 So. 366.

The position of accused's arm when wound was inflicted on him held material, but not provable by opinion of a medical expert. *Roden v. State*, 13 Ala. App. 105, 69 So. 366.

Direction of Shot.—In trial for murder by shooting, statements of a doctor that the load "didn't look to be shot right straight in front, it looked to be a little bit that way (indicating)," was not improper as invading the province of the jury. *Mathis v. State* (Ala. App.), 73 So. 122.

Wounds Made by Bullet of Particular Caliber.—*Smith v. State*, 182 Ala. 38, 62 So. 184. See the title CRIMINAL LAW, § 312, vol. 4, p. 224.

§ 313. — Cause and Effect.

Cause of Death.—A physician's opinion as to the cause of death is competent evidence. *Murphy v. State*, 14 Ala. App. 78, 71 So. 967.

Same—Gunshot Wound. — Testimony of doctor, qualified as expert, tending to show that gunshot wound which he found on decedent and treated was the cause of the death, was admissible. *Pearce v. State*, 14 Ala. App. 120, 72 So. 213.

Same—Blow on Head.—Where witness was shown to be expert, court properly overruled defendant's objections to questions propounded to elicit evidence tending to show that blow on deceased's

head caused his death *Bray v. State* (Ala. App.), 78 So. 463.

Same—Strangulation. — In a homicide case, where death was alleged to have been caused by strangulation, medical experts could testify as to that contention. *Madley v. State*, 192 Ala. 5, 68 So. 864.

Same—Blow from Falling on Rail.—Where one accused of murder defended on the ground that the deceased was killed by falling against a railroad rail and not by a blow from a blunt instrument as charged, he should have been permitted to ask physicians as expert witnesses whether the blow which caused the death could have been inflicted by falling on the rail. *Wilson v. State*, 195 Ala. 675, 71 So. 115.

That deceased had been dead some time when examined by medical experts, goes to the weight and credibility of their testimony as to cause of death and not the admissibility. *Madley v. State*, 192 Ala. 5, 68 So. 864.

Cause of Wounds.—*Costello v. State*, 176 Ala. 1, 58 So. 202, cited in note in L. R. A. 1915A, 1070. See the title CRIMINAL LAW, § 313, vol. 4, p. 224.

Carrying Distance of Gun Loaded with Bird Shot.—*Smith v. State*, 8 Ala. App. 187, 62 So. 575. See the title CRIMINAL LAW, § 313, vol. 4, p. 224.

§ 314. Competency of Experts.

§ 315. — Knowledge, Experience, and Skill in General.

§ 315 (1) In General.

Submission of Cow to Human Intercourse.—In a prosecution for sodomy, a witness for the defense whose experience with cows was confined to their conduct with the male of their own kind, held not shown to be qualified to express an opinion that a cow not in heat would not submit to the act with a man. *Tarrant v. State*, 1st Ala. App. 172, 67 So. 626, certiorari denied in *Ex parte Tarrant*, 191 Ala. 664, 67 So. 1018.

Recoil of Short Single-Barrelled Shotgun.—A witness whose experience is limited to modern arms used in warfare is not competent to testify as an expert as to the recoil of a short singled-bar-

relled shotgun. *Wise v. State*, 11 Ala. App. 72, 66 So. 128.

§ 315 (2) Handwriting Experts.

See post, "Comparison of Handwriting," § 328.

In a prosecution for forgery of a name on an injunction bond testimony of a witness, who stated that he knew the defendant's handwriting, and that in his judgment the signature to the bond was in the handwriting of defendant, was admissible; its weight and sufficiency being for the jury. *Everage v. State*, 14 Ala. App. 106, 71 So. 983.

§ 316. — Medical Experts.

How Close Gun Was to Deceased When Fired.—That witness is a physician does not establish his competency to testify as to how close the gun was to deceased when the shot that caused the death was fired. *Wise v. State*, 11 Ala. App. 72, 66 So. 128.

Direction Bullet Followed on Entering Body.—A physician, who examined a wound inflicted on a person by a bullet, was competent to testify to the direction the bullet followed on entering the body. *Clayton v. State*, 185 Ala. 13, 64 So. 76.

Wounds.—*Costello v. State*, 176 Ala. 1, 58 So. 202, cited in note in L. R. A. 1915A, 1070. See the title CRIMINAL LAW, § 316, vol. 4, p. 225. *Roberson v. State*, 183 Ala. 43, 62 So. 837. See the title CRIMINAL LAW, § 316, vol. 4, p. 225.

Place of Entrance of Shots on Decedent's Head.—Where witness testified that he was a practicing physician and had practiced for 16 years, his testimony as to place of entrance on decedent's head of shots that produced his death was admissible. *Rikard v. State* (Ala. App.), 73 So. 992.

Sanity of Accused.—A physician who examined accused once for a slight physical ailment, and who never made an examination of the mental condition of accused, is not competent to give his opinion that accused was sane. *Woods v. State*, 186 Ala. 29, 65 So. 342; *McGhee v. State*, 178 Ala. 4, 59 So. 573. See the title CRIMINAL LAW, § 316, vol. 4, p. 225.

§ 318. — Determination of Question of Competency.

Question for Court.—Whether witness possesses requisite qualifications of an expert is a preliminary question largely within the discretion of the trial court. *Mathis v. State* (Ala. App.), 73 So. 123.

Competency of a witness to testify to the sanity or insanity of accused rests largely in the discretion of the trial court. *Woods v. State*, 186 Ala. 29, 65 So. 342.

§ 319. Examination of Experts.

§ 320. — In General.

Range of Examination.—In examination of expert witnesses, the range of the examination is largely within the discretion of the trial court. *Wilson v. State*, 195 Ala. 675, 71 So. 115.

Witness Using His Body to Describe Wound.—A physician, testifying as to the appearance of deceased's wounds, could indicate, on his own body, where the knife struck and the direction in which the wound went. *Terry v. State*, 13 Ala. App. 115, 69 So. 370.

§ 322. — Hypothetical Questions and Answers.

How Far Gun Placed against Body Will Recoil.—Where defendant's theory was that deceased shot himself, testimony of an expert as to how far a gun pressed against the body will recoil on discharge is inadmissible, where there is no evidence that the gun was in fact placed against deceased's body; the muzzle having been found clasped in deceased's hand. *Wise v. State*, 11 Ala. App. 72, 66 So. 128.

Sanity or Insanity of Accused.—An expert may, on a proper hypothetical question which assumes the facts, give his opinion as to whether accused is sane or insane. *Woods v. State*, 186 Ala. 29, 65 So. 342.

On cross-examination of expert witnesses, hypothetical questions need not be based on facts proven in that particular case, but may rest on an assumed state of facts, for the purpose of getting opinion on all possible theories of the case, and of testing the value and accuracy thereof. *Wilson v. State*, 195 Ala. 675, 71 So. 115.

§ 326. — Cross-Examination.

Where accused's witness testified that blows by knucks upon certain parts of the body might be fatal, the state could properly cross-examine as to whether he had ever known of such a result and whether deceased's wounds were not more probably caused by a rock. *Roden v. State* (Ala. App.), 72 So. 605.

Competency of Imaginary and Abstract Questions.—Upon cross-examination an expert witness may be examined in the discretion of the court on purely imaginary and abstract questions. *Turner v. State* (Ala. App.), 72 So. 574.

Latitude Permissible to Test Means and Accuracy of Knowledge.—Where an expert witness testified as to what caused the death of a horse, in a prosecution for wrongfully killing the horse the court should have permitted reasonable latitude in cross-examination to test the means and accuracy of the witness' knowledge. *McDade v. State*, 10 Ala. App. 241, 64 So. 519.

§ 328. Comparison of Handwriting.

See ante, "Handwriting Experts," § 315 (2). As to writings submitted for comparison, see ante, "Writings Submitted for Comparison," § 249 (5).

Prior to the enactment of **Laws 1915, p. 134**, a disputed writing could not be proved by allowing a witness or the jury to compare it with a genuine writing not in evidence. *King v. State* (Ala. App.), 72 So. 552.

Submission of Writings to Jury without Comparison.—**Laws 1915, p. 134**, allowing comparisons to be made in criminal case between disputed writing and one the court considers genuine, by witnesses who are experts or familiar with the person's handwriting, does not authorize submission of writings to jury without such comparison. *King v. State* (Ala. App.), 72 So. 552.

A Nonexpert—Competency to Express Opinion.—*King v. State*, 8 Ala. App. 239, 62 So. 374. See the title **CRIMINAL LAW**, § 228 (1), vol. 4, p. 228.

(J) TESTIMONY OF ACCOMPLICES AND CODEFENDANTS.

As to acts or declarations of conspirators and codefendants, see ante, "Acts

and Declarations of Conspirators and Codefendants," §§ 265-269. As to instructions, see post, "Testimony of Accomplices," § 528.

§ 331. Accomplices within Rules of Evidence.

That witness was jointly indicted with accused will not per se raise the presumption that he was an accomplice, and his testimony may be used subject to proof as to whether he was an accomplice. *Moore v. State* (Ala. App.), 72 So. 596.

§ 334. Corroboration of Accomplice.

As to corroboration of accomplices being a question for jury, see post, "Corroboration of Accomplices," § 495 (4).

§ 335. — Necessity.

Felonies.—Under Code 1907, § 7897, conviction of a felony can not be had on the testimony of an accomplice, unless corroborated by other evidence connecting defendant with the offense. *Moore v. State* (Ala. App.), 72 So. 596.

Same—Necessity of Proving Witness an Accomplice.—Before Code 1907, § 7897, prohibiting conviction of a felony on uncorroborated testimony of an accomplice can be invoked, it must clearly appear that the witness is an accomplice. *Moore v. State* (Ala. App.), 72 So. 596.

The jury must be reasonably convinced that a witness was an accomplice before the statute (Code 1907, § 7897), requiring corroboration, can be invoked. *Horn v. State* (Ala. App.), 72 So. 768.

Misdemeanors.—A conviction for a misdemeanor may be had on the testimony of an accomplice, as Code 1907, § 7897, requiring corroboration applies to felony cases only. *Swope v. State*, 12 Ala. App. 297, 68 So. 562.

Code 1907, § 7879, requiring corroboration of an accomplice's testimony, applies only to felonies, and in misdemeanors a conviction may be had upon an accomplice's testimony without corroboration. *Quinn v. State* (Ala. App.), 74 So. 743.

§ 336. — Admissibility.

In a prosecution for larceny, evidence that defendant sought to have one of

the state's witnesses, his accomplices, help him out of his trouble, was competent corroboration of the accomplices. *English v. State*, 14 Ala. App. 636, 72 So. 292.

§ 337. — Sufficiency.

§ 337 (1) Character, Scope, and Sufficiency in General.

Tending to Prove Material Features of Accomplices' Testimony. — In a prosecution for larceny, testimony of state's witnesses tending to prove the truth of material features of the narrative of defendant's two accomplices was corroborative of their testimony, within Code 1907, § 7897. *English v. State*, 14 Ala. App. 636, 72 So. 292.

Evidence of circumstances tending to prove the truth of material features of the testimony of an alleged accomplice were corroborative of his testimony, within Code 1907, § 7879. *Newsum v. State*, 10 Ala. App. 124, 65 So. 87.

Evidence Sufficient without Corroboration. — Under Code 1907, § 7897, evidence in prosecution for murder held to warrant conviction independently of accomplice testimony. *Read v. State*, 195 Ala. 671, 71 So. 96.

§ 337 (2) Connecting Accused with Crime.

While the corroborative testimony must tend to connect defendant with the commission of the offense, it need not refer to any statement or fact testified to by the accomplice. *English v. State*, 14 Ala. App. 636, 72 So. 292.

Necessity of Referring to Specific Facts. — When a witness is an accomplice, Code 1907, § 7897, merely requires other evidence tending to connect accused with the offense, and it need not be of any specific fact. *Horn v. State* (Ala. App.), 72 So. 768.

Instances Held Sufficient. — Under Code 1907, § 7897, relating to corroboration of accomplice, corroborative testimony tending to connect defendant with commission of burglary held sufficient. *Norman v. State*, 13 Ala. App. 337, 69 So. 362.

Testimony of accomplice on trial for larceny held corroborated as required by Code 1907, § 7897, to sustain a conviction. *Johnson v. State*, 13 Ala. App. 193, 68 So. 687, certiorari denied in 192 Ala. 686, 68 So. 1018.

Evidence in Burglary Prosecution Insufficient for Conviction. — *Tompkins v. State*, 7 Ala. App. 140, 61 So. 479. See the title CRIMINAL LAW, § 337 (2), vol. 4, p. 231.

§ 337 (4½) Possession of Stolen Property.

In a prosecution for larceny of a cotton bale, evidence tending to identify the stolen bale with one which accused deposited in a warehouse, held to sufficiently corroborate an accomplice's testimony. *Elmore v. State* (Ala. App.), 72 So. 568.

(K) CONFESSIONS.

As to admission of accused, see ante, "Admissions, Declarations, and Hearsay," §§ 250-264. As to instructions on confessions, see post, "Admissions and Confessions," § 529.

§ 338. Nature and Sufficiency as Admission of Guilt.

There is a well-defined distinction between inculpatory admissions by a defendant of collateral facts and confessions or admissions in the nature of confessions of actual guilt. *Read v. State*, 195 Ala. 671, 71 So. 96.

§ 339. Admissibility in General.

§ 339 (1) In General.

See post, "Voluntary Character in General," § 341.

Rule Stated. — *Saulsberry v. State*, 178 Ala. 16, 59 So. 476, cited in note in 50 L. R. A., N. S., 1082. See the title CRIMINAL LAW, § 339 (1), vol. 4, pp. 233, 234.

Confession is not admissible, unless it is shown that it was made freely and voluntarily, without application of hope or fear. *Machen v. State* (Ala. App.), 76 So. 407.

Where circumstances under which defendant's statements in nature of confessions were made, as well as the statements themselves, showed them to be voluntary, they were properly admitted. *Ragsdale v. State*, 12 Ala. App. 1, 67 So. 783.

§ 339 (2) In Particular Criminal Prosecutions.

Adultery. — A statement by accused on a trial for adultery that he had a wife in a sister state was admissible as a confession.

Fortner v. State, 12 Ala. App. 179, 67 So. 720.

Arson. — In a prosecution for arson, where no evidence was offered tending to exclude the theory that the burning was accidental, there was no sufficient proof of the corpus delicti to afford a predicate for the admission of the defendant's confession. *Daniels v. State*, 12 Ala. App. 119, 68 So. 499.

Carnal Knowledge of Girl under Age. — To render evidence of confession to having carnal knowledge of girl under age of consent admissible, the corpus delicti need not be proved beyond a reasonable doubt. *Pool v. State* (Ala. App.), 78 So. 311.

Embezzlement. — *Barr v. State*, 7 Ala. App. 96, 61 So. 40. See the title CRIMINAL LAW, § 339 (2), vol. 4, p. 234.

Larceny. — Where in prosecution for larceny there was evidence tending to show that a prisoner was an accomplice of defendant, evidence of repeated efforts by defendant to see the prisoner, and the conversations between them, was admissible; the conversations being in the nature of a confession. *Britton v. State* (Ala. App.), 74 So. 721.

In a prosecution for larceny of a cow, statement of a defendant to the complaining witness held admissible as a confession. *Rivers v. State*, 13 Ala. App. 362, 69 So. 387.

§ 339 (3) Necessity of Laying Predicate for Admission.

Confessions are *prima facie* involuntary, and it must be satisfactorily shown to the court that they are voluntary, and were made when the mind of the accused was free from the influence of hope or fear, before they can be received in evidence. *Whitehead v. State* (Ala. App.), 78 So. 467.

Predicate Laid — Where the state laid an ample predicate showing that alleged confessions or declarations against interest were voluntarily made, they were admissible. *Ware v. State*, 12 Ala. App. 101, 67 So. 763.

Predicate Unnecessary. — In a prosecution for assault with intent to murder, where the assault was committed by one with a bucket and gun, a question to a witness whether accused, who claimed not to have gone clear to the place of

assault, stated that he had a bucket and gun with him on that night, does not call for a confession, and is not subject to objection that no predicate had been laid. *Webb v. State*, 11 Ala. App. 123, 65 So. 845.

§ 339 (4) After Proof Aliunde of Facts Confessed.

Necessity of First Proving Corpus Delicti. — Defendant's confession is not admissible until corpus delicti has been proven. *Pierson v. State* (Ala. App.), 76 So. 487.

In a prosecution for obtaining money under false pretenses, the falsity of the pretenses can not be shown by defendant's confessions until independent evidence of falsity has been introduced. *Sherard v. State* (Ala. App.), 75 So. 721.

Sufficient Proof of Corpus Delicti. — In a prosecution for larceny, the owner's testimony that he saw the stolen tobacco at night; that it was gone in the morning and had been stolen in the interval — held sufficient proof of corpus delicti to warrant introduction of accused's confession. *Marvin v. State* (Ala. App.), 72 So. 588.

Evidence held to establish the corpus delicti of bringing stolen property into the state so as to render admissible a confession. *Whitehead v. State* (Ala. App.), 78 So. 467.

§ 341. Voluntary Character in General.

See post, "Determination of Question of Admissibility," § 350.

§ 341 (1) In General.

See ante, "In General," § 339 (1).

Statements, voluntarily made as confessions, are admissible as such. *Burton v. State*, 194 Ala. 2, 69 So. 913.

§ 341 (2) What Confessions Are Voluntary.

In General. — *Barr v. State*, 7 Ala. App. 96, 61 So. 40, cited in note in 50 L. R. A., N. S., 1081. See the title CRIMINAL LAW, § 341 (2), vol. 4, p. 237.

Statements of accused to witness are properly admitted, where witness stated that neither he nor any other in his presence threatened or promised reward or inducement to get accused to talk. *James v. State*, 14 Ala. App. 652, 72 So. 299.

Purposely Shot His Wife. — *Aaron v. State*, 181 Ala. 1, 61 So. 812, cited in note in 50 L. R. A., N. S., 1082. See the title CRIMINAL LAW, § 341 (2), vol. 4, p. 237.

§ 341 (4) Confessions While in Custody in General.

As to confessions made to persons in authority, see post, "Confessions Made to Persons in Authority," § 341 (5).

The fact that one is under arrest at the time an incriminating statement in the nature of a confession is made does not render it inadmissible. *Moye v. State*, 12 Ala. App. 127, 67 So. 716.

§ 341 (5) Confessions Made to Persons in Authority.

Confession to Arresting Officer. — *Gilmer v. State*, 181 Ala. 23, 61 So. 377, cited in note in 50 L. R. A., N. S., 1079. See the title CRIMINAL LAW, § 341 (5), vol. 4, p. 239.

§ 342. Promises or Other Inducements.

Collateral Inducements. — A confession induced by hope that defendant would not be placed in jail without bail, and could secure bondsmen before he gave himself up, is not voluntary, and not admissible. *Machen v. State* (Ala. App.), 76 So. 407.

§ 349½. Codefendants.

In a prosecution of two persons for murder, testimony of voluntary confession of one of them was admissible when properly limited to affect the author. *Consford v. State* (Ala. App.), 74 So. 740, certiorari denied in 75 So. 335.

§ 349½. Preliminary Evidence as to Voluntary Character.

Presumptions and Burden of Proof. — Confessions are prima facie involuntary, so that, unless the circumstances attending them show they were voluntary, they should not be admitted without evidence rebutting that presumption, and showing prima facie that they were voluntary. *Godau v. State*, 179 Ala. 27, 60 So. 908, cited in notes in 50 L. R. A., N. S., 1079, 1081, 1089.

The prima facie presumption that confessions are involuntary may be overcome by circumstances as to render them ad-

missible. *Walling v. State* (Ala. App.), 73 So. 216, certiorari denied in *Ex parte Walling* (Ala.), 73 So. 1003.

Confessions are prima facie involuntary, and the court, before permitting proof thereof, must ascertain that they are voluntary. *Fortner v. State*, 12 Ala. App. 179, 67 So. 720.

Extrajudicial confessions are prima facie involuntary, and the burden rests on the state to overcome the prima facie infirmity by showing to the court's satisfaction the confession was voluntary. *Cook v. State* (Ala. App.), 78 So. 306.

Same — Subsequent Confession. — In absence of evidence that influence rendering a prior confession involuntary had ceased or been dispelled, the court must assume a subsequent confession, in presence of persons shown to have induced the prior confession, was impelled by the same influence, and exclude it. *Cook v. State* (Ala. App.), 78 So. 306.

Admissibility. — If a confession is admitted, accused is entitled to have the jury consider all evidence of circumstances under which it was made, along with other evidence in the case. *Cook v. State* (Ala. App.), 78 So. 306.

Weight and Sufficiency of Evidence. — Reasonable doubt whether confessions or admissions are freely and voluntarily made must be resolved against their admissibility. *Machen v. State* (Ala. App.), 76 So. 407.

Where it was affirmatively shown that accused's confession was made voluntarily without promise, inducement, or intimidation, confession was admissible. *Fuller v. State* (Ala. App.), 75 So. 879.

Some evidence tending to prove the corpus delicti is sufficient for admission, against objection that it had not been proved, of defendant's inculpatory statements. *Mason v. State* (Ala. App.), 78 So. 321.

In a prosecution for manslaughter, testimony of officer held to make predicate essential to render inculpatory statements of defendant, made when he was taken into custody, admissible. *Bray v. State* (Ala. App.), 78 So. 463.

In a larceny trial a proper predicate for the admission of defendant's confession held laid where a witness thereto before

testifying said that no one had threatened defendant nor promised nor made inducements. *Bufford v. State*, 14 Ala. App. 69, 71 So. 614.

No express foundation need be laid for a murder confession, where its language and the surrounding circumstances show it was not influenced by fear or hope. *Patton v. State*, 197 Ala. 180, 72 So. 401.

Predicate laid to introduce confession of accused, failing to predicate an absence of threats, was sufficient where the circumstances showed the confession was voluntary. *Walling v. State* (Ala. App.), 73 So. 216, certiorari denied in *Ex parte Walling* (Ala.), 73 So. 1003.

Right of Accused to Introduce Evidence. — Accused is entitled, before a confession is received, to rebut evidence that it was voluntary, and in determining its competency the court should consider his evidence, and it is reversible error to refuse the right to show it was involuntary. *Cook v. State* (Ala. App.), 78 So. 306.

§ 350. Determination of Question of Admissibility.

As to necessity of laying predicate for admission, see ante, "Admissibility in General," § 339.

Time of Determining Admissibility. — Before permitting a confession to be shown, the court should ascertain that it is voluntary. *Cook v. State* (Ala. App.), 78 So. 306.

§ 351. Corroboration.

§ 352. — In General.

See post, "Use of Evidence Obtained by Means of Confession," § 354.

Corroboration of Confession by Inculpating Facts. — Where an involuntary confession or inculpatory admission in the nature thereof leads to the discovery of physical facts which establish the truth of the confession, so much of the confession as relates to the fact thus discovered is admissible. *Whitehead v. State* (Ala. App.), 78 So. 467.

§ 353. — Corpus Delicti.

As to weight and sufficiency of evidence, see post, "Corpus Delicti," § 373.

Sufficiency of Proof of. — In a prosecution for violation of Laws 1909 (Sp.

Sess.) p. 91, § 31, evidence held sufficient to justify admission of the defendant's confession that the liquor did not belong to him. *Bush v. State*, 12 Ala. App. 260, 67 So. 847.

§ 354. Use of Evidence Obtained by Means of Confession.

Where an involuntary confession or inculpatory admission in the nature thereof leads to the discovery of physical facts which establish the truth of the confession, proof of these facts is admissible. *Whitehead v. State* (Ala. App.), 78 So. 467.

§ 355. Effect.

Weight and Effect. — *Williams v. State*, 8 Ala. App. 394, 62 So. 371. See the title CRIMINAL LAW, § 355, vol. 4, p. 249.

(L) EVIDENCE AT PRELIMINARY EXAMINATION OR AT FORMER TRIAL.

As to constitutional right of accused to confront witnesses, see post, "Testimony at Preliminary Examination, Former Trial, or in Other Proceedings," § 432 (6).

§ 357. Grounds for Admission of Former Testimony.

§ 358. — In General.

Testimony of a witness in a criminal case may be proved on a subsequent trial, where the witness is dead or insane, or is beyond the jurisdiction of the state. *Brown v. State*, 11 Ala. App. 321, 66 So. 829.

§ 359. — Death or Disability of Witnesses.

The Rule. — Testimony of a witness on a former trial is admissible on a subsequent trial, where the witness is dead. *Bone v. State*, 13 Ala. App. 5, 68 So. 702.

Marriage of Witness to Accused. — Where accused married, before his trial, one who had testified in his behalf at the preliminary hearing, he can not at the trial offer the testimony given by her at the preliminary hearing. *Langham v. State*, 12 Ala. App. 46, 68 So. 504.

§ 360. — Absence of Witness.

§ 360 (1) Admissibility in General.

Witness beyond Jurisdiction—Diligent Search. — If witness, who has been ex-

amined in criminal case, is not subsequently, after diligent search, found within jurisdiction of court, it is admissible to prove testimony he formerly gave. *Hardaman v. State* (Ala. App.), 78 So. 324.

Same—Failure of Sheriff to Find.—Testimony of witnesses in a criminal case held provable in a subsequent trial, on the state proving that they had left the state and could not be found by the sheriff. *Brown v. State*, 11 Ala. App. 321, 66 So. 829.

Same—Identified Stenographic Report.—The testimony of a witness taken down at the preliminary trial by a stenographer and identified as the testimony of the witness by the stenographer may be read on the trial, where the witness is beyond the jurisdiction of the court at the time. *Francis v. State*, 188 Ala. 39, 65 So. 969.

§ 360 (2) Sufficiency of Predicate to Authorize Admission of Evidence.

Absence Sufficiently Established.—Where it was shown that a witness had permanently removed from the state for an indefinite time, his testimony on a former trial of defendant for the same offense may be put in evidence against defendant. *Phillips v. State*, 11 Ala. App. 15, 65 So. 444.

In a prosecution for homicide, evidence held sufficient to show that a witness could not be found by the exercise of due diligence so as to permit the introduction of his testimony given at a previous trial. *Pope v. State*, 183 Ala. 61, 63 So. 71.

In prosecution for murder, testimony that absent former witness declared his intention to join United States army, to be sent to Georgia, held admissible as predicate for admission of former testimony. *Hardaman v. State* (Ala. App.), 78 So. 324.

Inability to find a witness in order to produce him at a criminal trial is a sufficient foundation for the admission of his testimony at a former trial, even though it is not affirmatively shown that he is dead, insane, or beyond the jurisdiction of the court. *Pope v. State*, 183 Ala. 61, 63 So. 71.

Where Reasonable Diligence Not Shown.—In a criminal prosecution, evidence held to show that one witness could not be found, but that reasonable diligence was not exercised to find another witness, so that the former testimony of the first was properly admitted, but not such testimony of the second. *Harwell v. State*, 12 Ala. App. 265, 68 So. 500.

Necessity of Issuing Subpoenas to Other Counties.—Where there is no evidence that a witness had ever resided or stopped in any other county than that of the prosecution, or that a subpoena to any other county would be of any avail in procuring his attendance, due diligence does not require the issuance of subpoenas to other counties. *Pope v. State*, 183 Ala. 61, 63 So. 71.

Reversibility for Admitting Incompetent Evidence to Establish Predicate.—Predicate for admitting former testimony of absent witness in criminal case must be shown by competent evidence; but if, in hearing this question, there was incompetent evidence introduced, action of court in admitting such evidence does not authorize reversal. *Hardaman v. State* (Ala. App.), 78 So. 324.

§ 361. — Opportunity for Cross-Examination.

It was proper to admit the former testimony of an absent witness in which the cross-examination had been erroneously restricted, where the facts excluded were fully shown by another witness. *Harwell v. State*, 12 Ala. App. 265, 68 So. 500.

§ 362. Evidence for or against Codefendants.

An objection to a question by counsel for one of several jointly indicted as to what a codefendant had admitted on preliminary trial was properly sustained, where the codefendant was present in court and had not yet testified. *Boswell v. State*, 9 Ala. App. 23, 64 So. 188.

§ 364. Method of Proof.

§ 364 (1) In General.

Introduction of Part of Former Testimony.—*West v. State*, 7 Ala. App. 145, 62 So. 290. See the title CRIMINAL LAW, § 364 (1), vol. 4, p. 254.

Proof of Substance of Former Testimony.—*Descrippo v. State*, 8 Ala. App. 85, 62 So. 1004. See the title CRIMINAL LAW, § 364 (1), vol. 4, p. 254.

§ 364 (3) Authentication and Sufficiency of Notes and Transcript of Testimony.

Stenographer's Transcript. — *Godau v. State*, 179 Ala. 27, 60 So. 908. See the title CRIMINAL LAW, § 364 (3), vol. 4, p. 256.

(M) WEIGHT AND SUFFICIENCY.

As to weight and effect of character of accused, see ante, "Weight and Effect of Evidence," § 231. As to sufficiency of corroboration of accomplices, see ante, "Sufficiency," § 337. As to instructions on weight and sufficiency of evidence, see post, "Determination of Sufficiency of Evidence in General," § 530. As to instructions invading province of jury to determine, see post, "Weight and Sufficiency of Evidence," § 514. As to weight and sufficiency of evidence on plea of former jeopardy, see ante, "Evidence," § 170. As to sufficiency of preliminary evidence to establish conspiracy, see ante, "Weight and Sufficiency," § 269 (4).

§ 364½. Weight and Conclusiveness in General.

Question for Court.—The credibility of the witnesses and the weight of the testimony are for the trial court. *Wright v. State*, 9 Ala. App. 79, 64 So. 173.

Finding by Court. — A finding by the trial court sitting without a jury held supported by the testimony. *Wright v. State*, 9 Ala. App. 79, 64 So. 173.

If there is a probability of defendant's innocence, he should not be found guilty. *Ware v. State*, 12 Ala. App. 101, 67 So. 763.

§ 365. Circumstantial Evidence.

As to circumstantial evidence on proof of corpus delicti, see post, "Corpus Delicti," § 373. As to instructions on circumstantial evidence, see post, "Circumstantial Evidence," § 532. As to circumstantial evidence on venue of prosecution, see post, "Circumstantial Evidence," § 374 (3).

§ 365 (1) In General.

Corpus Delicti—Sufficiency for Jury.—The corpus delicti may be established by circumstantial evidence; its sufficiency being for the jury. *Pappenburg v. State*, 10 Ala. App. 224, 65 So. 418.

A conspiracy to engage in an unlawful undertaking or enterprise, like any other material fact, may be shown by circumstantial evidence. *Whitehead v. State* (Ala. App.), 78 So. 467.

§ 365 (2) Sufficiency to Sustain Conviction.

Necessity of Convincing beyond Reasonable Doubt.—Circumstantial, like positive, evidence, need only be strong enough to convince beyond all reasonable doubt. *Nail v. State*, 12 Ala. App. 64, 67 So. 752.

Necessity of Being Inconsistent with Hypothesis of Innocence.—Circumstantial evidence, to justify a conviction, must not only be consistent with the hypothesis of guilt, but inconsistent with that of innocence. *Perry v. State*, 11 Ala. App. 195, 65 So. 683.

§ 365 (3¼) Degree of Proof.

Inconsistent with Any Reasonable Theory of Innocence. — Circumstantial evidence justifies a conviction only when it is inconsistent with any reasonable theory of innocence. *Newell v. State* (Ala. App.), 75 So. 625.

To warrant conviction on circumstantial evidence, it should exclude every other reasonable hypothesis than that of defendant's guilt. *Machen v. State* (Ala. App.), 76 So. 407.

§ 366. Credibility of Witnesses in General.

As to instructions, see post, "Credibility of Witnesses," § 533.

Question for Jury.—The credibility of a witness testifying in a criminal prosecution is a question for the jury, not for the appellate court. *Addington v. State* (Ala. App.), 74 So. 846.

Where Witness Somewhat Intoxicated.—*Smith v. State*, 183 Ala. 10, 63 So. 864. See the title CRIMINAL LAW, § 366, vol. 4, p. 257.

Testimony of Convicts.—Though the testimony of convicts is not regarded as

very reliable, yet such testimony, when uncorroborated, will authorize and sustain a conviction for a crime of the highest magnitude. *Johnson v. State*, 183 Ala. 79, 63 So. 163.

Testimony of an eyewitness to a crime is not to be excluded because not absolutely definite or positive. *Trailer v. State*, 8 Ala. App. 217, 63 So. 37.

§ 367. Testimony or Statement of Accused.

In weighing defendant's testimony, the jury can consider the fact that he is not a disinterested witness. *Bush v. State*, 12 Ala. App. 260, 67 So. 847.

§ 370. Degree of Proof in General.

As to instructions determining degree of proof in general, see post, "Degree of Proof in General," § 530 (9).

Possibility of Innocence.—In murder trial, jury should convict if satisfied of accused's guilt beyond reasonable doubt, although it is possible that he is not guilty. *Cain v. State* (Ala. App.), 77 So. 453.

Preponderance of Evidence.—The jury is not bound to convict on the mere preponderance of the evidence. *Adams v. State*, 9 Ala. App. 89, 64 So. 371, certiorari denied in *Ex parte Adams*, 187 Ala. 10, 65 So. 514.

Positive Proof Not Necessary. — *Givens v. State*, 8 Ala. App. 122, 62 So. 1020. See the title CRIMINAL LAW, § 370, vol. 4, p. 258.

Malice — Necessity of Absolute, Unqualified Belief.—To justify a conviction, the jury need not have an absolute, unqualified belief of defendant's malice, but only a belief beyond a reasonable doubt. *McConnell v. State*, 13 Ala. App. 79, 69 So. 333.

§ 371. Reasonable Doubt.

See post, "Reasonable Doubt," § 537.

As to reasonable doubt on proof of corpus delicti, see post, "Corpus Delicti," § 373. As to removal of reasonable doubt by circumstantial evidence, see ante, "Circumstantial Evidence," § 365. As to instructions on reasonable doubt, see post, "Reasonable Doubt," § 537. As to doubt of individual juror, see post, "In General," § 543 (1).

The state is not bound to establish accused's guilt absolutely, but only to prove it beyond a reasonable doubt. *Smith v. State*, 13 Ala. App. 313, 69 So. 350; *Fortner v. State*, 12 Ala. App. 179, 67 So. 720; *Bush v. State*, 12 Ala. App. 260, 67 So. 847; *McGhee v. State*, 178 Ala. 4, 59 So. 573.

It is not any doubt, but a reasonable doubt, that authorizes acquittal. *Ross v. State* (Ala. App.), 78 So. 309.

A reasonable doubt not arising from the evidence or not existing in the face of the whole evidence is not a proper predicate for an acquittal. *Jones v. State* (Ala. App.), 74 So. 843, certiorari denied in 75 So. 1003.

Probability of Innocence.—Reasonable doubt of defendant's guilt is not the same as a probability of his innocence, since there may be a reasonable doubt of guilt, though a probability of innocence is not shown by a preponderance of the evidence in his favor. *Harris v. State*, 8 Ala. App. 33, 62 So. 477.

Where the jury from all the evidence believes beyond a reasonable doubt that defendant is guilty, they must convict, though they may also believe it possible that he is not guilty. *Hooten v. State*, 9 Ala. App. 9, 64 So. 200.

The probability of innocence which will justify an acquittal must be a reasonable probability arising involuntarily out of the evidence, on the jury's consideration of the whole evidence. *Buckhanon v. State*, 12 Ala. App. 36, 67 So. 718.

Necessity of Excluding Every Hypothesis Except Guilt. — To authorize a conviction in a criminal case, it is not necessary that the evidence exclude every hypothesis except defendant's guilt, but it is sufficient if it show him guilty beyond a reasonable doubt. *Phillips v. State*, 11 Ala. App. 15, 65 So. 444.

Conduct Reasonably Consistent with Innocence. — If conduct of defendant, upon reasonable hypothesis, is consistent with his innocence, jury must acquit. *Wilson v. State*, 14 Ala. App. 87, 71 So. 971.

Doubt as to Statement of One Witness.—The existence of a doubt as to

the truth of a statement as to a material fact testified to by any one of the state's witnesses will not prevent a conviction if, upon a consideration of all the evidence, the jury are convinced beyond a reasonable doubt. *Hubbard v. State*, 10 Ala. App. 47, 64 So. 633.

Single Fact Inconsistent with Guilt.—Where a single fact is proved to the satisfaction of the jury which is inconsistent with defendant's guilt, it is sufficient to raise a reasonable doubt, and to require an acquittal. *Hubbard v. State*, 10 Ala. App. 47, 64 So. 633.

Necessity of Doubt Arising from the Evidence.—A reasonable doubt to prevent a conviction, must arise out of the evidence after a consideration thereof. *Collins v. State*, 14 Ala. App. 54, 70 So. 995.

Necessity of Considering All the Evidence.—An acquittal on a doubt arising out of any part of the evidence is authorized only if such doubt exists after a consideration of all the evidence. *Smith v. State*, 197 Ala. 193, 72 So. 316.

Unless the jury, after having considered all the evidence and giving the weight they think it entitled to receive, have an actual substantial doubt that defendant is guilty as charged, they should convict. *Lane v. State*, 14 Ala. App. 40, 70 So. 982.

If, after considering all evidence, the jury does not believe beyond a reasonable doubt that defendant is guilty, they should acquit. *Quinn v. State* (Ala. App.), 74 So. 743.

Doubt of Individual Juror.—An acquittal can not be predicated upon the reasonable doubt of defendant's guilt by one juror. *Quinn v. State* (Ala. App.), 74 So. 743.

Propriety of Instruction.—An instruction that, if the jury had no reasonable doubt of defendant's guilt, although they might believe it possible that he was not guilty, he should be convicted is correct. *Lovett v. State*, 10 Ala. App. 72, 64 So. 643.

§ 372. Sufficiency to Support Conviction in General.

Necessity of Clear, Full and Conclusive Proof.—*McClain v. State*, 182 Ala.

67, 62 So. 241. See the title CRIMINAL LAW, § 372, vol. 4, p. 259.

§ 373. Corpus Delicti.

Circumstantial Evidence.—Corpus delicti may be proven by facts and circumstances from which jury might legally infer that offense has been committed. *McWhorter v. State* (Ala. App.), 76 So. 325.

Same—Question for Jury.—The corpus delicti may be established by circumstantial evidence; its sufficiency being for the jury. *Pappenburg v. State*, 10 Ala. App. 224, 65 So. 418, certiorari denied in *Ex parte Pappenburg*, 188 Ala. 3, 66 So. 32.

Same—Necessity for Positive Evidence.—The corpus delicti may be proven by circumstances from which the jury might reasonably infer that the offense has been committed, and positive evidence is unnecessary. *Truett v. State*, 10 Ala. App. 108, 64 So. 529 (a prosecution for petit larceny), cited in note in *L. R. A.* 1916B, 846.

§ 374. Place of Commission of Offense and Venue.

§ 374 (1) In General.

Sufficiency of Proof.—*McGhee v. State*, 178 Ala. 4, 59 So. 573. See the title CRIMINAL LAW, § 374 (1), vol. 4, p. 260.

In a prosecution for forgery of an injunction bond, evidence that the defendant lived in the county at the time of the execution of the bond, and that all the transactions in connection therewith were in the county was a sufficient showing of venue. *Everage v. State*, 14 Ala. App. 106, 71 So. 983.

Failure of Proof.—Under Const. 1901, § 143, as to criminal jurisdiction of circuit courts, § 6, and Code 1907, §§ 6694 and 7225, fixing place at which crimes must be tried, and § 7140, dispensing with necessity of allegation of venue, failure on the trial to prove that offense was committed within territorial limitations, as if there was precise averment of it, is fatal if the failure is taken advantage of in proper and timely manner. *King v. State* (Ala. App.), 77 So. 935.

§ 374 (3) Circumstantial Evidence.

In a murder case, it is not necessary to prove venue in express terms by direct testimony; but it may be proven, as any other fact, by circumstances from which the inference may be drawn by the jury. *Pounds v. State* (Ala. App.), 73 So. 127.

§ 374 (4) Crime Committed in Well-Known or Public Locality.

Crime Committed a Few Miles from Courthouse.—*Marberry v. State*, 7 Ala. App. 58, 60 So. 949. See the title CRIMINAL LAW, § 374 (4), vol. 4, p. 260.

Within a Mile and a Quarter of County Seat.—Where the evidence showed that a homicide occurred within a mile and a quarter of Vernon the county seat of Lamar county, the jury could find that the offense was committed in that county. *Rector v. State*, 11 Ala. App. 333, 66 So. 857.

§ 375. Time of Commission of Offense and Limitations.

In a prosecution for shooting a firearm across a public road, evidence held insufficient to show that the offense was committed within 12 months prior to the finding of the indictment. *Holley v. State*, 9 Ala. App. 33, 63 So. 738.

§ 376½. Corporate Existence and Incidents Thereof.

Burden of proving existence of corporation named in indictment, cast on the state by plea under Code 1907, § 6876, held not sustained by proof of ineffective attempt to change name of existing corporation, by giving it the name used in indictment, followed by doing business under that name. *Speaker v. State* (Ala. App.), 75 So. 178.

§ 377½. Elements of Offense in General.

The law does not require the prosecution to prove motive for a crime, and proof that the accused committed the criminal act furnishes all the evidence of motive that the law requires; so that a failure to prove motive raises no presumption in favor of defendant. *Jones v. State*, 13 Ala. App. 10, 68 So. 690.

XI. TIME OF TRIAL AND CONTINUANCE.

As to adjournment pending trial, see

post, "Adjournments Pending Trial," § 422.

§ 382. Time for Trial.

Though defendant did not demand trial by jury, court was not without authority to try her during week of term designated for trial of jury cases. *Doulin v. State* (Ala. App.), 74 So. 86.

§ 384. Time for Preparation of Defense.

That defendant was indicted on the night following his arrest on the afternoon of the murder and was arraigned and required to plead a few minutes after the indictment was found, and was placed on trial within 48 hours thereafter, held not to require a reversal. *Morris v. State*, 193 Ala. 1, 68 So. 1003.

§ 387. Discretion of Court.

As to granting continuance for absence of witnesses being within the court's discretion, see post, "In General," § 391 (1).

Continuance.—The granting or refusal of a continuance rests in the discretion of the trial court, and will not be disturbed unless grossly abused. *Curtis v. State*, 9 Ala. App. 36, 63 So. 745; *Brand v. State*, 13 Ala. App. 390, 69 So. 379.

Same — Absence of Witnesses and Other Reasons.—Application for continuance for absence of witnesses, accused's physical condition, and failure to arraign him in time to enable the sheriff to summon jurors, is addressed to the discretion of the court, and its ruling will not be disturbed, in the absence of abuse of discretion. *Richardson v. State*, 191 Ala. 21, 68 So. 57.

§ 388. Grounds for Continuance.**§ 389. — In General.**

Objections to Jury.—Under § 32 of the jury law, variance in name of venireman, as noted in copy served on defendant, in absence of proof to contrary, held, presumed a mistake, and no ground for continuance. *Read v. State*, 195 Ala. 671, 71 So. 96.

Under Acts 1909, p. 312, § 17, a continuance on the ground that some of the jurors drawn were not served held properly denied. *Richardson v. State*, 191 Ala. 21, 68 So. 57.

Refusal of continuance, asked because the jurors had heard all the evidence in a previous case against defendant, held not an abuse of discretion. *Brown v. Tuscaloosa*, 12 Ala. App. 608, 67 So. 780.

Physical Condition of Accused. —

Where defendant moved for a continuance because of her sickness accompanied by a physician's statement that, though he was unable to find any specific disease, she should not be required to be in court, and the court passed the case for two days, and then on defendant's nonappearance directed an examination by the county physician, who reported that she might be put on trial without injury to her health, there was no impropriety in denying the continuance. *Bryant v. State*, 185 Ala. 8, 64 So. 333.

§ 390. — Want of Preparation.

As to time for preparation of defense, see ante, "Time for Preparation of Defense," § 384.

Where accused, after the quashing of an indictment on his own motion, was held awaiting a new indictment, found more than a month later, and his case was set for trial eight days after the finding of the indictment, a continuance on the ground that he was without an attorney and had not had time to prepare his defense held properly denied. *Curtis v. State*, 9 Ala. App. 36, 63 So. 745.

§ 391. — Absence of Witness or Evidence in General.

§ 391 (1) In General.

Discretion of Court.—*Sanders v. State*, 181 Ala. 35, 61 So. 336. See the title CRIMINAL LAW, § 391 (1), vol. 4, p. 268.

§ 391 (2) Witness Residing beyond Jurisdiction of Court.

Accused is entitled to a continuance on the ground of absence of witnesses only when the witnesses are within the court's jurisdiction. *Curtis v. State*, 9 Ala. App. 36, 63 So. 745.

§ 391½. — Competency or Materiality of Expected Evidence.

Necessity of Showing.—Denial of a continuance for absence of witnesses

who resided in another county was not error, in the absence of a showing that the testimony expected of them was material and competent. *Ragland v. State*, 187 Ala. 5, 65 So. 776.

Refusing defendant's motion for continuance, or postponement of trial, that he might have witnesses brought in by attachment, was not error, he in no way having indicated to the court that he expected to elicit any material testimony from either witness. *Malone v. State*, 10 Ala. App. 178, 64 So. 632.

§ 396. Admission to Prevent Continuance.

Propriety of Striking Immaterial Statement from Showing.—A statement is properly stricken from a showing made by defendant for an absent witness; the fact recited therein being immaterial to any issue in the case. *Hale v. State*, 10 Ala. App. 22, 64 So. 530.

Right of Accused to Change Admitted Showing.—Without the consent of the state's solicitor, accused can not change the showing for an absent witness as originally agreed to and admitted by the state. *Autrey v. State*, 190 Ala. 10, 67 So. 237.

There is no abuse of discretion in refusing continuance for absence of witnesses, there being no motion or request for compulsory process to require their attendance, and the state admitting the prepared statements of defendant as to what the witnesses would testify, if present. *Watts v. State*, 8 Ala. App. 264, 63 So. 18.

§ 397. Application and Affidavits for Continuance.

Hearing. — While witnesses attached may, under Const., § 16, give bail for their appearance, refusal of the court to hear accused's offered showing for a continuance as to what such absent witnesses would testify was a denial of his right under § 6 to be heard. *Brand v. State*, 13 Ala. App. 390, 69 So. 379.

§ 400½. Second or Further Continuance.

Refusal to grant a second continuance until a witness could be served held not error. *Wells v. State* (Ala. App.), 75 So. 176.

XII. TRIAL.

As to summary trial and conviction, see ante, "Summary Trial and Conviction," § 135. As to trial and determination on plea of former jeopardy, see ante, "Trial and Determination," § 171.

(A) PRELIMINARY PROCEEDINGS.

As to necessity of objections for purpose of review, see post, "Proceedings at Trial in General," § 682. As to necessity of exceptions to rulings for purpose of review, see post, "Review of Proceedings at Trial in General," § 695. As to matters to be shown by record on appeal, see post, "Proceedings at Trial in General," § 708 (10). As to review of questions as dependent on presentation of same by record, see post, "Preliminary Proceedings," § 727. As to harmless error on preliminary proceedings, see post, "Preliminary Proceedings," § 722.

§ 404. Separate Trial of Codefendants.

§ 404 (1) Authority and Right to Require Severance Generally.

Inherent Right to Demand Joint Trial.—One indicted jointly with another has no inherent right to demand a joint trial. *Palmer v. State* (Ala. App.), 73 So. 139, certiorari denied in 73 So. 1001.

Same—And under Code 1907, § 7842.—There is no error in allowing a motion by the state for severance of codefendants, a defendant having no inherent right to demand a joint trial, nor under Code 1907, § 7842, which only gives a codefendant the right to demand a separate trial. *Felder v. State*, 9 Ala. App. 48, 64 So. 162.

Same—Court's Discretion as to Joint or Several Trial.—Code 1907, § 7842, as to trial of two defendants jointly indicted, confers on such a defendant no right to demand that the trial be joint, and if there is no demand for separate trial, it is within the discretion of the court whether the trial be joint or several. *Palmer v. State* (Ala. App.), 73 So. 139, certiorari denied in 73 So. 1001.

One Severance Allowed—Further Motion for Severance.—Where one severance of a number of codefendants has been allowed any further motion for

severance is addressed to the discretion of the court. *Felder v. State*, 9 Ala. App. 48, 64 So. 162.

§ 404 (4) Waiver of Right.

Where accused, indicted jointly with another for a capital offense, did not demand a severance, the right to have a joint or several trial was waived. *Palmer v. State* (Ala. App.), 73 So. 139, certiorari denied in 73 So. 1001.

§ 406. Separate Trial of Issue of Insanity.

The trial court has a discretion under Code 1907, § 7178, as to granting defendant's motion to execute an inquisition as to his sanity at the time of the trial. *Granberry v. State*, 184 Ala. 5, 63 So. 975.

§ 407. Service of Copy of Indictment, Information, or Minutes of Evidence.

§ 407 (4) Time for Service.

Service of New Indictment Afternoon before Trial.—Where, after vacation of service of a copy of the indictment, the court ordered service of a new copy forthwith, but service was not made until seven days after in the afternoon, and defendant was required to go to trial the next morning, the service was void. *Smiley v. State*, 11 Ala. App. 67, 65 So. 916.

Service Four Days before Trial.—*Swain v. State*, 8 Ala. App. 26, 62 So. 446. See the title CRIMINAL LAW, § 407 (4), vol. 4, p. 275.

§ 407 (5) Sufficiency of Copy.

Clerical Errors Not Prejudicing Accused.—*Story v. State*, 178 Ala. 98, 59 So. 480. See the title CRIMINAL LAW, § 407 (5), vol. 4, p. 275.

Conclusiveness of Sheriff's Return.—*Swain v. State*, 8 Ala. App. 26, 62 So. 446. See the title CRIMINAL LAW, § 407 (5), vol. 4, p. 275.

§ 410. Service of List of Jurors.

§ 410 (1/2) In General.

Sufficiency of Sheriff's Return of Service.—The sheriff's return of service of the list of jurors on defendant held to sufficiently show that the jurors had been summoned. *Cunningham v. State*, 14 Ala. App. 1, 69 So. 982.

Where there is nothing in the record

to contradict the return of the sheriff as to his service of the list of jurors, which is an official act, the return *prima facie* imports verity as to the facts stated therein. *Cunningham v. State*, 14 Ala. App. 1, 69 So. 982.

Accused's Right to Definite Order Fixing Number of Jurors.—Under Acts Sp. Sess. 1909, p. 319, § 32, as to summoning and service of list of jurors in capital case, accused is entitled to definite order fixing number of jurors constituting venire for his trial, consisting of names specially drawn by the court and the regular jurors drawn and summoned for the week in which the trial is to occur. *Cain v. State* (Ala. App.), 77 So. 453.

§ 410 (1) Necessity to Serve.

The provision of Jury Act (Acts 1909, p. 305), which requires that the list of jurors summoned for the trial shall be served on accused charged with a capital felony, is mandatory, notwithstanding § 29. *Ziniman v. State*, 186 Ala. 9, 65 So. 56.

§ 410 (4) Time of Service.

Sufficiency of Service Five Days before Trial.—Under Acts 1909 (Sp. Sess.) p. 317, § 32, providing for the summoning of a jury on indictment for capital felony on the first day of the term or as soon as practicable and for service of the list on the defendant, where a former act required service one day before the trial, service in five days was a compliance with the statute. *Daniel v. State*, 14 Ala. App. 63, 71 So. 79.

Sufficiency of Service Four Days before Trial.—*Swain v. State*, 8 Ala. App. 26, 62 So. 446.

§ 410 (5) Sufficiency of List in General.

Only Initials of Veniremen Appearing on List.—Under Acts 1909, p. 317, § 29, the fact that only the initials of the veniremen appeared on the list served on accused did not require that the venire be quashed. *Morris v. State*, 193 Ala. 1, 68 So. 1003.

Necessity of List Including Jurors Drawn and Summoned.—*Bone v. State*, 8 Ala. App. 59, 62 So. 455. See the title CRIMINAL LAW, § 410 (5), vol. 4, p. 277.

§ 410 (6) Venireman Excused or Not Summoned.

List Omitting Jurors Drawn but Excused.—Under Acts Sp. Sess. 1909, p. 319, § 32, as to service of list of jurors in capital case, a list was defective in omitting jurors originally drawn but excused. *Cain v. State* (Ala. App.), 77 So. 453.

That one of jurors drawn was not on list served on defendant was not sufficient ground for quashing venire, where record showed that such juror was not summoned. *Norris v. State* (Ala. App.), 75 So. 718.

§ 410 (11) Objections and Waiver Thereof.

Necessity of Objecting before Announcing Readiness for Trial.—*Gaston v. State*, 179 Ala. 1, 60 So. 805. See the title CRIMINAL LAW, § 410 (11), vol. 4, p. 284.

(B) COURSE AND CONDUCT OF TRIAL IN GENERAL.

As to necessity of objections for purpose of review, see post, "Course and Conduct of Trial in General," § 682 (2). As to review of questions as dependent on presentation of same by record, see post, "Conduct of Trial in General," § 730. As to estoppel to allege error, see post, "Estoppel," § 745. As to review of question involving discretion of court, see post, "Conduct of Trial in General," § 758.

§ 415. Presence of Accused.

As to presence of accused in discharge of jury, see ante, "Consent or Fault of Accused," § 96.

On Reception of Evidence.—Where, after close of testimony and after argument and before rendition of judgment by court trying the case without a jury, in the absence and without knowledge of accused and his counsel, court called a state's witness and examined her further, and also had goods introduced by the state as evidence valued by person not a witness, such action invaded accused's constitutional right to a fair and open trial. *De Bardeleben v. State* (Ala. App.), 77 So. 979.

§ 417. Counsel for Prosecution.

Right to Accept Assistance from Practicing Attorneys.—Code 1907, § 7781, de-

fining the duties of solicitors for the state in criminal cases, does not prohibit them from accepting assistance, in their exclusive discretion, from duly licensed practicing attorneys. *Johnson v. State*, 13 Ala. App. 140, 69 So. 396.

Sufficiency of Record of Appointment of Substitute.—Record showing appointment of substitute prosecutor held sufficient. *Jones v. State* (Ala. App.), 75 So. 830.

Appointment of Substitute though Solicitor without Excuse for Absence.—*Newell v. State*, 8 Ala. App. 182, 62 So. 968, cited in notes in Ann. Cas. 1918A, 721; 47 L. R. A., N. S., 1109. See the title CRIMINAL LAW, § 417, vol. 4, p. 287.

Private Counsel.—It is immaterial that an attorney, aiding a solicitor in the prosecution of a criminal case, was employed by those interested in such prosecution. *Johnson v. State*, 13 Ala. App. 140, 69 So. 396.

§ 418. Counsel for Accused.

As to time of counsel to prepare defense, see ante, "Time for Preparation of Defense," § 384. As to want of time to prepare defense as ground for continuance, see ante, "Want of Preparation," § 390.

Necessity for Presence of Counsel.—It was error, after close of the trial, when the jury retired but returned for instructions, for the court to give them in the absence of defendant's attorney, who was allowed and who took exception. *McLain v. State* (Ala. App.), 72 So. 511.

Constitutionality of Rule of Court.—The rule that the action of the trial court in refusing to allow additional pleas, including a plea of not guilty by reason of insanity, to be filed after the time prescribed by law is not revisable on appeal held not to violate the defendant's right under Const. 1901, § 6, to be heard by himself and counsel, or either. *Rohn v. State*, 186 Ala. 5, 65 So. 42.

Authority to Appoint in Supreme Court.—*Campbell v. State*, 182 Ala. 18, 62 So. 57. See the title CRIMINAL LAW, § 418, vol. 4, p. 287.

§ 419. Appointment and Services of Stenographer.

Necessity of Record Showing Special Appointment and Qualification.—Where court makes use of another than official stenographer, record should show his special appointment, and that he qualified as required by law. *Dilburn v. State* (Ala. App.), 77 So. 983.

Stenographer from Office of Attorney Assisting Prosecution.—Though a stenographer, appointed during illness of the official stenographer, was from the office of an attorney assisting in the prosecution, yet, where the bill of exceptions was complete and correct, and nothing indicated that accused was injured by the substitution, the appointment was authorized under Acts 1909, p. 265, § 4. *Jennings v. State* (Ala. App.), 72 So. 690.

§ 422. Adjournments Pending Trial.

Refusal to Continue Trial until Following Day.—*Key v. State*, 8 Ala. App. 2, 62 So. 335. See the title CRIMINAL LAW, § 422, vol. 4, p. 288.

To Procure Witnesses.—Motion for postponement to allow defendant time to get witnesses is so largely in sound discretion of court that in the absence of abuse appellate court will not interfere. *Brown v. State* (Ala. App.), 75 So. 174.

Action of the court in suspending the trial to enable the state to produce witnesses is discretionary. *Stokes v. State*, 13 Ala. App. 294, 69 So. 303.

Discretion to Pass Case until Succeeding Day.—Where the order of the court in a homicide case fixed the date of trial, if the business of the court required it, it was within its discretion to pass the case until a succeeding day of the term. *Daniel v. State*, 14 Ala. App. 63, 71 So. 79.

§ 426. Remarks and Conduct of Judge.
As to withdrawal of remarks, see post, "Withdrawal of Instructions or Remarks," § 562.

§ 427. — In General.

§ 427 (1) In General.

Rebuking Defendant for Misconduct Towards Witness.—In prosecution for keeping unlawful drinking place, where defendant was smiling, making signs and faces at the witness, it was not error for

the court to tell him to quit looking at the witness and smiling. *Stramler v. State* (Ala. App.), 74 So. 727.

Statement before Jury of Reason for Calling Special Term.—In a prosecution for violating the prohibition law, statement of the judge at the special term in the presence of the jury as to the reason for calling such term held not an abuse of discretion. *Shiver v. State*, 13 Ala. App. 258, 69 So. 238.

Cautioning Counsel Not to Waste Time.—*Key v. State*, 8 Ala. App. 2, 62 So. 335. See the title CRIMINAL LAW, § 427 (1), vol. 4, p. 289.

§ 427 (2½) Remarks and Conduct on Giving Instructions.

Remarks of court, in reading special charges, in nature of explanation of charges, which did not qualify written charges given at request of defendant, were not erroneous. *Miller v. State* (Ala. App.), 75 So. 819.

§ 428. — Comments on Evidence or Witnesses.

§ 428 (2) Examination and Cross-Examination of Witnesses.

A statement by the judge concurring in the assertion of counsel for the state that a question had been asked six times, and his remark, after the reservation of exception, that the record would so show, does not show bias or prejudice. *Carmichael v. State*, 197 Ala. 185, 72 So. 405.

§ 428 (3) Remarks on Ruling on Admissibility of Evidence.

In a prosecution for violating the prohibition law, the remark of the court, after excluding evidence of gambling by the state's witnesses, that the jury was not trying defendant for gambling, was proper. *Studdard v. State*, 14 Ala. App. 33, 70 So. 978.

Remarks Not Destroying Force of Evidence.—*Jones v. State*, 181 Ala. 63, 61 So. 434. See the title CRIMINAL LAW, § 428 (3), vol. 4, p. 290.

§ 428 (5) Expressions Affecting Credibility of Witnesses.

Reprimand of a witness by the court for failure to answer a question held not erroneous as bearing upon such witness'

credibility. *Patterson v. State*, 191 Ala. 16, 87 So. 997, cited in note in L. R. A. 1917E, 860.

§ 428 (6) Expression of Opinion as to Facts in Issue.

Propriety of Remarks.—*Rigell v. State*, 8 Ala. App. 46, 62 So. 977. See the title CRIMINAL LAW, § 428 (6), vol. 4, p. 290.

Same—Distance of Hack from Sidewalk.—The statement of the presiding judge, made in response to objection to evidence, on a trial for the killing of a hack driver by a customer, as to the distance the hack was from the sidewalk at the time and place of the difficulty, that he thought it was a fact that, if a man was on the sidewalk and the hack was in the street, the man would have to step down to get to the hack was not prejudicial. *Clayton v. State*, 185 Ala. 13, 64 So. 76.

§ 430. Presence and Conduct of Bystanders.

In a prosecution for homicide, it is not an abuse of discretion for the lower court to permit deceased's wife and children to occupy prominent places in view of the jury. *Pollard v. State*, 12 Ala. App. 82, 68 So. 494.

§ 430½. Objections and Exceptions.

Accused can not complain as to who conducted the prosecution for the state. *Jones v. State* (Ala. App.), 75 So. 830.

(C) RECEPTION OF EVIDENCE.

As to review of questions as dependent on prejudicial nature of error, see post, "Rulings as to Evidence in General," § 775. As to exceptions for purpose of review, see post, "Review of Rulings on Evidence," § 696. As to review of questions as dependent on presentation of same by record, see post, "Admissibility of Evidence," § 731. As to review of questions involving discretion of court, see post, "Reception of Evidence," § 759. As to waiver and correction of irregularities, and error, see post, "Ruling as to Admissibility of Evidence," § 614.

§ 431. Necessity and Scope of Proof.

The fact that accused claimed to have

acted in self-defense would not preclude him from also showing that the offense was committed under circumstances reducing it to manslaughter. *Reeves v. State*, 186 Ala. 14, 65 So. 160.

§ 432. Right of Accused to Confront Witnesses.

§ 432 (1) In General.

Where, after close of testimony and after argument and before rendition of judgment by court trying the case without a jury, in the absence and without knowledge of accused and his counsel, court called a state's witness and examined her further, and also had goods introduced by the state as evidence valued by person not a witness, such action invaded accused's constitutional right to be confronted with witnesses. *De Bardeleben v. State* (Ala. App.), 77 So. 979.

§ 432 (4) Documentary or Record Evidence.

Const. art. 1, § 6, held not to apply to a public record declared by law to be evidence importing verity, since cross-examination has no application to such evidence. *Todd v. State*, 13 Ala. App. 301, 69 So. 325.

§ 432 (6) Testimony at Preliminary Examination, Former Trial, or in Other Proceedings.

Perjury — Transcript of Defendant's Testimony in Murder Trial.—Act Aug. 26, 1909 (Acts Sp. Sess. 1909, pp. 264, 266), §§ 3, 7, under which transcript of defendant's testimony in a murder trial was admitted in his prosecution for perjury committed in such trial, held not to infringe his right under Const. art. 1, § 6, to confront the witnesses against him. *Todd v. State*, 13 Ala. App. 301, 69 So. 325.

Same — Certified Transcript of Accused's Evidence on Former Trial.—In a prosecution for perjury, no constitutional right of accused was violated by admitting in evidence official stenographer's certified transcript of evidence given by accused on a former trial. *Kelsoe v. State* (Ala. App.), 73 So. 831.

§ 432½. Introduction of Documentary and Demonstrative Evidence.

It was not error to refuse to require

the state's counsel to turn over to defendant's counsel a slip of paper in his possession on which accused had written his name, but which was not offered in evidence. *Spicer v. State*, 188 Ala. 9, 65 So. 972.

§ 433. Separation and Exclusion of Witnesses.

As to review of discretion of court, see post, "Separation and Exclusion of Witnesses," § 759 (5).

§ 433 (1) Power and Duty of Court to Invoke Rule.

Permitting Solicitor to Talk to State's Witnesses Together.—It was within the discretion of the court to permit solicitor to talk to state's witnesses together before commencement of trial; such action being within the sound discretion of court. *Vaughan v. State* (Ala.), 78 So. 378.

Permitting State's Witness to Remain in Courtroom.—It was within the sound discretion of the court to permit a witness for the state to remain in the courtroom during the trial. *Brannon v. State* (Ala. App.), 76 So. 991.

§ 433 (3) Right to Except Certain Witnesses.

The court's permission to state's counsel to introduce a witness who had remained in courtroom after witness had been put under rule was not an abuse of discretion, where he was the second witness. *Ragsdale v. State*, 12 Ala. App. 1, 67 So. 783.

§ 433 (4½) Enforcement of Rule.

The trial court in its discretion may permit a witness put under the rule to testify, notwithstanding his disobedience of the rule, and the exercise of such discretion can not be reviewed. *Ward v. State* (Ala. App.), 72 So. 754; *Jones v. State* (Ala. App.), 74 So. 843, certiorari denied in 75 So. 1003.

§ 433 (5) Effect of Violation of Rule.

Whether a witness, who violated the rule, should be permitted to testify was within the discretion of the trial court. *Belk v. State*, 10 Ala. App. 70, 64 So. 515.

Where Violation Due to Defendant's Fault.—*Johnson v. State*, 8 Ala. App.

14, 62 So. 450. See the title CRIMINAL LAW, § 433 (5), vol. 4, p. 293.

§ 435. Taking Oral Testimony in General.

Where no predicate was laid for impeachment of a witness who had testified before the jury, held proper to refuse to allow the stenographic report of his testimony to be read. *Stokes v. State*, 13 Ala. App. 294, 69 So. 303.

§ 436. Statement by Accused.

As to weight and effect of statement, see ante, "Testimony or Statement of Accused," § 367.

Statutory Right to Testify — Bill of Rights.—*Jones v. State*, 181 Ala. 63, 61 So. 434. See the title CRIMINAL LAW, § 436, vol. 4, p. 295.

§ 437. Offer of Proof.

In General.—*Sellers v. State*, 7 Ala. App. 78, 61 So. 485. See the title CRIMINAL LAW, § 537, vol. 4, p. 295.

Necessity of Showing Relevancy.—To make erroneous the exclusion of evidence on its face irrelevant, its relevancy should be shown to the court. *McConnell v. State*, 13 Ala. App. 79, 69 So. 333.

Proper Admission of Question—Materiality Explained by Counsel.—In manslaughter case, it appearing that the killing occurred in a fight, and that deceased's brother was there a question, "Did you hear Roscoe (the brother) make any threats or say anything as he was going up there?" held proper, on explanation by counsel of materiality. *Tittle v. State* (Ala. App.), 73 So. 142.

Proper Exclusion of Question—Materiality Not Shown. — In manslaughter case, it appearing that the killing occurred in a fight, it was proper to sustain objection to question what deceased's brother said when he came up with a knife during the fight and made threat against accused, since the question did not apprise the court of the materiality of the answer expected, nor was the court apprised of this fact by counsel. *Tittle v. State* (Ala. App.), 73 So. 142.

Same—Too Indefinite.—Offer to show what "one said to the other" held too indefinite to render conversation be-

tween defendant and third person before the killing admissible. *Ingram v. State*, 13 Ala. App. 147, 69 So. 976.

Same—Question Too General.—A question put to accused by his counsel to state anything further he might have to state about the case was too general. *Scott v. State* (Ala. App.), 73 So. 212.

Same—Answer Not Shown to Be Responsive.—Error could not be predicated upon the exclusion of a question, where the proof offered by defendant's counsel as an answer would not have been responsive. *Welsh v. State*, 9 Ala. App. 4, 63 So. 685.

Same — Materiality Shown Subsequently.—There was no error in excluding testimony for defendant that deceased was in the habit of carrying a pistol, in the absence of an offer then to show that defendant knew of such habit, notwithstanding subsequent evidence thereof. *Glover v. State* (Ala.), 76 So. 300.

Same—Testimony Not Shown to Be Relevant.—In a prosecution for uxoricide, the court did not err in refusing to permit a witness to testify who occupied the room with decedent on the night that she slept in a certain place; the testimony not having been shown to be relevant. *Ragland v. State*, 187 Ala. 5, 65 So. 776.

A question by defendant's attorney to a state's witness as to whether she, and a witness for defendant, and a third party were not together one day, and if witness did not request the third party to go, as she had something to say to defendant's witness, was irrelevant, in the absence of anything connecting it with the case. *Beiser v. State*, 10 Ala. App. 86, 65 So. 312.

Erroneous Exclusion of Question — Counsel Not Permitted to State Expected Proof.—*Sellers v. State*, 7 Ala. App. 78, 61 So. 485. See the title CRIMINAL LAW, § 437, vol. 4, p. 295.

Purpose of Testimony.—*Descippo v. State*, 8 Ala. App. 85, 62 So. 1004. See the title CRIMINAL LAW, § 437, vol. 4, p. 295.

§ 439. Provisional or Conditional Admission.

Order of Proof. — *Minto v. State*, 8

Ala. App. 306, 62 So. 376. See the title CRIMINAL LAW, § 439, vol. 4, p. 296.

§ 440. Effect of Admission.

§ 440 (½) In General.

Objections to a preliminary inquiry to identify a paper and connect accused with it was properly overruled, though the testimony thus developed failed to connect defendant with the paper. *Moore v. State*, 12 Ala. App. 243, 67 So. 789.

§ 440 (1) Restriction to Special Purpose in General.

If issues on trial for perjury involve same issues litigated on trial in which perjury is alleged to have been committed, any evidence admissible in first trial is competent on trial for perjury, but where indictment for perjury relates to subordinate evidential matter, issue should be limited to such matter, and *res gestæ* of fact involved in issue. *Jordan v. State* (Ala. App.), 74 So. 864.

Duty of Court.—In prosecution for perjury by having sworn falsely in murder case, judgment in such case being admitted in evidence only to show trial of case, and not tending to show that defendant swore falsely, the court should so limit the use of the evidence. *Jordan v. State* (Ala. App.), 74 So. 864.

§ 440 (1½) Limiting Effect of Impeaching Evidence.

Bad Character.—Evidence of bad character of accused offered to impeach his testimony should be limited by the court to that purpose. *Mitchell v. State*, 14 Ala. App. 46, 70 So. 991.

Where accused had testified in his own behalf and produced witness as to his good character, it was not error, in absence of request, not to limit impeaching testimony to accused's impeachment as witness. *Norris v. State* (Ala. App.), 75 So. 718.

§ 441. Exclusion of Improper Evidence.

The question of admitting all the testimony of a witness, and then excluding it, is addressed largely to the sound discretion of the trial court. *Sherard v. State* (Ala. App.), 75 So. 721.

§ 443½. Number of Witnesses.

Although state had examined 13 wit-

nesses on character, and accused 8, exclusion of testimony of another character witness for defendant was not reversible error. *Norris v. State* (Ala. App.), 75 So. 718.

§ 445. Election between Acts.

See generally post, INDICTMENT AND INFORMATION.

§ 445 (1) Right to Compel Election.

Indictment charging but one offense, state can not be required to elect, unless evidence of more than one offense is offered. *Collier v. State* (Ala. App.), 78 So. 419.

Offense Consisting of Series of Acts.

—When the offense charged is one which may consist of a series of acts, but one offense has been committed, and no occasion for election arises. *Boice v. State*, 10 Ala. App. 100, 65 So. 83.

Attempt to Convict of Two or More Offenses.—Whenever an attempt is being made to convict the defendant of two or more offenses growing out of separate and distinct transactions, the court will grant a timely motion to require the state to elect or suffer quashal. *Herring v. State* (Ala. App.), 75 So. 646.

Assault with Glass Jug and a Stick.

In prosecution for assault with a weapon where the evidence showed that there was but one difficulty, and that accused was the aggressor, and that he struck the prosecuting witness with a glass jug and then with a stick, it was not error to refuse to require the state to elect as to which offense it would seek conviction; the affidavit charging assault both with the jug and the stick. *Wall v. State* (Ala. App.), 77 So. 977.

Joinder Curing Defect in Indictment.

—Where one count of an indictment contains allegations of more than one offense, and the joinder is intended in order to meet the different aspects in which the evidence may present a single transaction, the court will not interfere to require an election. *Herring v. State* (Ala. App.), 75 So. 646.

Embezzlement — Failure to Show When Money Converted.—Where evidence in embezzlement prosecution showed that immigration commissioner had cashed several checks within period

covered by indictment, but did not show exactly when money was converted, the state was not required to elect on which single item of evidence it would rely. *Cowart v. State* (Ala. App.), 75 So. 711.

Keeping of Intoxicating Liquors.

Where the state, in a prosecution for illegal keeping of intoxicants for sale, introduced evidence of a number of large shipments of intoxicants to accused, it can not be required to elect as to which shipment it would rely on for conviction. *Fletcher v. State*, 12 Ala. App. 216, 67 So. 631.

Same — Proof of Various Sales.

Where a count charges only a keeping for sale, the proving of various sales is proper to prove the offense charged, and there is no occasion for an election. *Barefield v. State*, 14 Ala. App. 638, 72 So. 293.

Sale of Intoxicating Liquors.—Where the indictment charged that defendant sold, offered for sale, kept for sale, or otherwise disposed of prohibited liquors, but the evidence showed only one transaction and one offense, there is no occasion for an election. *Rogers v. State* (Ala. App.), 73 So. 994.

Where under indictment charging illegal sale and offering for sale of intoxicating liquors both the sale and possession were proved as arising from a single transaction, it was not error to refuse to compel the state to elect. *Herring v. State* (Ala. App.), 75 So. 646.

Where there is only one count in an indictment for violation of the prohibition law, the state may be required to elect which transaction it will rely on for conviction, where witnesses testify to several sales of intoxicating liquors. *Joyner v. State* (Ala. App.), 77 So. 78.

Charges of Violations of Prohibition Laws in Alternative.—While, under Code 1907, § 7151, single count of an indictment may include various charges of violations of the prohibition laws in the alternative, defendant may on conclusion of the state's evidence require an election. *Brooms v. State* (Ala. App.), 72 So. 691, certiorari denied in *Ex parte State*, 197 Ala. 419, 73 So. 35.

Where an indictment count charges, in the alternative, the sale, keeping for

sale, or disposing of intoxicating liquors, the state may be required to elect on which charge it stands at the close of its testimony. *Barefield v. State*, 14 Ala. App. 638, 72 So. 293.

Several Offenses Charged in Alternative.—*Warrick v. State*, 8 Ala. App. 391, 62 So. 342. See the title CRIMINAL LAW, § 445 (1), vol. 4, p. 298.

Same — Demurrability.—Under Code 1907, § 7151, permitting an alternative averment of different offenses, an indictment containing alternative allegations is not demurrable, but when the evidence is all in and two or more offenses have been proved, the state will be required to elect. *Herring v. State* (Ala. App.), 75 So. 646.

Same — Only One Conviction under Count.—Under Code 1907, § 7151, providing that where offenses are of the same character and subject to the same punishment the defendant may be charged with either in the same count, in the alternative, only one conviction may be had under a count. *Barefield v. State*, 14 Ala. App. 638, 72 So. 293.

Under Laws 1909 (Sp. Sess.) p. 90, § 29½, allowing charges that defendant sold, kept for sale, etc., intoxicating liquors to be joined in the same count, in the alternative, and § 30, authorizing several counts and conviction under each, only one conviction may be had under a count. *Barefield v. State*, 14 Ala. App. 638, 72 So. 293.

Waiver of Election.—The right to compel an election under an indictment charging a liquor law violation may be waived. *Barefield v. State*, 14 Ala. App. 638, 72 So. 293.

§ 445 (2) What Constitutes Election.

Answer of Witness Not Constituting Election.—An answer by a witness for the state to a question whether he had ever bought whisky from the defendant, that he had sent his son to defendant's father's house, and the boy had got the whisky, does not constitute an election by the state to rely upon the sale to the boy for conviction, and the prosecuting attorney can by repetition of his question elicit testimony that the witness in person bought the whisky from

the defendant. *Slaten v. State*, 10 Ala. App. 185, 65 So. 85.

State Particularizing Specific Situation. — Where an indictment count charges a single offense and the state particularizes a specific situation in developing its case, it must stand upon that and can not later rely upon another state of facts for conviction. *Barefield v. State*, 14 Ala. App. 638, 72 So. 293.

Seduction—Specific Date Alleged—Admissibility of Subsequent Acts.—Where prosecutrix testified that she was seduced on a specific date, this constituted an election, and evidence of subsequent acts and promises should not have been admitted over objection. *Herbert v. State* (Ala.), 78 So. 386.

Right to Second Election.—*Warrick v. State*, 8 Ala. App. 391, 62 So. 342. See the title CRIMINAL LAW, § 445 (2), vol. 4, p. 298.

§ 446. Order of Proof In General.

As to order of proof of conspiracy and acts and declarations of conspirators, see ante, "Necessity in General," § 269 (1). As to review of discretion of courts, see post, "Order of Proof," § 759 (3).

Alleged admissions of defendant were not admissible before corpus delicti was proven, even if a proper predicate had been laid. *Wiley v. State* (Ala. App.), 75 So. 641.

§ 447. Admission of Evidence Dependent on Preliminary Proof.

As to offer of proof, see ante, "Offer of Proof," § 437. As to proof of conspiracy as preliminary to evidence of acts and declarations of co-conspirators, see ante, "Preliminary Evidence as to Conspiracy or Common Purpose," § 269. As to proof of facts confessed as predicate for admission of confession, see ante, "Admissibility in General," § 339. As to proof of voluntary character of confession as preliminary to introduction of confession in evidence, see ante, "Preliminary Evidence as to Voluntary Character," § 349½.

Evidence Properly Excluded. — In prosecution for murder, where purpose of state, in showing deceased had

secreted whisky about defendant's premises, was to show motive for killing, that defendant might keep whisky, court properly refused to permit defendant to go into explanation as to how whisky came into his possession. *Hardaman v. State* (Ala. App.), 78 So. 324.

Evidence Erroneously Admitted.—In a homicide case it was error to permit a state's witness, who did not see the difficulty, after stating that the place of the difficulty was pointed out to him by other witnesses, to testify as to certain tracks, as tending to show who was the aggressor, without first showing by the other witnesses, that the place they pointed out was to their knowledge the place of the difficulty. *Phillips v. State*, 11 Ala. App. 15, 65 So. 444.

No Overt Act Shown—Exclusion of Threats.—No evidence having been introduced that the deceased had committed any overt act, it was not error to exclude testimony as to whether witness had heard deceased make any threats of general character against accused. *Pip-pin v. State*, 197 Ala. 613, 73 So. 340.

§ 449. Scope of Evidence in Rebuttal.

As to evidence of defendant's good character, see ante, "Rebuttal of Evidence of Good Character," § 228. As to where one party introduces illegal evidence his adversary may rebut it by testimony of same character, see ante, "In General," § 243 (1).

In prosecution for murder for robbery of cattle, testimony that witnesses had tried to buy cattle from decedent, and he had refused, was not in rebuttal of defendant's witness disclaiming knowledge as to how decedent regarded his cattle. *Rikard v. State* (Ala. App.), 73 So. 992.

§ 450. Admission in Rebuttal of Evidence Proper in Chief.

On trial for murder, testimony of a physician as to the direction the pistol bullet followed on entering decedent's body was admissible as against the objection that it was brought out on rebuttal examination instead of on direct examination. *Clayton v. State*, 185 Ala. 1, 64 So. 76.

§ 451. Re-Opening Case for Further Evidence.

§ 452. — In General.

After Party Offering Evidence Has Rested.—*Savage v. State*, 8 Ala. App. 334, 62 So. 999, certiorari denied in Ex parte State, 184 Ala. 1, 63 So. 1006. See the title CRIMINAL LAW, § 452, vol. 4, p. 301.

§ 453. — After Close of Evidence.

It is within sound discretion of trial court whether it will allow defendant to examine witness after evidence has closed. *Flowers v. State* (Ala. App.), 73 So. 126.

(D) OBJECTIONS TO EVIDENCE, MOTIONS TO STRIKE OUT, AND EXCEPTIONS.

As to necessity for purpose of review, see post, "Evidence," § 683.

§ 458. Time for Objection.

Objections not made to questions until after the witness answered were too late. *Lawson v. State* (Ala. App.), 76 So. 411; *Rogers v. State* (Ala. App.), 75 So. 264; *Miller v. State* (Ala. App.), 74 So. 840; *Walling v. State* (Ala. App.), 73 So. 216, certiorari denied in Ex parte Walling (Ala.), 73 So. 1003; *Patton v. State*, 197 Ala. 180, 72 So. 401; *Inglis v. State*, 13 Ala. App. 184, 68 So. 583; *Bailey v. State*, 11 Ala. App. 8, 65 So. 422; *Gravett v. State*, 11 Ala. App. 211, 65 So. 850; *Tillis v. State*, 10 Ala. App. 16, 64 So. 527; *Smith v. State*, 183 Ala. 10, 62 So. 864; *Key v. State*, 8 Ala. App. 2, 62 So. 335; *Farlow v. State*, 7 Ala. App. 137, 61 So. 474.

Speculating on Testimony.—A party can not speculate on a favorable answer by not objecting to the question as to the good character of the assaulted party, and then move to exclude the answer responsive thereto. *McDaniel v. State*, 10 Ala. App. 79, 64 So. 641; *Robinson v. State*, 8 Ala. App. 435, 62 So. 372. See the title CRIMINAL LAW, § 458, vol. 4, p. 302.

Witness Volunteering Incompetent Testimony.—*Allen v. State*, 8 Ala. App. 228, 62 So. 971. See the title CRIMINAL LAW, § 458, vol. 4, p. 303.

Question Abandoned and Subsequently Asked without Objection. — Where a

question calling for a confession was apparently abandoned upon objection and after the confession's voluntary character was established, it was received without objection except one made after its admission, held its admissibility was not raised by timely objection. *Marvin v. State* (Ala. App.), 72 So. 588.

§ 460. Sufficiency and Scope of Objection.

§ 460 (2) General or Specific.

General Rule.—A general objection to evidence, no grounds being stated, was properly overruled. *Carroll v. State* (Ala. App.), 78 So. 717; *Carter v. State* (Ala. App.), 76 So. 468; *Malone v. State* (Ala. App.), 76 So. 469; *Hornsby v. State* (Ala. App.), 75 So. 637; *Patton v. State*, 197 Ala. 180, 72 So. 401; *Roden v. State*, 13 Ala. App. 105, 69 So. 366; *West v. State*, 7 Ala. App. 145, 62 So. 290.

Under Supreme Court Rule.—A general objection to a question asked a witness held, under Supreme Court Rule 33 (Code 1907, p. 1527), properly overruled. *Inglis v. State*, 13 Ala. App. 184, 68 So. 583.

Character.—Defendant's general objection to evidence of bad character was properly overruled. *Rowlan v. State*, 14 Ala. App. 17, 70 So. 953.

On general objection, where the character of defendant was in issue, character evidence will not be excluded because it related to a period subsequent to the offense. *Drinkard v. State*, 12 Ala. App. 184, 68 So. 553.

The transcript of defendant's previous testimony offered for impeachment held admissible, where only generally objected to; parts thereof being competent. *Patterson v. State*, 191 Ala. 16, 67 So. 997.

Where Evidence Illegal upon Its Face.—A general objection to a question will avail nothing unless the testimony sought to be elicited is patently illegal and irrelevant. *Thomas v. State*, 11 Ala. App. 85, 65 So. 863.

Confession by One of Joint Defendants.—In a prosecution of joint defendants, a confession by one, being admissible at least against that one, was properly admitted in evidence over a general

objection by one of the others. *Boswell v. State*, 9 Ala. App. 23, 64 So. 188.

Where a general objection was made to a mass of testimony, the admission of the testimony is not error, unless no part of it was admissible. *Gravett v. State*, 11 Ala. App. 211, 65 So. 850.

General Objection to Threats against Decedent by Joint Defendant.—*Harris v. State*, 177 Ala. 17, 59 So. 205. See the title CRIMINAL LAW, § 460 (2), vol. 4, p. 303.

Inference or Conclusion of Witness.—*West v. State*, 7 Ala. App. 145, 62 So. 290. See the title CRIMINAL LAW, § 460 (2), vol. 4, p. 303.

Opinion of Unqualified Witness.—Notwithstanding circuit and inferior court rule 33 (Civ. Code 1907, p. 1527), it is not error to exclude an opinion by an unqualified witness for the accused, though the state made only the general objection. *Tarrant v. State*, 12 Ala. App. 172, 67 So. 626, certiorari denied in *Ex parte Tarrant*, 191 Ala. 664, 67 So. 1018.

Opinion of Nonexpert.—*Key v. State*, 8 Ala. App. 2, 62 So. 335. See the title CRIMINAL LAW, § 460 (2), vol. 4, p. 303.

§ 460 (3) Statements of Grounds.

Assignment of Wrong Objection.—If the objection assigned to evidence was not well taken, the court can not be put in error for admitting the evidence, though it was subject to another objection. *Harwell v. State*, 12 Ala. App. 265, 68 So. 500.

Perjury — Presentation of Identity of Record of Indictment.—In prosecution for perjury, where objection to admission in evidence of record of indictment in case in which perjury was alleged to have been committed was general, no grounds being stated, question of identity of record was not presented. *Jordan v. State* (Ala. App.), 74 So. 864.

Admission of Affidavit, Warrant, and Return Together.—*Patterson v. State*, 8 Ala. App. 420, 62 So. 1023. See the title CRIMINAL LAW, § 460 (3), vol. 4, p. 304.

Dying Declaration—Objection Inapt.—Where a dying declaration was admissible unless a conclusion of a witness, its reception in evidence was correct; the objection not raising that ground and being

inapt. *Autrey v. State*, 190 Ala. 10, 67 So. 237.

§ 460 (4) Scope and Questions Raised.

Waiver of Other Grounds by Grounds Stated.—In perjury case, an objection to evidence on the sole ground that defendant returned to the hearing and corrected his testimony was a waiver of all other grounds upon which the testimony might be excluded. *Carroll v. State* (Ala. App.), 78 So. 717.

Hearsay—General Objection.—General objection to evidence waives objection that it was hearsay. *Minor v. State* (Ala. App.), 74 So. 98.

Same—Sufficiency of “Immaterial, Irrelevant, and Incompetent.”—General objection to evidence as immaterial, irrelevant, and incompetent may be overruled, unless it is manifestly illegal and irrelevant, and incapable of being rendered admissible. *Brannon v. State* (Ala. App.), 76 So. 991.

§ 460 (5) Evidence Admissible in Part.

Dying Declaration.—Accused can not complain of the admission of a dying declaration because a part of it was improper, where other portions were admissible, and the only objection, which was to the whole, was not well taken. *Autrey v. State*, 190 Ala. 10, 67 So. 237.

Several Questions in One—Objection to Whole.—*Minto v. State*, 8 Ala. App. 306, 62 So. 376. See the title CRIMINAL LAW, § 460 (5), vol. 4, p. 305.

Official stenographer's certified transcript of evidence of accused on a former trial being competent, an objection to the transcript as a whole was properly denied. *Kelsoe v. State* (Ala. App.), 73 So. 831.

Affidavit, Warrant, and Return in One Paper.—*Patterson v. State*, 8 Ala. App. 420, 62 So. 1023. See the title CRIMINAL LAW, § 460 (5), vol. 4, p. 305.

§ 461. Motion to Strike Out.

§ 461 (1) In General.

Refusal to strike out testimony of a witness unwilling to testify that a signature shown him looked like the signature of accused on motion to strike out his “opinion” held not error, there being no opinion given. *Farrior v. State*, 12 Ala. App. 123, 67 So. 633.

Witness' Statement Not Responsive to Question.—A statement by a witness not responsive to the question may be properly excluded on motion. *James v. State*, 12 Ala. App. 16, 67 So. 773.

Witness Repeating Previous Statement.—Error, if any, in permitting a witness to repeat what he had previously stated, was not error in the absence of motion to exclude the previous statement. *Rector v. State*, 11 Ala. App. 333, 66 So. 857.

Evidence Shown Incompetent by Cross-Examination.—*Brigman v. State*, 8 Ala. App. 400, 62 So. 980. See the title CRIMINAL LAW, § 461 (1), vol. 4, p. 306.

Evidence Affording Basis for Inference of Guilt.—Where the evidence in a prosecution for violating the prohibition law was sufficient to afford a basis for an inference of defendant's guilt, the court properly refused to exclude the evidence on defendant's motion; the sufficiency of the evidence to sustain a conviction being for the jury. *Thomas v. State*, 12 Ala. App. 293, 68 So. 549.

Purpose.—*Smith v. State*, 183 Ala. 10, 62 So. 864. See the title CRIMINAL LAW, § 461 (1), vol. 4, p. 305.

Rulings on Evidence.—*Smith v. State*, 183 Ala. 10, 62 So. 864. See the title CRIMINAL LAW, § 461 (1), vol. 4, p. 305.

§ 461 (1½) Necessity of Motion.

Where accused objected to the question asked a witness, but made no objection to the answer, nor motion to exclude the same, the error, if any, is waived on appeal. *Miller v. State* (Ala. App.), 74 So. 840.

§ 461 (2) Grounds for Motion.

Objection to Question Propounded.—*Bone v. State*, 8 Ala. App. 59, 62 So. 455. See the title CRIMINAL LAW, § 461 (2), vol. 4, p. 306.

Character—Hearsay Brought Out on Cross-Examination.—Defendant having put his character in issue, and a witness having qualified on direct to state defendant's bad character, his statement on cross-examination that "they accuse him of selling and drinking whisky" did not render his testimony subject to a motion to exclude. *Cranford v. State* (Ala. App.), 75 So. 274.

§ 461 (3) Necessity of Previous Objection.

General Rule.—Where defendant failed to object to question asked witness until question had been answered, he was not entitled to have answer stricken on motion. *Malone v. State* (Ala. App.), 76 So. 469; *Machen v. State* (Ala. App.), 76 So. 407; *Foot v. State* (Ala. App.), 75 So. 728; *Turney v. State* (Ala. App.), 75 So. 726; *Hill v. State*, 194 Ala. 11, 69 So. 941; *Keeble v. State*, 14 Ala. App. 31, 70 So. 971; *Roden v. State*, 13 Ala. App. 105, 69 So. 366; *Rivers v. State*, 13 Ala. App. 362, 69 So. 387; *Lambert v. State*, 13 Ala. App. 289, 69 So. 261; *Thomas v. State*, 12 Ala. App. 278, 68 So. 524, certiorari denied in 192 Ala. 690, 68 So. 1020; *Granberry v. State*, 184 Ala. 5, 63 So. 975; *Sanders v. State*, 181 Ala. 35, 61 So. 336.

Where no objection to the competency of a witness was made before he stated that marks on accused were made by blood, the objection by motion to exclude was too late. *Lightner v. State*, 195 Ala. 687, 71 So. 469.

Discretion of Court.—*Allen v. State*, 8 Ala. App. 228, 62 So. 971. See the title CRIMINAL LAW, § 461 (3), vol. 4, p. 307.

Question Anticipating Answer.—Where a question asked a witness gave notice of the anticipated answer, and the defendant allowed the question to be answered without objection, his motion to exclude the evidence was properly overruled. *Bailey v. State*, 183 Ala. 78, 63 So. 73.

Question Calling for Illegal Evidence.—In a prosecution for murder, the state's counsel asked a witness the question, "Before he would be arrested, he would die and go to hell?" Witness answered, "He said it was not his whisky, and that he would die and go to hell before he was arrested." Held, that the court properly overruled a motion to exclude the answer, since no objection was made to the question; the rule being that, if it is apparent that illegal testimony will result from a responsive answer to a question asked, objection must be interposed to the question. *Sharp v. State*, 193 Ala. 22, 69 So. 123.

Hearsay in Reply to Proper Question.—State held not precluded from moving to exclude hearsay answer to proper ques-

tion by its failure to object to the question. *Randall v. State*, 14 Ala. App. 122, 72 So. 214.

Motion to Exclude Made after Cross-Examination.—Motion to exclude testimony of a witness is properly overruled, where no objection was made to admission of the testimony and the motion to exclude was not made until after his cross-examination. *James v. State*, 14 Ala. App. 652, 72 So. 299.

§ 461 (4) Evidence Admissible in Part.

A motion to exclude all of a witness' testimony was properly denied, where it appeared that some of such testimony was admissible. *Turney v. State* (Ala. App.), 75 So. 726.

§ 461 (5) Evidence Elicited by Party Moving to Strike Out.

Accused can not secure the exclusion of testimony elicited by his own questions. *Turney v. State* (Ala. App.), 75 So. 726; *Footte v. State* (Ala. App.), 75 So. 728; *Keeble v. State*, 14 Ala. App. 31, 70 So. 971.

§ 463. Effect of Failure to Object or Except.

As to exclusion of improper evidence by court, see ante, "Exclusion of Improper Evidence," § 441.

Failure of Counsel to Hear Question.—Right to object to a question calling for incompetent testimony, held waived where no timely objection was made, though counsel for accused was engaged in other matters, and did not hear the question propounded. *Lovelady v. State* (Ala. App.), 74 So. 734.

No Exception to Subsequent Admission of Evidence Previously Excluded.—Where defendant rightfully objects and excepts to the admission of a paper in evidence, he can not be held to have waived the error, or be held not prejudiced, because the paper was afterwards admitted over his objection on the same grounds, but to which he did not reserve an exception. *Young v. State*, 9 Ala. App. 55, 64 So. 171.

(E) ARGUMENTS AND CONDUCT OF COUNSEL.

As to conduct of bystanders, see ante, "Presence and Conduct of Bystanders," §

430. As to necessity of exceptions to ruling for purpose of review, see post, "Review of Rulings as to Arguments or Conduct of Counsel," § 697. As to review of questions as dependent on presentation of same by record, see post, "Conduct of Trial in General," § 730. As to presumption on appeal, see post, "Conduct of Trial in General," § 751 (8).

§ 464. Control by Court in General.

Protection of Defendant from Prejudicial Acts of Solicitor.—*Simon v. State*, 181 Ala. 90, 61 So. 801. See the title CRIMINAL LAW, § 464, vol. 4, p. 309.

§ 464½. Representation of Accused by Counsel.

Refusal to Allow Motion to Exclude Evidence.—Refusal to allow accused's counsel to move for exclusion of the state's evidence and discharge of accused is error. *Taylor v. State* (Ala. App.), 72 So. 557.

Refusal to Allow Argument to Jury after Waiver.—Where defendant has affirmatively waived his right to argue to jury, it is not error for the court later to decline to allow him such argument. *Cole v. State*, 14 Ala. App. 71, 71 So. 616.

§ 465. Scope and Effect of Opening Statement.

For the Prosecution.—Evidence that the defendant, after his arrest, informed the officer where the goods alleged to have been stolen were concealed, and that the officer found the goods at that place, and that previous to the arrest defendant had some of the goods in his possession, and stated first that he bought the box of hardware from a negro, and afterwards that he took the box of hardware, but did not break open the box car, but got it off the platform, justified the statement by the solicitor in his preliminary statement to the jury that he expected the evidence of the state to show the defendant had made a statement voluntarily and freely at the police station. *Summers v. State*, 14 Ala. App. 16, 70 So. 951.

§ 466. Presentation of Evidence.

For Prosecution.—*Gibson v. State*, 8 Ala. App. 56, 62 So. 895. See the title CRIMINAL LAW, § 466, vol. 4, p. 310.

§ 468. Limiting Scope or Time of Argument.

Burglary — Five Minutes.—Limitation of the time for argument to jury by accused's counsel must be reasonably exercised, and limitation in trial for burglary to five minutes was an abuse of discretion. *Taylor v. State* (Ala. App.), 72 So. 557.

Thirty-Five Minutes.—In a simple case it was not an abuse of discretion for the court to limit counsel's argument to 35 minutes a side. *Hickey v. State*, 12 Ala. App. 143, 67 So. 732, cited in note in Ann. Cas. 1917A, 720.

§ 469. Statements as to Facts, Comments, and Arguments.

§ 470. — In General.

Undignified argument and conduct and anything bordering upon familiarity with jury on part of counsel is reprehensible and unprofessional, and trial courts are charged with duty not to permit counsel to indulge in such character of argument and conduct. *Bell v. State* (Ala. App.), 75 So. 181, certiorari denied in *Ex parte Bell* (Ala.), 76 So. 1.

Improper Statement of Solicitor.—In a prosecution for illegally selling intoxicants, court's ruling permitting statement by solicitor, in closing argument to jury, that "they were marching down there [referring to defendant's place of business] every Sunday in droves to buy whisky," held erroneous. *Flowers v. State* (Ala. App.), 73 So. 126.

Proper Statement of Solicitor.—Remarks of counsel for the state while addressing the jury held within the bounds of legitimate argument. *Johnson v. State*, 13 Ala. App. 140, 69 So. 396, certiorari denied in *Ex parte State*, 193 Ala. 682, 69 So. 1020.

Same—Court Would Set Aside Illegal Verdict.—The statement of the prosecutor that the jury might rest assured that if it convicted defendant, and it was shown to the court that the verdict was not sustained by the law and the evidence, it would be the duty of the court to set it aside and he would do so is not improper or prejudicial. *Wright v. State* (Ala. App.), 72 So. 564.

Same—Defendant Can Appeal if Convicted.—That solicitor in his argument to

jury stated that, if defendant is convicted, he can appeal, was not error. *Norris v. State* (Ala. App.), 75 So. 718.

§ 471. — Exhibits and Illustrations.

In prosecution for assault with intent to murder, solicitor's argument and his illustration as to how the defendant's blow produced wound on assaulted party held proper, where not without support in the evidence. *Henderson v. State* (Ala. App.), 72 So. 590.

§ 475. — Matters Not Sustained by Evidence.

Argument of prosecuting attorney held not justified by the evidence. *Roden v. State*, 13 Ala. App. 105, 69 So. 366.

Appetite of Indian for Whiskey.—Statement of solicitor in argument, relative to the appetite of an Indian for liquor, held erroneous when not sustained by the evidence. *Irwin v. State* (Ala. App.), 75 So. 701.

Pickpockets Infesting Hotels and Depots.—In a prosecution for larceny from the person, it was proper for the solicitors to refer in argument to the matter of common knowledge that pickpockets infest hotels and depots to snatch pocketbooks, basing the argument on the jury's observation and experience as men possessed of common knowledge. *Lane v. State*, 14 Ala. App. 40, 70 So. 982.

Sale of Whisky by Another in Solicitor's Presence.—It was error to refuse to strike statement of the prosecuting attorney in argument that the jury may have heard that a man, which he did not say was accused, drove up behind a store in the city of the trial, and while the solicitor was watching sold whisky from his buggy, that being entirely without the evidence. *Strother v. State* (Ala. App.), 72 So. 566.

Murder—Propriety of Solicitor's Statement.—In a prosecution for murder, the state's attorney in argument to the jury said: "Don't you think it about time we are calling a halt in the country? Don't you think there has been enough officers killed in this country by outlaws, and it is about time to stop them?" Defendant objected to this "statement," but made no suggestion that the court instruct the jury to disregard it. Held, that the argument of the state's attorney being proper, the objection to the statement was properly

overruled. *Sharp v. State*, 193 Ala. 22, 69 So. 122.

§ 476. — Comments on Evidence or Witnesses.

As to comments on evidence or witnesses by judge, see ante, "Comments on Evidence or Witnesses," § 428.

§ 476 (½) In General.

Propriety of Solicitor's Arguments.—In a prosecution for larceny, arguments of solicitor held not improper, as they were comments on evidence before jury. *Ragland v. State* (Ala. App.), 75 So. 280, 282.

Immaterial Evidence Brought Out on Cross-Examination.—In a prosecution for larceny, where defendant on cross-examination of a witness for state brought out fact that father of defendant had said that his son and brother of defendant was in penitentiary for stealing, although such evidence was not material, it was not improper for solicitor to refer to it in his argument, and court did not err in overruling objection to such argument. *Ragland v. State* (Ala. App.), 75 So. 280, 282.

§ 476 (1) Inferences from and Effect of Evidence in General.

Proof of Fact Properly Admitted.—*Granberry v. State*, 182 Ala. 4, 62 So. 52. See the title CRIMINAL LAW, § 476 (1), vol. 4, p. 315.

Malicious Killing of Hog—Propriety of Solicitor's Argument.—On a trial for the malicious killing of a hog, the argument of the prosecuting attorney that accused had offered to pay for a hog, and inquiring why he had done so, and why he did not explain, and calling on his counsel to explain was not objectionable. *Merrill v. State*, 11 Ala. App. 224, 65 So. 709, cited in note in Ann. Cas. 1917D, 280.

§ 476 (7) Forgery.

Remark of solicitor that accused picked up a little negro to go and cash a forged check held not such a comment on the evidence as the court was required to exclude. *Newsom v. State*, 10 Ala. App. 124, 65 So. 87.

§ 476 (8) Homicide.

In a prosecution for murder a statement by counsel for the state in his argument that a witness had intimated that defendant had admitted going to the

place of the homicide with the express purpose of murdering deceased was error. *Gibson v. State*, 193 Ala. 12, 69 So. 533.

No Evidence Reflecting on Character of Deceased.—Counsel in a homicide case may not state that there is no evidence reflecting on the character of deceased. *Forman v. State*, 190 Ala. 22, 67 So. 583.

Presumption Defendant Started Out with Pistol.—In a prosecution for homicide, argument by the solicitor that the presumption was that defendant started out that morning with a pistol held a justifiable inference from the evidence. *Langham v. State*, 12 Ala. App. 46, 68 So. 504.

§ 476 (11) Violation of Liquor Laws.

The solicitor has a right to comment on defendant's testimony that the one for whom he was transporting the liquor agreed to take care of him. *Moragne v. State* (Ala. App.), 74 So. 862.

§ 476 (14) Credibility and Character of Witnesses.

Statement That Witness Told the God's Truth.—*Hammock v. State*, 7 Ala. App. 112, 61 So. 471; S. C., 8 Ala. App. 367, 62 So. 322, cited in Ann. Cas. 1916A, 452. See the title CRIMINAL LAW, § 476 (14), vol. 4, p. 318.

§ 478. — Comments on Failure to Produce Witnesses or Evidence.

Witness Equally Accessible to Both Parties.—No unfavorable argument of counsel can be made because of absence of testimony of a witness equally accessible to both parties. *Forman v. State*, 190 Ala. 22, 67 So. 583.

Defendant's Failure to Call Witness in Jail.—Argument by the state solicitor that an inference should be drawn against accused because he failed to call a witness in jail is objectionable. *Jackson v. State*, 193 Ala. 36, 69 So. 130.

§ 478. — Comments on Character or Conduct of Accused or Prosecutor.

As to comment on character of witnesses, see ante, "Credibility and Character of Witnesses," § 476 (14). As to retaliatory statement and remarks, see

post, "Retaliatory Statements and Remarks," § 484.

Evidence Justifying Comment on Conduct of Accused.—In a prosecution for homicide, held that the argument of the state's attorney, "that the defendant at the time of the killing was already violating the law, living in adultery with the deceased as his concubine," held clearly within the inference of the evidence, and not improper. *Smith v. State*, 197 Ala. 193, 72 So. 316.

In a vagrancy case overruling defendant's objection to prosecuting solicitor's argument that defendant associated with certain negroes who robbed and killed, and that defendant got proceeds of such crimes, is erroneous, where such charges were unsupported by evidence. *Wallace v. State* (Ala. App.), 75 So. 633.

Evidence Failing to Justify Solicitor's Statement.—The solicitor's statement in argument to the jury that defendant had stolen 2,000 pounds of copper wire within two months was improper, where evidence did not justify remark. *McMickens v. State* (Ala. App.), 75 So. 626.

§ 481. — Appeals to Sympathy or Prejudice.

As to action of court, see post, "Appeals to Sympathy or Prejudice," § 486 (6).

§ 481 (1) In General.

The prosecuting attorney may properly argue that if accused was guilty he ought to be convicted and that it is dangerous to society to turn a guilty man loose. *James v. State*, 14 Ala. App. 652, 72 So. 299.

§ 481 (2) Reference to Frequency of Offenses and Appeals for Enforcement of Laws.

Propriety of Solicitor's Statement—Homicide.—*Olden v. State*, 176 Ala. 6, 58 So. 307. See the title CRIMINAL LAW, § 481 (2), vol. 4, p. 321.

Same—Allowing Stock to Run at Large.—In a prosecution for allowing stock to run at large, a refusal to exclude a statement by the prosecuting attorney in his argument, "If you turn this man loose, it will be a license for all them people up there in beat 24 to turn

their stock out," was not error. *Blalock v. State*, 8 Ala. App. 349, 63 So. 26.

§ 481 (3) Appeals to Racial Prejudices.

Propriety of Solicitor's Statement—Murder.—In a prosecution for murder, statement of solicitor, "If you do not hang this negro, you will have a similar crime in this county in six months," was improper and prejudicial, being an appeal to race prejudice. *Moulton v. State* (Ala.), 74 So. 454.

Same—Violation of Prohibition Law.

—In a prosecution for violating the prohibition law, the statement of the solicitor that "you must deal with a negro in the light of the fact that he is a negro, and applying your experience and common sense," was improper. *Simmons v. State*, 14 Ala. App. 103, 71 So. 979.

§ 484. Retaliatory Statements and Remarks.

Right to Answer Statements.—The solicitor has a right to answer statements made by defendant's counsel. *Moragne v. State* (Ala. App.), 74 So. 862.

Reply in Kind to Argument Going beyond Evidence.—Where defendant in his argument has gone outside of evidence, he can not complain if, in heat of argument, state's counsel replies to him in kind. *Newell v. State* (Ala. App.), 75 So. 625.

§ 485. Objections and Exceptions.

As to necessity for purpose of review, see post, "Review of Rulings as to Arguments or Conduct of Counsel," § 697.

Sufficiency—Where Part of Statement Not Objectionable.—Where part at least of a statement of the prosecutor was justified by the evidence, the objection should be limited to that part unsupported by evidence. *Carmichael v. State*, 197 Ala. 185, 72 So. 405; *Kinsaul v. State*, 8 Ala. App. 405, 62 So. 990, cited in note in Ann. Cas. 1916A, 555. See the title CRIMINAL LAW, § 485, vol. 4, p. 323.

Waiver of Objection.—Where defendant objected to part of the solicitor's argument because not based on the evidence, whereupon the stenographic report of the testimony of a witness was read, and defendant's counsel then said, "Go ahead," the objection was waived. *Belk v. State*, 10 Ala. App. 70, 64 So.

515, cited in note in Ann. Cas. 1916A, 553.

Failure to Move for Mistrial.—Simon v. State, 181 Ala. 90, 61 So. 801. See the title CRIMINAL LAW, § 485, vol. 4, p. 323.

§ 486. Action of Court.

§ 486 (1) In General.

Improper Statement of Solicitor Cured by Instructions.—Error in statement of solicitor, "If verdicts in the past had been proper, this would not have occurred," held cured by instructions. Rogers v. State (Ala. App.), 75 So. 264.

Curing Erroneous Statement of Law by Oral Charge.—In train-wrecking trial, court's overruling objection to erroneous statement of law in the solicitor's argument was rendered harmless by court's oral charge, which thoroughly corrected and covered the erroneous statement. Davis v. State (Ala. App.), 75 So. 825.

Ordering Jury Not to Consider Improper Statement.—Statement of solicitor on trial for homicide, that "it is a horrible thing to relate," held rendered harmless by court's repudiation of it as an improper remark, and statement that the jury would not consider it. Hill v. State, 194 Ala. 11, 69 So. 941.

§ 486 (4½) Comments on Evidence or Witnesses.

Statement of solicitor on prosecution involving the intent of defendant, that it was his experience that these Greeks and their interpreters fix up the testimony to suit themselves, held not rendered harmless by court's admonition to disregard it. Cassemus v. State (Ala. App.), 75 So. 267.

§ 486 (6) Appeals to Sympathy or Prejudice.

In a prosecution for murder, solicitor's remarks in his opening argument, "If you do not hang this negro, you will have a similar crime in this county in six months," held not cured by a later charge to effect that jury were not to consider remarks. Moulton v. State (Ala.), 74 So. 454.

(F) PROVINCE OF COURT AND JURY IN GENERAL.

§ 488. Questions of Law or of Fact.

§ 489. — Questions of Law in General.

Whether Act Lawful or Unlawful.—Spivey v. State, 7 Ala. App. 36, 61 So. 607. See the title CRIMINAL LAW, § 489, vol. 4, p. 326.

What Were Necessary and Material Allegations of Indictment.—Davis v. State, 8 Ala. App. 147, 62 So. 1027, certiorari denied in Ex parte Davis, 184 Ala. 26, 63 So. 1010. See the title CRIMINAL LAW, § 489, vol. 4, p. 325.

Requested charge leaving it to the jury to say what were the material averments of the indictment, and whether they were proven "as required by law" referred a question of law to the jury, and was properly refused. Harvey v. State (Ala. App.), 73 So. 200.

What Are Essential Elements of Unlawful Homicide.—Charge that, if jury had a reasonable doubt of any essential element of unlawful homicide, they could not convict defendant, referred a question of law to the jury, and was properly refused. Harvey v. State (Ala. App.), 73 So. 200.

What Are Elements of Self-Defense.—McGhee v. State, 178 Ala. 4, 59 So. 573. See the title CRIMINAL LAW, § 489, vol. 4, p. 325.

A charge submitting the issue of what constitutes self-defense is bad as submitting a question of law. Jennings v. State (Ala. App.), 72 So. 690.

A requested charge to acquit if the jury have a reasonable doubt as to whether defendant acted in self-defense is properly refused as referring to the jury the question of law of what constitutes self-defense. Henderson v. State, 11 Ala. App. 37, 65 So. 721.

In a murder case, an instruction that, if the jury had a reasonable doubt, generated by all the evidence in the case, as to whether defendant acted in self-defense, they should acquit, held properly refused, as submitting a question of law. Pounds v. State (Ala. App.), 73 So. 127.

What Constitutes Practicing Medicine.—In prosecution for practicing med-

icine without a license, instruction held improper as submitting to the jury the question of law, as to what constitutes practicing medicine. *Fealy v. Birmingham* (Ala. App.), 73 So. 296.

§ 490. — Preliminary or Introductory Questions of Fact.

§ 490 (1) Preliminary Determination of Existence of Conspiracy.

Smith v. State, 8 Ala. App. 187, 62 So. 575. See the title CRIMINAL LAW, § 490 (1), vol. 4, p. 326.

§ 490 (2) Determination of Voluntary Character of Confession.

Question for Trial Court.—*Godau v. State*, 179 Ala. 27, 60 So. 908, cited in notes in 50 L. R. A., N. S., 1079, 1081, 1089. See the title CRIMINAL LAW, § 490 (2), vol. 4, p. 327.

§ 490 (4) Confessions, Admissions, and Declarations.

Whether confessions or admissions are freely and voluntarily made is matter of law for the court. *Machen v. State* (Ala. App.), 76 So. 407.

§ 491. — Issues of Fact in General.

Place of Offense.—Where three shoats the subject of larceny disappeared in B. county, and were found in defendant's possession about a mile away in H. county with marks changed, it was a question for jury whether crime was committed in B. county, or within one-fourth of a mile of line thereof. *Houston v. State* (Ala. App.), 78 So. 415.

Same.—Under the evidence and Code 1907, § 7229, held, that whether larceny of an animal was committed in the county of the court's jurisdiction was for the jury. *Britton v. State* (Ala. App.), 74 So. 721.

Same—State's Evidence Tending to Show Venue.—Where the state's evidence tends to show commission of the crime within the court's jurisdiction, venue is a question for the jury. *Britton v. State* (Ala. App.), 74 So. 721.

Same—Conflicting Evidence.—Under conflicting evidence as to venue in a prosecution for larceny of a steer, held, the court properly refused the affirmative charge. *Britton v. State* (Ala. App.), 74 So. 721.

§ 495. — Weight and Sufficiency of Evidence in General.

As to conflicting evidence, see post, "Conflicting Evidence," § 500. As to credibility of witnesses, see post, "Credibility of Witnesses," § 496. As to direction of verdict, see post, "Direction of Verdict," § 504. As to instructions invading province of jury to determine weight and sufficiency of evidence, see post, "Weight and Sufficiency of Evidence," § 514.

See post, "When Evidence Affords an Inference Adverse to Accused," § 504 (4).

§ 495 (1) In General.

The sufficiency and weight of the evidence in a criminal prosecution is a question for the jury. *King v. State* (Ala. App.), 75 So. 692; *Quinn v. State* (Ala. App.), 74 So. 743; *Stout v. State* (Ala. App.), 72 So. 762, writ of certiorari denied in 73 So. 1002; *Brooks v. State*, 8 Ala. App. 277, 62 So. 569.

Propriety of Affirmative Charge.—A general affirmative charge in defendant's favor is properly refused, where there is any evidence tending to show guilt, or affording an inference of guilt. *Quinn v. State* (Ala. App.), 74 So. 743; *Bell v. State* (Ala. App.), 75 So. 181, certiorari denied in *Ex parte Bell* (Ala.), 76 So. 1; *Brown v. State* (Ala. App.), 72 So. 757, writ of certiorari denied in 73 So. 999; *Walling v. State* (Ala. App.), 73 So. 216, certiorari denied in *Ex parte Walling* (Ala.), 73 So. 1003; *Turner v. State* (Ala. App.), 72 So. 574; *Thomas v. State*, 12 Ala. App. 278, 68 So. 524; *Moye v. State*, 12 Ala. App. 127, 67 So. 716; *Finney v. State*, 10 Ala. App. 39, 65 So. 93; *Cheshire v. State*, 10 Ala. App. 139, 64 So. 544.

Same—Evidence Supporting State's and Defendant's Theory.—There being evidence tending to support the state's theory, as well as defendant's, he was properly refused the affirmative charge. *Bradley v. State*, 11 Ala. App. 329, 66 So. 820.

Same—Evidence Prima Facie Overcoming Presumption of Innocence.—Wherever the evidence is such as prima facie overcomes the presumption of innocence, the affirmative charge should be denied. *Wilson v. State*, 13 Ala. App. 58, 69 So. 295.

Seduction—Charges Invading Province of Jury.—Charges that the mere fact that accused had sexual intercourse with the prosecutrix does not warrant a conviction invade the province of the jury. *Brand v. State*, 13 Ala. App. 390, 69 So. 379.

§ 495 (2) Confessions, Admissions, and Declarations.

Admission of Ownership in Claim Affidavit.—In a prosecution for a violation of the liquor law, the weight to be given defendant's admission of ownership, contained in his claim affidavit against the property seized, held for the jury upon consideration of all the circumstances. *Coleman v. State*, 10 Ala. App. 164, 64 So. 529.

Defendant's Statement after Deceased Made Threats.—Where defendant's statement in the absence of deceased after deceased had made certain threats is admissible as *res gestæ*, the probative force thereof is still for the jury, depending on whether it expressed defendant's honest purpose at the time, and whether, if so, such purpose was not changed prior to the final difficulty. *Maxwell v. State*, 11 Ala. App. 53, 65 So. 732.

§ 495 (4) Corroboration of Accomplices.

See ante, "Corroboration of Accomplice," § 334.

Sufficiency of evidence, tending to connect accused with the offense, to corroborate his accomplice, is for the jury. *Horn v. State* (Ala. App.), 72 So. 768.

On a trial for forging a check, evidence held sufficient to make a question for the jury as to accused's guilt, even though the jury found that a witness for the state was an accomplice. *Newsom v. State*, 10 Ala. App. 124, 65 So. 87.

Burglary.—Where accused's father testified that accused, with witness, and another boy, on the night of the burglary, went in the direction of the premises burglarized, whether the witness, as an accomplice, was corroborated, was for the jury. *Horn v. State* (Ala. App.), 72 So. 768.

§ 496. — Credibility of Witnesses.

As to instructions invading province of jury to determine credibility of witnesses,

see post, "Credibility of Witnesses," § 508.

§ 496 (1) In General.

The credibility of witnesses is for the jury. *Quinn v. State* (Ala. App.), 74 So. 743; *Stout v. State* (Ala. App.), 72 So. 762, writ of certiorari denied in 73 So. 1002; *Brooks v. State*, 8 Ala. App. 277, 62 So. 569; *Snead v. State*, 7 Ala. App. 118, 61 So. 473.

Witness Related to Prosecutor.—Where relationship to the prosecutor is shown to establish bias of a witness, the weight to be given thereto is for the jury. *Murray v. State*, 13 Ala. App. 175, 69 So. 354.

§ 496 (1½) Accomplices.

Whether Witness Was Accomplice.—Where there is doubt whether a witness is an accomplice, and the testimony is susceptible of different inferences, such question is for the jury, and not the court. *Horn v. State* (Ala. App.), 72 So. 768.

Same—Propriety of Refusal of Affirmative Charge.—Where the only evidence connecting accused with the offense was that of his alleged accomplice, the affirmative charge was properly refused if it did not clearly appear that such witness was an accomplice. *Moore v. State* (Ala. App.), 72 So. 596.

Same—Propriety of Deciding Questions as Matter of Law.—On trial for forging a check, question whether boy who presented the check to the bank and was jointly indicted with accused was an accomplice held for the jury, and the court properly declined to decide as a matter of law that he was. *Newsom v. State*, 10 Ala. App. 124, 65 So. 87.

§ 498. — Uncontroverted Evidence.

See post, "Of Conviction," § 504 (5).

Propriety of Refusing Defendant Affirmative Charge.—Court erred in refusing defendant affirmative charge, where evidence, which was without conflict, would not support judgment of conviction. *Condry v. State* (Ala. App.), 76 So. 476.

Unlawful Sale of Liquors — General Charge for State.—In a trial for unlawful sale of liquors, where defendant introduced no evidence, and the only in-

ference from the state's evidence was that of defendant's guilt, the general charge for the state held not error. *Cole v. State*, 14 Ala. App. 71, 71 So. 616.

Where accused shot deceased and nothing suggested a lack of malice, the court properly directed the jury to find accused guilty of murder, if they believed the evidence beyond a reasonable doubt. *Warren v. State*, 197 Ala. 313, 72 So. 624.

§ 499. — Inferences from Evidence.

As to instructions invading province of jury, see post, "Inferences from Evidence," § 510.

The inferences from the evidence are for the jury. *Stout v. State* (Ala. App.), 72 So. 762, writ of certiorari denied in 73 So. 1002.

Propriety of Refusing Affirmative Charge for Defendant.—Where the evidence not only carried inferences of guilt, but was strong enough to carry conviction to the minds of the jury, the general affirmative charge was properly refused. *Thomas v. State* (Ala. App.), 72 So. 688.

Where there was evidence which, if believed by the jury, was sufficient in its inferences to overcome prima facie the presumption of innocence, the general affirmative charge for defendant was properly refused. *Benjamin v. State*, 12 Ala. App. 148, 67 So. 792; *Bonner v. State*, 8 Ala. App. 236, 62 So. 337. See the title CRIMINAL LAW, § 499, vol. 4, p. 330.

§ 500. — Conflicting Evidence.

General affirmative charge is properly refused in the face of conflicting evidence. *Strother v. State* (Ala. App.), 72 So. 566; *McDaniel v. State*, 10 Ala. App. 79, 64 So. 641; *McWhorter v. State*, 9 Ala. App. 70, 64 So. 158.

Carnal Knowledge of Girl under 12.—In a prosecution for carnal knowledge of a girl under 12 years, evidence being conflicting, the affirmative charge held correctly refused. *Mayo v. State* (Ala. App.), 73 So. 141.

Where Conflict Made by Testimony of Defendant and Wife.—A general affirmative charge can not be given in favor of the state where the testimony of defendant and his wife makes a material con-

flict in the evidence, in which case it is for the jury to determine the weight of the evidence. *Brown v. State* (Ala. App.), 74 So. 394.

Defendant's Christian Name to Grand Jury Unknown.—*Axelrod v. State*, 7 Ala. App. 61, 60 So. 959. See the title CRIMINAL LAW, § 500, vol. 4, p. 330.

§ 501. — Extent of Punishment.

The question of proper punishment within statutory limitations after conviction is a matter for the court. *Norris v. State* (Ala. App.), 74 So. 394.

§ 503. Demurrer to Evidence.

Propriety—To Test Sufficiency of Evidence.—A motion to exclude the state's evidence and discharge accused is a proper method of testing the sufficiency of the evidence. *Taylor v. State* (Ala. App.), 72 So. 557.

Same—State Not Making Prima Facie Case.—In criminal cases a motion to exclude the evidence is proper where state has not made a prima facie case. *Wallace v. State* (Ala. App.), 75 So. 633.

Same—Venue Not Proven.—A motion made by, accused after the prosecution had offered the evidence in chief and rested to exclude the evidence on the ground that the venue had not been proven was appropriate and timely. *Britton v. State* (Ala. App.), 74 So. 721.

§ 504. Direction of Verdict.

As to directing verdict on conflicting evidence, see ante, "Conflicting Evidence," § 500. As to directing verdict or declaring law if jury believe evidence, see post, "Directing Verdict or Declaring Law if Jury Believe the Evidence," § 514 (5). As to directing verdict or declaring if jury believe facts, see post, "Directing Verdict or Declaring Law if Certain Facts Are Found," § 514 (6).

§ 504 (1) In General.

Where defendant refused to rest his case at close of plaintiff's evidence, no duty rested on the court to give an affirmative charge because the ordinance on which the conviction was sought, had not been introduced in evidence. *Roe v. Tuscaloosa*, 12 Ala. App. 614, 67 So. 845.

§ 504 (3) Of Acquittal.

Propriety — Crime Committed More than 12 Months before Indictment.—Where, on trial for petit larceny, it appears that the crime was committed more than 12 months before indictment, it is error to refuse the general affirmative charge; circuit court rule 35 that the court will not be put in error for refusing the general charge on failure of proof, etc., not applying. *Enlow v. State* (Ala. App.), 72 So. 571.

Same — Evidence Circumstantial and Not Inconsistent with Innocence.—Where the evidence was entirely circumstantial, and not inconsistent with innocence, or sufficient to overcome the presumption of innocence, the general affirmative charge should have been given. *Starkes v. State*, 11 Ala. App. 268, 64 So. 158.

Propriety of Refusal—Invading Province of Jury.—Affirmative charge held properly refused as invasive of province of jury. *Rogers v. State* (Ala. App.), 75 So. 264.

Same—Evidence Sufficient to Sustain Conviction. — Where the evidence was sufficient to sustain a conviction, the court properly refused an affirmative charge requested by defendant. *Turney v. State* (Ala. App.), 75 So. 726.

Same — Evidence Connecting Accused with Crime.—The general charge for accused was properly refused; there being sufficient evidence to connect him with the crime. *Chappell v. State* (Ala. App.), 73 So. 134.

Same—Evidence Affording Inference Adverse to Accused.—General affirmative charge can not be given when evidence affords inference adverse to accused who requests it. *Suttles v. State* (Ala. App.), 74 So. 400.

Same—Accused at Least Guilty of Another Offense.—In a prosecution under Code 1907, § 7388, prohibiting abuse of any person with intent to force a confession or consent to his leaving the vicinity, requested charges requiring an acquittal were properly refused where accused was at least guilty of assault and battery. *Love v. State* (Ala. App.), 75 So. 189.

§ 504 (4) When Evidence Affords an Inference Adverse to Accused.

Propriety of Refusing General Charge.—Refusal of an affirmative charge for defendant is not error, where there was evidence in the case, from which guilt could be inferred, sufficient prima facie to overcome the presumption of innocence. *Bryant v. State*, 13 Ala. App. 206, 68 So. 704; *Bush v. State*, 12 Ala. App. 260, 67 So. 847; *Fulton v. State*, 8 Ala. App. 257, 62 So. 959; *Bartlett v. State*, 7 Ala. App. 85, 60 So. 958.

Same—Violation of City Ordinance.—In a prosecution for violation of a city ordinance, where the evidence afforded an inference that defendant was guilty, the refusal of the court to give the affirmative charge for him was not error. *Roe v. Tuscaloosa*, 12 Ala. App. 614, 67 So. 645.

§ 504 (5) Of Conviction.

Propriety—Venue Not Proven. — In prosecution for larceny, where there was no evidence that the offense was committed in the county, affirmative charge for state was erroneously given, despite Circuit Court Rule of Practice 35 (175 Ala. xxi). *Thomas v. State* (Ala. App.), 72 So. 686.

Same—Undisputed Evidence and Defendant's Admissions Showing Guilt. — Where the undisputed and direct evidence, as well as the defendant's own admission, shows that he was guilty of the offense charged, the court can not be put in error for giving the general charge, with proper hypothesis, requested by the state against the defendant. *Rogers v. State* (Ala. App.), 73 So. 994.

Oral Affirmative Charge Given on Oral Request.—Under Code 1907, §§ 5362, 5364, an oral general affirmative charge in behalf of the state given on oral request, being on effect of evidence, held erroneous. *Brown v. State* (Ala. App.), 74 So. 394.

§ 505. Instructions Invading Province of Jury.**§ 506. — Authority to Instruct in General.**

Propriety of Refusal.—A charge invoking the court to invade the jury's prov-

ince was properly refused. *Tucker v. State* (Ala.), 73 So. 385; *Howell v. State*, 10 Ala. App. 1, 64 So. 522; *Bone v. State*, 8 Ala. App. 59, 62 So. 455.

§ 506½. — Comments on Facts or Evidence.

An instruction invading the province of the jury is properly refused. *White v. State*, 195 Ala. 681, 71 So. 452.

Self-Defense. — Instruction on self-defense in prosecution for murder held not to invade the province of jury. *White v. State*, 195 Ala. 681, 71 So. 452.

§ 506. — Credibility of Witnesses.

As to assumption as to credibility, see post, "Credibility and Impeachment of Witnesses," § 512 (8). As to necessity, requisite and sufficiency of instructions, see post, "Credibility of Witnesses," § 533. As to application of instructions to case, see post, "Credibility of Witnesses," § 558 (15).

§ 506 (1) In General.

Instruction that if the witnesses for the state and those for the defendant are of equal credibility, and those of defendant are corroborated, the jury may look to that fact in determining whether defendant is guilty beyond all reasonable doubt is properly refused, as invading the province of the jury. *Strother v. State* (Ala. App.), 72 So. 566.

§ 506 (3½) Interest or Bias.

Argumentative Instruction. — An instruction as to right of the jury to look at the interest, bias, and kinship with decedent of state's witnesses held argumentative. *Roden v. State*, 13 Ala. App. 105, 69 So. 366.

Instructions as to Weight of Particular Witness' Testimony. — The court could not instruct as to the weight to be given the evidence of a particular witness should they find that he held malice toward accused. *Adams v. State*, 9 Ala. App. 89, 64 So. 371, certiorari denied in *Ex parte Adams*, 187 Ala. 10, 65 So. 514.

Malice of One Witness As Affecting All Evidence. — A request to charge that if, after considering all the evidence, the jury believed that a certain witness exhibited malice toward accused they might

disregard the evidence was properly refused. *Adams v. State*, 9 Ala. App. 89, 64 So. 371, certiorari denied in *Ex parte Adams*, 187 Ala. 10, 65 So. 514.

§ 506 (5) Effect of Willful Falsehood.

Charge that, if any witness willfully swears falsely jury "must" disregard his testimony entirely, was properly refused, because there is no law requiring that they "must" do so. *Butler v. State* (Ala. App.), 77 So. 72.

§ 506. — Credibility of Accused.

As to necessity and sufficiency of instruction, see post, "Credibility of Testimony or Statement of Accused" § 534.

An instruction as to credibility of defendant held properly refused as invading the province of the jury. *Bullington v. State*, 13 Ala. App. 61, 69 So. 319.

Interest in Result. — Court's oral charge that in considering defendant's testimony jury must look to fact he was defendant, was invasive of jury's province, and improper. *Adams v. State* (Ala. App.), 75 So. 641; *Swain v. State*, 8 Ala. App. 26, 62 So. 446.

§ 510. — Inferences from Evidence.

See post, "Inferences from Evidence," § 530 (7).

§ 510 (1) In General.

A request to charge held properly refused as invading the province of the jury. *Rector v. State*, 11 Ala. App. 333, 66 So. 857.

Circumstantial Evidence. — Instruction as to inferences to be drawn from circumstantial evidence, and other instructions, were properly refused, as invading province of jury. *Lawson v. State* (Ala. App.), 76 So. 411.

§ 510 (2) Intent and Malice.

A requested instruction that, where the attending circumstances of the killing are shown in detail, if some of the circumstances tend to disprove the presence of purpose to kill, the mere fact that death was caused by the use of a deadly weapon does not raise the presumption of malice, but the question of whether or not malice existed must be determined from all the facts and circumstances in the case, in-

vaded the province of the jury, and was misleading. *De Wyre v. State*, 190 Ala. 1, 67 So. 577.

§ 510 (4) Flight.

As to requisites and sufficiency of instructions, see post, "Flight or Surrender," § 526 (10).

On evidence in prosecution for robbery, held, that question of flight was for the jury, so that requested charges that jury could not find flight from the consciousness of guilt or desire to escape arrest, etc., were properly refused. *Ware v. State*, 12 Ala. App. 101, 67 So. 763.

§ 512. — Assumptions As to Facts.

See ante, "Inferences from Evidence," § 510. As to instructions ignoring evidence, see post, "Assumption as to Facts," § 559 (2).

§ 512 (1) In General.

General Rule.—Instructions which assume as true facts which are for the jury's determination are properly refused. *Parker v. State*, 7 Ala. App. 9, 60 So. 995; *Underwood v. State*, 179 Ala. 9, 60 So. 842; *Brooks v. State*, 8 Ala. App. 277, 62 So. 569; *McGhee v. State*, 178 Ala. 4, 59 So. 573; *Reid v. State*, 181 Ala. 14, 61 So. 324.

Charge Assuming Question as Matter of Law.—*Brooks v. State*, 8 Ala. App. 277, 62 So. 569. See the title CRIMINAL LAW, § 512 (1), vol. 4, p. 340.

Charge that Rock Is Deadly Weapon.—Where the evidence as to the rock and the circumstances of its use by defendant's adversary makes the question of its being a deadly weapon one for the jury, a charge that it is a deadly weapon is properly refused. *Hall v. State*, 11 Ala. App. 95, 65 So. 427.

§ 512 (2) Instructions Assuming Facts in General.

The Rule.—Instructions assuming as a fact a matter which was for the jury are properly refused. *Pollard v. State*, 12 Ala. App. 82, 68 So. 494; *Bone v. State*, 13 Ala. App. 5, 68 So. 702.

Disputed Fact.—A charge which assumes a fact in dispute is properly refused. *Prater v. State*, 193 Ala. 40, 69 So. 539.

Assumption Wife Has Present Means of Subsistence.—*Grantland v. State*, 8 Ala. App. 319, 62 So. 470. See the title CRIMINAL LAW, § 512 (2), vol. 4, p. 340.

Condition of Affairs Presented by Case.—*Johnson v. State*, 8 Ala. App. 207, 62 So. 328. See the title CRIMINAL LAW, § 512 (2), vol. 4, p. 340.

Good Character of Defendant.—*Reid v. State*, 181 Ala. 14, 61 So. 324; *Axelrod v. State*, 7 Ala. App. 61, 60 So. 959. See the title CRIMINAL LAW, § 512 (2), vol. 4, p. 341.

Hearing Defamatory Remarks About Defendant's Wife Destroying His Free Agency.—*Jones v. State*, 181 Ala. 63, 61 So. 434. See the title CRIMINAL LAW, § 512 (2), vol. 4, p. 341.

Relative Position of Accused at Time of Homicide.—*McGhee v. State*, 178 Ala. 4, 59 So. 573. See the title CRIMINAL LAW, § 512 (2), vol. 4, p. 342.

Assuming Defendant in Position of Peril.—A charge held erroneous in assuming that defendant was in a position of peril. *Murray v. State*, 13 Ala. App. 175, 69 So. 354.

In a prosecution for manslaughter, instruction on self-defense held faulty as assuming that defendant was in peril from a murderous assault. *Thomas v. State*, 13 Ala. App. 50, 69 So. 315.

Assuming Accused Was Assaulted by Others.—An instruction held erroneous as assuming that accused was being assaulted by others as well as decedent. *Rector v. State*, 11 Ala. App. 333, 66 So. 857.

Assuming Accused's Freedom from Fault.—A charge on self-defense held erroneous as assuming accused's freedom from fault in bringing on the fatal difficulty. *Bone v. State*, 13 Ala. App. 5, 68 So. 702.

§ 512 (2½) Issues and Theories of Case.

Instruction that, if defendant provoked the difficulty, he can not claim self-defense, held erroneous in assuming that defendant's conduct was wrongful. *Smith v. State* (Ala. App.), 74 So. 755.

§ 512 (3) Intent and Malice.

Defendant's requested charge on intent

held properly refused as assuming that the act resulting in the death of the deceased was an act of violence or an unlawful act without so stating. *Jones v. State*, 13 Ala. App. 10, 68 So. 690.

§ 512 (3½) Time and Place of Offense.

Where the evidence showed that defendant was in a public road at some distance from his home when he committed a homicide, instructions assuming that he was within the curtilage of his home, and under no duty to retreat, were properly refused. *Bailey v. State*, 11 Ala. App. 8, 65 So. 422.

§ 512 (3½a) Facts Connected with Crime Charged in General.

In a murder case, an instruction held erroneous, in assuming truth of facts which jury had a right to disbelieve. *Pounds v. State* (Ala. App.), 73 So. 127.

Defendant in Peril of Life or Bodily Harm.—In prosecution for murder, an instruction, assuming that evidence showed without dispute that defendant was in imminent peril of his life or of serious bodily harm when he fired on the deceased, was properly refused. *Allsup v. State* (Ala. App.), 72 So. 599.

An instruction that, if accused was free from fault, he was under no duty to retreat, unless he could have retreated without increasing his danger or with reasonable safety, is properly refused as assuming his imminent peril. *Pippin v. State*, 197 Ala. 613, 73 So. 340.

That Accused Feared for His Life.—A requested instruction upon self-defense held bad because assuming that accused feared for his life. *Hutchinson v. State* (Ala. App.), 72 So. 572.

That Deceased Assaulted Defendant.—Instruction on self-defense in prosecution for murder held properly refused as assuming that deceased assaulted defendant. *White v. State*, 195 Ala. 681, 71 So. 452.

Accused's Sister in Danger of Harm or Death.—Requested charge on self-defense in murder trial held faulty in assuming that accused's sister, in defense of whom he claimed to have struck, was in imminent danger of suffering grievous harm or death when accused interfered, and

that accused interfered in her defense. *Cain v. State* (Ala. App.), 77 So. 453.

§ 512 (4) Admitted or Uncontroverted Facts.

Existence of Fact Not in Dispute.—It is not error to refuse a charge which assumes the existence of a fact, though the existence was not in dispute. *Campbell v. State*, 13 Ala. App. 70, 69 So. 322.

In a prosecution for homicide, the trial court could not be put in error for refusing an instruction assuming the existence of a fact, even though the evidence was not in dispute. *Huguley v. State* (Ala. App.), 72 So. 764.

Defendant's Right to Be at a Still.—On trial for manufacturing prohibited liquors, instruction that defendant had a right to be at a still unless he was there for unlawfully or illegal purposes held properly refused as asserting a fact not disclosed by undisputed evidence and invading the province of the jury. *Walker v. State*, 11 Ala. App. 198, 65 So. 713.

Accused Inflicted Wounds on Deceased.—The court's assumption in an instruction that accused inflicted wounds on the deceased is not error, where such fact is not disputed. *Murphy v. State*, 14 Ala. App. 78, 71 So. 967.

§ 512 (8) Credibility and Impeachment of Witnesses.

Instruction that jury must believe a certain witness alleged to be an accomplice before it could convict is properly refused as an invasion of the province of the jury if based on fact of complicity. *Moore v. State* (Ala. App.), 72 So. 596.

§ 512 (8½) Truth, Weight or Incriminating Character of Evidence.

Truthfulness of Evidence in Conflict.—A charge assuming the credibility of testimony, or predicated upon testimony that is in conflict, assuming its truthfulness, is properly refused. *Jennings v. State* (Ala. App.), 72 So. 690.

Evidence to Establish Alibi Perjured.—That portion of the charge which assumed that testimony offered by accused to establish his defense of alibi was perjured was erroneous. *Doby v. State* (Ala. App.), 74 So. 724.

§ 513. — Opinion or Belief as to Facts.

As to remarks during trial, see ante, Expression of Opinion as to Facts in Issue," § 428 (6). As to assumption of facts, see ante, "Assumptions as to Facts," § 512.

General Rule.—*Johnson v. State*, 8 Ala. App. 207, 62 So. 328. See the title CRIMINAL LAW, § 513, vol. 4. p. 344.

Weight and Effect of Evidence.—In a prosecution for burglary, defendant's requested charge calling for the court's expression of opinion as to what the evidence showed was properly refused. *Norman v. State*, 13 Ala. App. 337, 69 So. 362.

A requested instruction held erroneous, as assuming the truth of defendant's theory that he was in his dwelling when the fatal shot was fired. *Langston v. State* (Ala. App.), 75 So. 715.

A requested instruction that the hall from which defendant was alleged to have fired the fatal shot constituted part of his house was properly refused as on the effect of the evidence. *Langston v. State* (Ala. App.), 75 So. 715.

Guilt of Defendant.—A requested instruction charging that defendant was free from fault in bringing on the fatal difficulty was properly refused, as an invasion of the province of the jury. *Smith v. State*, 197 Ala. 193, 72 So. 316.

Intimating Opinion as to Liquor.—Where beer and also liquor, apparently whisky, had been found on accused's premises, requested instruction that "the material or beer found in the barrels and box was not one of the liquors or beverages prohibited by law" invaded the province of the jury. *Ogles v. State* (Ala. App.), 72 So. 598.

§ 514. — Weight and Sufficiency of Evidence.**§ 514 (1) In General.**

Charges clearly on the effect of the evidence are properly refused, being in violation of Code 1907, § 5362. *Doby v. State* (Ala. App.), 74 So. 724.

Instructions Improper.—A requested instruction held erroneous as charging on the effect of the evidence. *Langston v. State* (Ala. App.), 75 So. 715; *Spivey v.*

State, 7 Ala. App. 36, 61 So. 607. See the title CRIMINAL LAW, § 514 (1), vol. 4, p. 345.

Same—Jury Jumping to Conclusions.—A requested instruction, "You have a right to weigh the evidence, but you have no right to jump to conclusions, except to draw conclusions and deductions from the evidence given you from the stand," was invasive of the province of the jury. *West v. State* (Ala. App.), 75 So. 709.

Same—Burglary.—In prosecution under indictment charging burglary, larceny, etc., charge, in part, that it makes no difference who has testified in this case, held improper as on testimony in violation of Code 1907, § 5362. *Wade v. State*, 14 Ala. App. 130, 72 So. 269.

Same—Homicide.—In a homicide case, requested affirmative charges are properly refused as invading jury's province, where evidence presented question for their determination. *Hall v. State* (Ala. App.), 74 So. 731.

Same—Violation of Liquor Laws.—In a prosecution for violating the prohibition law, a requested instruction as to the effect of keeping prohibited liquors held erroneous as invading the province of the jury. *Harwell v. State*, 12 Ala. App. 265, 68 So. 500.

Same — Violation of Bonner Anti-Shipping Law.—In prosecution for violating the Bonner Anti-Shipping Law requested charges held properly refused as invasive of province of jury. *Howard v. State* (Ala. App.), 73 So. 559.

Same—Murder.—In a prosecution for murder, defendant's requested instructions as to the weight of evidence held properly refused. *Jones v. State*, 13 Ala. App. 10, 68 So. 690.

Defendant's Right to Be at Place of Shooting.—Where it appeared that there was bad feeling between defendant and deceased because of a previous difficulty and a probability of a renewal of trouble when they met again, a requested instruction that defendant, as a matter of law, had the right to be where he was at the time of the shooting was an invasion of the province of the jury. *Ragsdale v. State*, 12 Ala. App. 1, 67 So. 783.

Defendant's Right to Be in Home of

Another.—In a prosecution for manslaughter, instructions that, under the law and facts, defendant, if a guest in the home of another when assaulted, had every right to defend himself he would have had in his own home, held faultily as invasive of the jury's province; the evidence tending to show the killing was in the yard. *Thomas v. State*, 13 Ala. App. 50, 69 So. 315.

Inability of Jury to Decide between Two Theories.—A requested charge to acquit in case of two theories and inability of the jury to say which is correct held to invade the province of the jury. *Terry v. State*, 13 Ala. App. 115, 69 So. 370.

Giving Construction of Facts Favorable to Defendant.—In a prosecution for murder, a requested instruction that if there be two reasonable constructions which can be given to facts proven, one favorable and the other unfavorable to a party charged with crime, it is the duty to give that which is favorable, is properly refused as invading the province of the court and jury. *Donald v. State*, 12 Ala. App. 61, 67 So. 624.

An instruction that defendant did not provoke the fatal difficulty was properly refused, as invading the province of the jury. *Wood v. State*, 10 Ala. App. 19, 64 So. 644.

Court Defining Position of State and Accused.—A charge held not objectionable as on the weight of the evidence, the court merely defining the position of the state and accused. *Murray v. State*, 13 Ala. App. 175, 69 So. 354.

Instruction Held Not on the Weight of the Evidence.—*McGuffin v. State*, 178 Ala. 40, 59 So. 635. See the title CRIMINAL LAW, § 514 (1), vol. 4, p. 347.

§ 514 (1½) Determination That There Is Some Evidence.

Trial courts can not be required to charge that there is evidence of a particular fact. *Huguley v. State* (Ala. App.), 72 So. 764.

§ 514 (2) Determination That There Is No Evidence.

Specified Fact or State of Facts.—Trial courts can not be required to give

charges that there is no evidence of particular fact. *Bridgeforth v. State* (Ala. App.), 74 So. 402, certiorari denied in 74 So. 1005; *Huguley v. State* (Ala. App.), 72 So. 764; *Roden v. State*, 13 Ala. App. 105, 69 So. 366; *Williams v. State*, 13 Ala. App. 133, 69 So. 376.

Issue or Elements of Issues Involved.—*Campbell v. State*, 182 Ala. 18, 62 So. 57. See the title CRIMINAL LAW, § 514 (2), vol. 4, p. 347.

Kept Prohibited Liquor.—In a prosecution for violating the prohibition law, refusal to instruct that there was no evidence that defendant kept prohibited liquor for sale held not error. *Thomas v. State*, 12 Ala. App. 293, 68 So. 549.

At Fault in Bringing on Difficulty.—Where one accused of murder pleaded self-defense, a charge that there was no evidence that accused was at fault in bringing on the difficulty is properly refused as invading the province of the jury. *James v. State*, 14 Ala. App. 652, 72 So. 299.

Asserting No Proposition of Law.—*Gunn v. State*, 7 Ala. App. 132, 61 So. 468. See the title CRIMINAL LAW, § 514 (2), vol. 4, p. 348. *Kirkwood v. State*, 8 Ala. App. 108, 62 So. 1011, certiorari denied in 184 Ala. 9, 63 So. 990. See the title CRIMINAL LAW, § 514 (2), vol. 4, p. 348.

§ 514 (4) Weight of Particular Parts of Testimony.

One Single Fact Inconsistent with Guilt.—A charge that if one single thing or fact was proved to the jury's satisfaction, inconsistent with defendant's guilt, it was sufficient to raise a reasonable doubt for acquittal, was properly refused as invading the province of the jury. *Thomas v. State*, 13 Ala. App. 246, 68 So. 799, certiorari denied in Ex parte *Thomas*, 193 Ala. 682, 69 So. 1020.

In a prosecution for murder, an instruction that if there was one fact proven which was not consistent with the guilt of defendant, he must be acquitted was properly refused as invading the province of the jury. *Johnson v. State*, 13 Ala. App. 140, 69 So. 396.

Interest of Certain Witness.—It is invasive of province of jury to charge that

there was no evidence that a certain witness was interested. *James v. State*, 14 Ala. App. 652, 72 So. 299.

Impropriety of Certain Character Evidence.—It is invasive of province of jury to charge that certain character testimony is not improper. *James v. State*, 14 Ala. App. 652, 72 So. 299.

Carrying Pistol Not Evidence of Guilt.—An instruction that the fact that defendant carried a pistol is no evidence that defendant is guilty held properly refused, as invading the province of the jury. *Wood v. State*, 10 Ala. App. 19, 64 So. 644.

§ 514 (5) Directing Verdict or Declaring Law if Jury Believe the Evidence.

Of Acquittal.—A requested instruction that, if the jury believes from all the evidence that defendant's testimony is true, the jury should acquit held properly refused as an invasion of the province of the jury. *Stevens v. State* (Ala. App.), 75 So. 708.

Same — Evidence Giving Rise to Inference against Innocence.—Under evidence giving rise to an inference against defendant's innocence, instruction that if the jury believe the evidence they can not convict defendant held properly refused, as invading province of jury. *Smith v. State*, 197 Ala. 193, 72 So. 316.

Can Not Find Defendant Guilty of First Degree Murder.—A charge that, if the jury believes the evidence, it can not find defendant guilty of first degree murder, is invasive of province of jury and otherwise objectionable. *James v. State*, 14 Ala. App. 652, 72 So. 299.

Evidence, if Believed, Would Warrant Conviction.—In prosecution for violating prohibition laws, charge that the evidence, if believed, would warrant conviction, held erroneous as charge on effect of testimony, in violation of Code 1907, § 5362. *Edmunds v. State* (Ala. App.), 76 So. 466.

Defendant's Character for Truth.—Instruction, "If you believe the evidence, the state has not proved that the character of defendant for truth is bad," held properly refused as invasive of province of jury. *Rogers v. State* (Ala. App.), 75 So. 264.

Instruction, "If you believe the evidence, defendant has proven a good char-

acter for truth," held properly refused as invasive of province of jury. *Rogers v. State* (Ala. App.), 75 So. 264.

Other Evidence by Which to Find Defendant Guilty.—*Tennison v. State*, 183 Ala. 1, 62 So. 780. See the title CRIMINAL LAW, § 514 (5), vol. 4, p. 351.

Lapse of Time Not Sufficient for "Cooling Time."—Instruction that if the jury believes the evidence there was not the lapse of sufficient time, after defendant saw his father dead or dying until the shooting by the defendant, for what the law terms "cooling time," is properly refused as invasive of the province of the jury. *Dickey v. State* (Ala. App.), 72 So. 608, certiorari denied in 197 Ala. 610, 73 So. 72.

§ 514 (6) Directing Verdict or Declaring Law if Certain Facts Are Found.

Instruction Argumentative.—Instruction that, if defendant approached deceased in a quiet manner, with the purpose to settle peaceably a difference between them, and deceased struck defendant, the blows being sufficient to engender sudden passion sufficient to dethrone defendant's reason, to acquit, is properly refused, as argumentative and invasive of the province, of the jury. *Diamond v. State* (Ala. App.), 72 So. 558, certiorari denied in *Ex parte State* (Ala.), 73 So. 1002.

Unlawfulness of Resisting Arrest.—Instruction that if accused's father was authorized by warrant to arrest the assaulted person and undertook to arrest him, but he resisted and killed the father, such resistance was unlawful and unjustifiable is properly refused as invasive of the province of the jury. *Dickey v. State* (Ala. App.), 72 So. 608, certiorari denied in 197 Ala. 610, 73 So. 72.

Overpowering Resentment from Seeing Father Dead.—Instruction that if defendant saw his father dead or dying, so as to cause in an ordinary man overpowering resentment, rendering his mind incapable of cool reflection, he would not be guilty of assault with intent to murder is properly refused as invasive of the province of the jury. *Dickey v. State* (Ala. App.), 72 So. 608, certiorari denied in 197 Ala. 610, 73 So. 72.

Charge Not Prohibited by Code 1907, § 5362.—*Dunn v. State*, 8 Ala. App. 410, 62 So. 996. See the title CRIMINAL LAW, § 514 (6), vol. 4, p. 351.

§ 514 (7) Degree of Crime.

Question for Jury.—An instruction, on a trial for assault with intent to murder, that under the evidence the jury may or have a right in their discretion to find accused guilty of assault and battery with a weapon invades the province of the jury, who must determine what evidence to believe. *Hudson v. State*, 11 Ala. App. 116, 65 So. 732.

Instruction that to reduce offense to assault and battery, it was not necessary that defendant, when he struck, should have been unconscious of what he was doing, but if there was sufficient provocation, the presumption is that passion disturbed the sway of reason, is properly refused as invasive of the province of the jury. *Dickey v. State* (Ala. App.), 72 So. 608, certiorari denied in 197 Ala. 610, 73 So. 72.

§ 514 (9) Conflicting Evidence.

Where Two Conclusions Can Be Drawn.—Requested instruction that, if from all the evidence there arose two theories, one consistent with defendant's innocence, and the other with his guilt, the jury should adopt the theory of innocence, was properly refused as invading the province of the jury. *Harvey v. State* (Ala. App.), 73 So. 200.

Acquittal if Jury Believed Certain Witness.—A charge directing an acquittal if the jury believed the testimony of a witness was properly refused, where the testimony conflicted with evidence affording a basis for a conviction. *Finney v. State*, 10 Ala. App. 39, 65 So. 93.

§ 514 (12) Confining Jury to Consideration of Part of Evidence.

"One Single Fact Inconsistent with Defendant's Guilt."—A requested instruction, "if there is one single fact proved to the satisfaction of the jury which is inconsistent with defendant's guilt, the jury should acquit," held properly refused as invading the province of the jury. *Ex parte Davis*, 184 Ala. 26, 63 So. 1010,

denying certiorari *Davis v. State*, 8 Ala. App. 147, 62 So. 1027, overruling *Walker v. State*, 153 Ala. 31, 45 So. 640 (headnote 8); *Roberson v. State*, 175 Ala. 15, 57 So. 829 (headnote 4); *Simmons v. State*, 158 Ala. 8, 48 So. 606 (headnote 10).

Taking Disputed Questions of Fact from Jury.—Charges invading the province of the jury by taking from them the disputed questions of fact and confining them to part of the evidence are properly refused. *Murray v. State*, 13 Ala. App. 175, 69 So. 354.

Instructions that Certain Portion of Evidence Is Material.—*Spivey v. State*, 7 Ala. App. 36, 61 So. 607. See the title CRIMINAL LAW, § 514 (12), vol. 4, p. 354.

§ 514 (14) Corroboration of Witness.

Seduction—Fact of Intercourse.—A requested charge in seduction that the fact that defendant had intercourse is not corroboration of prosecutrix, invades the province of the jury. *Watts v. State*, 8 Ala. App. 264, 63 So. 18.

Same—Promise of Marriage.—A requested charge in seduction that if the jury believe the evidence, no temptations, arts, flattery, or deception were practiced by defendant on prosecutrix, and that if prosecutrix is not corroborated as to promise of marriage, they should acquit, invades the province of the jury. *Watts v. State*, 8 Ala. App. 264, 63 So. 18.

§ 514 (16½) Admissions and Declarations.

Requested charges that what defendant might have said if deceased was killed would not be evidence as to his aiding and abetting before the killing was done were properly refused, in invading the province of the jury. *Johnson v. State* (Ala. App.), 73 So. 210, certiorari denied in *Ex parte Johnson* (Ala.), 73 So. 1000.

§ 514 (17) Defense of Insanity.

Propriety of Charge.—*Smith v. State*, 182 Ala. 38, 62 So. 184. See the title CRIMINAL LAW, § 514 (17), vol. 4, p. 356.

§ 514 (18) Self-Defense.

Charges Held Erroneous.—A charge on self-defense held to invade province of jury. *Ragsdale v. State*, 12 Ala. App. 1, 67 So. 783.

Requested charge held erroneous invading province of the jury by instructing as to defendant's freedom from fault. *Minor v. State* (Ala. App.), 74 So. 98.

Instructions on self-defense held violative of Code 1907, § 5362, and an invasion of the province of the jury. *Cole v. State* (Ala. App.), 75 So. 261.

Justification in Using Deadly Weapon When Assaulted.—An instruction that an assault on the part of deceased upon accused would not justify accused in using a deadly weapon in defending himself against such assault is erroneous as being upon the effect of evidence and invasive of the province of the jury. *Culliver v. State* (Ala. App.), 73 So. 556.

In a prosecution for murder, where defendant set up self-defense in that deceased assaulted him and was beating him viciously, instruction that such beating would not justify the use of a deadly weapon in resisting the assault, was erroneous, as being upon the weight of the evidence. *Elliott v. State* (Ala. App.), 78 So. 633.

Assuming Deceased Was Making Hostile Demonstrations against Defendant.

—In a homicide case, a charge assuming that deceased was making hostile demonstration against defendant at time of killing is properly refused, where under evidence that question was for jury. *Hall v. State* (Ala. App.), 74 So. 731.

§ 514 (18½) Reasonable Doubt.

"Single Fact Inconsistent with Guilt."

—Instruction that, if a single fact inconsistent with guilt is proven, this is sufficient to raise reasonable doubt, and the jury should acquit, invades their province. *Pinson v. State* (Ala.), 78 So. 876.

A requested instruction that "if there is one single fact proven to the satisfaction of the jury which is inconsistent with the defendant's guilt, this is sufficient to raise a reasonable doubt, and the jury should acquit," held to invade the jury's province. *Cowan v. State* (Ala. App.), 72 So. 578.

§ 516. — Determination of Question of Law.

See ante, "Questions of Law in General," § 489.

Defendants requested charge held objectionable as referring the determination of matters of law to the jury. *Todd v. State*, 13 Ala. App. 301, 69 So. 325.

Self-Defense.—An instruction on self-defense held to refer questions of law to the jury in a prosecution for homicide. *Bone v. State*, 8 Ala. App. 59, 62 So. 455.

Charge on self-defense held erroneous as submitting a question of law to jury. *Ragsdale v. State*, 12 Ala. App. 1, 67 So. 783.

A charge which submits to the jury a question of law as to what is self-defense held properly refused. *Rector v. State*, 11 Ala. App. 333, 66 So. 857.

§ 516½. — Application of Law to Facts.

A sentence in the charge held not erroneous, as invading the province of the jury, because it did not include a requirement that the false pretense be one of fact, where it was stated elsewhere in the charge, which sufficiently stated the principles of law applicable to the facts. *Addington v. State* (Ala. App.), 74 So. 846.

(G) NECESSITY, REQUISITES, AND SUFFICIENCY OF INSTRUCTIONS.

As to remarks and conduct of counsel, see ante, "Action of Court," § 486. As to instructions invading province of juries, see ante, "Authority to Instruct in General," § 506. As to instructions after submission of cause, see post, "Instructions after Submission of Cause," § 588. As to necessity of objections for purpose of review, see post, "Instructions," § 685. As to necessity of exceptions to ruling for purpose of review, see post, "Review of Instructions and Failure or Refusal to Give Instructions," § 698. As to instructions as part of record on appeal, see post, "Instructions," § 710 (7). As to review as dependent on prejudicial nature of error, see post, "Instructions, and Failure or Refusal to Give Instruction," § 733. As to procuring error in admission of evidence by instructions, see post, "Curing Error by Withdrawal, Striking Out, or Instructions to Jury," § 776 (5).

§ 518. Issues and Theories of the Case in General.

In a prosecution for crime, where the indictment's averment that defendant's name was otherwise unknown was essential but was unnecessary to be sustained by proof, charge that, if the state failed to prove every essential averment of indictment, defendant was not guilty, held properly refused as misleading. *Oliveri v. State*, 13 Ala. App. 348, 69 So. 359.

§ 519. Elements and Incidents of Offense, and Defenses in General.

As to applicability of instructions to case, see post, "Application of Instructions to Case," § 558. As to ignoring evidence, see post, "Instructions Excluding or Ignoring Issues, Defenses, or Evidence," § 559. As to presumption and burden of proof, see post, "Presumptions and Burden of Proof," § 526. As to requests for instructions, see post, "Requests for Instructions," §§ 567-578.

§ 519 (1) Defining or Describing Offense.

Propriety of Charge Failing to Define Elements of Offense.—*Brooks v. State*, 8 Ala. App. 277, 62 So. 569. See the title CRIMINAL LAW, § 519 (1), vol. 4, p. 358.

In prosecution for perjury, defendant's requested charge held bad in failing to inform the jury of the elements of the offense comprehended in the charge on which the defendant was being tried. *Todd v. State*, 13 Ala. App. 301, 69 So. 325.

§ 519 (2½) Reference to Indictment.

In a prosecution for larceny from the person, charges that the jury could not convict unless they believed from the evidence that defendant took from the person of the individual robbed his pocketbook "in which was the money described in the indictment" were improper, as not being complete in themselves by referring to the indictment for a description of the money. *Lane v. State*, 14 Ala. App. 40, 70 So. 982.

§ 519 (3) Place of Offense.

Failure to Prove Venue—Court's Attention Not Called Thereto.—Where failure to prove venue was not called to

the attention of the trial court as required by Rule of Practice 35 (175 Ala. xxi), accused could not complain of the refusal of an affirmative charge for want of proof of venue. *Rector v. State*, 11 Ala. App. 333, 66 So. 857.

Crime Committed Near Boundary.—*Davis v. State*, 8 Ala. App. 147, 62 So. 1027, certiorari denied in *Ex parte Davis*, 184 Ala. 26, 63 So. 1010. See the title CRIMINAL LAW, § 519 (3), vol. 4, p. 358.

§ 519 (4) Intent, Motive, and Malice.

Instructions that on trial for assault with intent to murder the facts which would make the offense murder if death ensued do not necessarily furnish evidence of intention were properly refused as argumentative. *Rowlan v. State*, 14 Ala. App. 17, 70 So. 953.

§ 519 (5) Defenses in General.

A charge that if defendant failed to prove that he acted in self-defense he should be convicted, provided the assault was shown, held defective for failure to define the elements of self-defense. *Blankenship v. State*, 11 Ala. App. 125, 65 So. 860.

§ 520. Insanity.

As to applicability of instructions, see post, "Insanity or Intoxication," § 558 (9). As to argumentative instructions, see post, "Insanity or Intoxication," § 530 (14). As to degree of proof, see post, "Insanity or Intoxication," § 530 (14). As to presumption and burden of proof, see post, "Insanity," § 526 (6). As to continuance of insanity, see post, "Insanity," § 526 (6).

§ 520 (1) In General.

Omission of Essential Conditions.—*Smith v. State*, 182 Ala. 38, 62 So. 184. See the title CRIMINAL LAW, § 520 (1), vol. 4, p. 359.

§ 520 (2) Test of Accountability.

Insane Impulse.—*Smith v. State*, 182 Ala. 38, 62 So. 184. See the title CRIMINAL LAW, § 520 (2), vol. 4, p. 359.

§ 522. Alibi.

As to presumptions and burden of proof, see post, "Alibi," § 526 (7).

§ 522 (1) Necessity of Special Instructions.

It is error to refuse to charge that, if defendant was at another place at time of rape, he should be acquitted, where evidence introduced tended to establish an alibi. *McKissack v. State* (Ala. App.), 75 So. 701.

§ 522 (2) Requisites and Sufficiency in General.

Failure to State Elements Constituting.—An instruction on the defense of alibi is properly refused where it fails to state the elements constituting an alibi, but refers that question of law to the jury. *Collins v. State*, 14 Ala. App. 54, 70 So. 995.

Predicating Doubt on Evidence of Alibi Alone.—*McClain v. State*, 182 Ala. 67, 62 So. 241. See the title CRIMINAL LAW, § 522 (2), vol. 4, p. 360.

§ 522 (4) Effect of Failure to Prove.

It is a circumstance that may be weighed against a defendant, if he unsuccessfully attempts to prove an alibi; and it is not error to so charge. *Wiley v. State*, 10 Ala. App. 249, 65 So. 204.

§ 523. Character.**§ 523 (1) Necessity of Instructions.**

Where there was evidence of defendant's good character, he was entitled to have the jury instructed as to the proper functions and possible effect thereof. *Ducett v. State*, 186 Ala. 34, 65 So. 351.

§ 523 (1½) Sufficiency in General.

Defendant's requested charge, not requiring the evidence of good character sufficient to raise a reasonable doubt to be considered with the other evidence in the case, was properly refused. *Henderson v. State* (Ala. App.), 72 So. 590.

§ 523 (4) Effect to Generate Reasonable Doubt.**§ 523 (4a) Good Character of Itself.**

In General.—*Brown v. State*, 7 Ala. App. 26, 61 So. 12. See the title CRIMINAL LAW, § 523 (4a), vol. 4, p. 363. *Allen v. State*, 8 Ala. App. 228, 62 So. 971. See the title CRIMINAL LAW, § 523 (4a), vol. 4, p. 363.

Charge Held Bad.—Requested charge, "Good character alone, when proven,

may be sufficient to generate reasonable doubt of defendant's guilt, when without such proof, * * * the jury would have no doubt of his guilt," is bad. *Pinson v. State* (Ala.), 78 So. 876.

§ 523 (4b) Good Character in Connection with Other Evidence.

General Rule.—Instruction on character held erroneous for omitting proof of good character in connection with other evidence. *De Wyre v. State*, 190 Ala. 1, 67 So. 577.

A request to charge that proof of good character, taken in connection with the other evidence, may be sufficient to generate a reasonable doubt of defendant's guilt, requiring an acquittal, was properly refused. *Ducett v. State*, 186 Ala. 34, 65 So. 351.

§ 523 (5) Effect of Bad Character.

Misleading.—*Jones v. State*, 181 Ala. 63, 61 So. 434. See the title CRIMINAL LAW, § 523 (5), vol. 4, p. 365.

§ 524. Rules of Evidence in General.

As to admissions and confessions, see post, "Admissions and Confessions," § 529. As to circumstantial evidence, see post, "Circumstantial Evidence," § 532. As to credibility of testimony or statement of accused, see post, "Credibility of Testimony or Statement of Accused," § 534. As to credibility of witness, see post, "Credibility of Witnesses," § 533. As to determination of sufficiency of evidence, see post, "Determination of Sufficiency of Evidence in General," § 530. As to presumptions and burden of proof, see post, "Presumptions and Burden of Proof," § 526. As to reasonable doubt, see post, "Reasonable Doubt," § 537.

A requested instruction that the jury are not to consider anything, except facts, was properly refused. *Wilson v. State*, 191 Ala. 7, 67 So. 1010.

§ 525. Statement and Review of Evidence.

The court need not give requested charges that there is or not evidence of certain facts. *Watts v. State*, 8 Ala. App. 264, 63 So. 18.

A charge merely asserting the absence of evidence to prove a controverted fact

in a criminal prosecution states no proposition of law and is properly refused. *Kirk v. State*, 10 Ala. App. 216, 65 So. 195.

Stating Defendant's Testimony.—*Roberson v. State*, 183 Ala. 43, 62 So. 837. See the title CRIMINAL LAW, § 525, vol. 4, p. 365.

§ 526. Presumptions and Burden of Proof.

§ 526 (1) Sufficiency in General.

Where There Are Two Defendants.—*Davis v. State*, 8 Ala. App. 147, 62 So. 1027, certiorari denied in *Ex parte Davis*, 184 Ala. 26, 63 So. 1010. See the title CRIMINAL LAW, § 526 (1), vol. 4, p. 366.

Charges Held Erroneous.—Requested charge on burden of proof on state held erroneous and properly refused. *Minor v. State* (Ala. App.), 74 So. 98.

Charge on the burden of proof held erroneous, tending to have the jury disregard, on question of guilt, any evidence but that of state. *Minor v. State* (Ala. App.), 74 So. 98.

Embezzlement — Argumentative and Misleading Charge.—In a prosecution for embezzlement, defendant's requested charge that the burden was on the state of proving guilt to the exclusion of every reasonable doubt, and that, if it failed to sustain such burden, the defect could not be supplied by guessing what the truth was, and that the verdict must be based on the evidence, and not on guesses, speculations, or suppositions, was objectionable as argumentative and as tending to mislead the jury into believing that the court thought the evidence insufficient to sustain a conviction; and charges that defendant must be tried on the evidence alone, and that unless it satisfied the jury he could not be convicted, and that he should not be tried on suspicions or suppositions, but on the evidence alone, and that unless that convinced the jury of guilt he should be acquitted, were likewise objectionable as argumentative. *Lacy v. State*, 13 Ala. App. 267, 69 So. 244, judgment affirmed in *Ex parte Lacy*, 195 Ala. 668, 70 So. 272.

§ 526 (3) Sufficiency of Instructions as to Presumption of Innocence.

Instructions Held Misleading.—Requested charges on presumptions of innocence held misleading. *Ragsdale v. State*, 12 Ala. App. 1, 67 So. 783.

In a prosecution for homicide, defendant's requested instruction on burden of proof and presumption of innocence held faulty, as capable of misleading the jury to conclude that he could not be convicted, unless they were absolutely convinced of his guilt. *Martin v. State*, 196 Ala. 584, 71 So. 693.

In a prosecution for robbery, a charge that, in order to convict, the jury must find that there was no other reasonable conclusion to be reached but that of guilt, and that, if it did not so find, the state had no case, and they should acquit, was misleading and incorrect. *Ware v. State*, 12 Ala. App. 101, 67 So. 763.

Presumption of Innocence Regarded as Evidence.—Instruction that there is a legal presumption of innocence which is to be regarded as evidence to the benefit of which accused is entitled, and that it attends the defendant as a matter of evidence until his guilt is established beyond a reasonable doubt, is proper, and its refusal is error. *Diamond v. State* (Ala. App.), 72 So. 558, certiorari denied in *Ex parte State* (Ala.), 73 So. 1002.

In a prosecution for robbery, defendant's requested charge that the legal presumption of innocence must be regarded by the jury as matter of evidence to the benefit of which he was entitled, and which attended him until the evidence placed his guilt beyond a reasonable doubt, "therefore you must acquit," was properly refused, as being the equivalent of an affirmative charge. *Ware v. State*, 12 Ala. App. 101, 67 So. 763.

Till Guilt Established by Verdict.—An instruction is incorrect which asserts that accused is presumed to be innocent until his guilt is established by the verdict. *Beiser v. State*, 10 Ala. App. 86, 65 So. 312.

§ 526 (6) Insanity.

As to degree of proof, see post, "Insanity or Intoxication," § 530 (14).

Charges that, if the jury was satisfied from the preponderance of the evidence that if, at the time of the killing, defendant was afflicted with a mental disease by reason of which he had lost the power to choose between right and wrong and to resist the killing, which was the result solely of such mental disease, he was not guilty, were not objectionable as relieving the defendant of the burden of proving insanity. *Mizell v. State*, 184 Ala. 16, 63 So. 1000.

Presumption of Continuance.—*Cogbill v. State*, 8 Ala. App. 223, 62 So. 406. See the title CRIMINAL LAW, § 526 (6), vol. 4, p. 368.

§ 528 (7) Alibi.

A charge on alibi, which declared that the burden was on accused to so account for his time as to have made commission of the offense out of the question, is erroneous. *Doby v. State* (Ala. App.), 74 So. 724.

§ 528 (10) Flight or Surrender.

An instruction in a prosecution for robbery that evidence to show flight of a defendant may be offered by the state and may be considered in connection with the other evidence, that on evidence of defendant's flight it would be for the jury to say, whether it was, in fact, a flight, and that evidence as to flight should be considered in the light of all the other evidence in the case, including any explanation thereof, was proper. *Ware v. State*, 12 Ala. App. 101, 67 So. 763.

§ 526 (11) Self-Defense.

Misleading Instruction.—Charge on burden of proof as to self-defense held misleading. *Ragsdale v. State*, 12 Ala. App. 1, 67 So. 783.

Placing Burden on State—Propriety of Refusal.—A charge held properly refused as placing on the state the burden of proof on the issue of self-defense. *Prater v. State*, 193 Ala. 40, 69 So. 539.

§ 528. Testimony of Accomplices.

As to instructions ignoring evidence, see post, "Testimony of Accomplices," § 559 (6).

§ 528 (1) Correctness and Sufficiency in General.

On a trial for forgery, an instruction

that state had burden of exculpating alleged accomplice, and that, unless this was done, a conviction could not be had, unless he was corroborated, held properly refused, as the state had no such burden, but might avail itself of his testimony, whether he was an accomplice or not. *Newsom v. State*, 10 Ala. App. 124, 65 So. 87.

§ 528 (2) Extent of Corroboration Required.

In prosecution for homicide, instruction that there was sufficient corroborative evidence of the accomplice to submit the question of guilt, and that the question whether such evidence had been sufficiently corroborated to warrant a conviction was for the jury, held proper. *Read v. State*, 195 Ala. 671, 71 So. 96.

Excluding from Consideration if Found Involuntary.—In prosecution for carnal knowledge of eight year old girl, requested instruction that confession must have been voluntary and free from threats or promises, that accused's age might be considered on question whether confession was voluntary, and to acquit unless each juror was satisfied that the corpus delicti was proved, was properly refused as argumentative. *Pool v. State* (Ala. App.), 78 So. 311.

§ 529. Admissions and Confessions.

As to testimony or statement of accused, see post, "Credibility of Testimony or Statement of Accused," § 534.

§ 530. Determination of Sufficiency of Evidence in General.

As to construction of charge as to whole, see post, "Weight and Sufficiency of Evidence," § 566 (4). As to ignoring evidence, see post, "Sufficiency of Evidence and Reasonable Doubt," § 559 (8). As to presumptions and burden of proof, see ante, "Presumptions and Burden of Proof," § 526. As to reasonable doubt, see post, "Reasonable Doubt," § 537. As to undue prominence to particular facts, see post, "Undue Prominence of Particular Matters," § 555.

See post, "Reference to Interest in Event," § 534 (2).

§ 530 (1) In General.

Argumentative Instructions. — A re-

quested instruction that defendant should be given the benefit of a favorable construction of the facts held properly refused as argumentative. *Donald v. State*, 12 Ala. App. 61, 67 So. 624.

Instructions asserting that the jury may look to certain evidence are argumentative. *Ragsdale v. State*, 12 Ala. App. 1, 67 So. 783.

An instruction as to sufficient evidence held properly refused as argumentative. *Williams v. State*, 13 Ala. App. 133, 69 So. 376.

Instructions in prosecution for arson on weight of evidence held argumentative. *Cunningham v. State*, 14 Ala. App. 1, 69 So. 982.

A requested charge to acquit if the jury are not convinced so that they would venture to act in the matter of the highest importance to themselves held argumentative. *Terry v. State*, 13 Ala. App. 115, 69 So. 370.

Erroneous Instructions.—A requested charge that, if the evidence is reasonably consistent with the defendant's innocence, the jury should "promptly" acquit is erroneous. *Davis v. State*, 8 Ala. App. 147, 62 So. 1027, certiorari denied in *Ex parte Davis*, 184 Ala. 26, 63 So. 1010.

Instructions in a prosecution for arson upon the sufficiency of the evidence held bad. *Cunningham v. State*, 14 Ala. App. 1, 69 So. 982.

Theory Some Other Person May Have Committed Crime.—It was proper to refuse to charge that the evidence is insufficient to convict if it can be reconciled with a theory that some person other than accused may have done the killing, but not requiring such theory to be based on the evidence. *Thomas v. State*, 11 Ala. App. 85, 65 So. 863.

It was proper to refuse to charge, "If under all the evidence some one else than defendant may have killed deceased, * * * then your verdict should be not guilty." *Thomas v. State*, 11 Ala. App. 85, 65 So. 863.

Is or Is Not Evidence of Certain Fact.—The court need not give requested charges that there is or is not evidence of certain facts. *Andrews v. State*, 11 Ala. App. 271, 65 So. 688.

Directing Jury to Consider a Fact.—It was not error to refuse a charge direct-

ing the jury to consider a fact, if believed, without requiring the belief or finding to be based on evidence adduced. *Lewis v. State*, 10 Ala. App. 31, 64 So. 537.

Where Two Constructions May Be Given Evidence.—An instruction that, if there be two reasonable constructions which can be given to facts proven, one favorable and the other unfavorable to the defendant, it is the jury's duty to give that which is favorable rather than that which is unfavorable, was properly refused. *Jones v. State*, 13 Ala. App. 10, 68 So. 690; *Kelly v. State*, 13 Ala. App. 39, 68 So. 675.

Effect of Fact That Deceased Met Violent Death.—A requested charge that the mere fact that deceased met her death violently is no evidence against defendant was properly refused. *Wilson v. State*, 191 Ala. 7, 67 So. 1010.

Tending to Excite Speculation.—Defendant is not entitled to a charge that, if the jury can reconcile the evidence with the theory that he is innocent, it is its duty to acquit, it having a tendency to excite speculation, whereas cases should be determined on the facts as the jury finds them from the evidence; "theory," if referring to defendant's own theory of innocence, being a matter about which the jury need not give itself concern, and the charge, if intended to state the proposition that the law presumes innocence till guilt is established beyond a reasonable doubt, being an imperfect, confusing, and misleading statement of the law. *Walker v. State*, 185 Ala. 30, 64 So. 351.

Failing to State Proposition of Law.—A requested charge that there is no positive evidence that defendant fired the shot that killed deceased is properly refused as not stating a proposition of law. *Wise v. State*, 11 Ala. App. 72, 66 So. 128.

§ 530 (9) Reference to Policy of Law and Conviction of Innocent Men.

Safer to Acquit in Cases of Doubt than to Convict.—*McGhee v. State*, 178 Ala. 4, 59 So. 573. See the title CRIMINAL LAW, § 530 (2), vol. 4, pp. 375, 376.

Vindication of Law—Improvement of Public Morals.—A requested instruction that it is not the duty of the jury to convict defendant to vindicate the law, or improve public morals, unless the evidence was so convincing as to lead their minds to the conclusion that defendant could not be innocent, is properly refused. *Lovett v. State*, 10 Ala. App. 72, 64 So. 643.

§ 530 (3) That Jury Are Exclusive Judges of Facts.

Effect of Verdict.—*McClain v. State*, 182 Ala. 67, 62 So. 241. See the title CRIMINAL LAW, § 530 (3), vol. 4, p. 376.

§ 530 (5) Character of Evidence in General.

It was proper to refuse to charge that there should not be a conviction on circumstantial evidence, unless it is of the strongest and the highest. *Thomas v. State*, 11 Ala. App. 85, 65 So. 863.

§ 530 (7) Inferences from Evidence.

Instructions Argumentative and Misleading.—In a homicide case, a requested charge held argumentative and misleading. *Minor v. State* (Ala. App.), 74 So. 98.

Adoption of Construction of Facts Favorable to Accused.—*McGhee v. State*, 178 Ala. 4, 59 So. 573, 574. See the title CRIMINAL LAW, § 530 (7), vol. 4, p. 377.

It is not error to refuse a requested instruction that if there are two reasonable constructions which can be given to facts proved, one favorable and the other unfavorable to accused, it is the jury's duty to give the favorable construction. *Pippin v. State*, 197 Ala. 613, 73 So. 340.

In a murder trial, instruction that it is a well-settled rule of law that if there be two reasonable constructions which can be given to facts proven, one favorable and the other unfavorable to accused, it is the jury's duty to give that which is favorable rather than unfavorable was properly refused. *Mathis v. State* (Ala. App.), 73 So. 122; *McGhee v. State*, 178 Ala. 4, 59 So. 573. See the title CRIMINAL LAW, § 530 (7), vol. 4, pp. 377, 378.

Evidence of Guilt—Charge Not to Convict if Evidence Believed.—Where there was evidence that defendant was guilty of the offense charged in the indictment, requests to charge that the jury should not convict if they believed the evidence were properly refused. *Brock v. State* (Ala. App.), 61 So. 474.

§ 530 (8) Conflicting Evidence.

A requested instruction that the jury should reconcile conflicting evidence favorably to defendant is properly refused. *Bryant v. State*, 13 Ala. App. 206, 68 So. 704.

§ 530 (9) Degree of Proof in General.

See post, "Reasonable Doubt," § 537.

Held Argumentative.—In murder trial, requested instruction upon degree of conviction of accused's guilt necessary to convict held properly refused as argumentative. *Cain v. State* (Ala. App.), 77 So. 453.

Same—Circumstantial Evidence.—Instruction as to degree of proof required to convict on circumstantial evidence, and other instructions, were properly refused, as argumentative. *Lawson v. State* (Ala. App.), 76 So. 411.

Same—Vindication of Law—Improvement of Public Morals.—Requested charge that it is not duty of jury to convict accused to vindicate law or to improve public morals, unless evidence is so convincing as to lead to conclusion that accused can not be innocent, is argumentative and bad. *Minor v. State* (Ala. App.), 74 So. 98.

Held Erroneous.—A requested charge to acquit unless the evidence fully satisfies the minds and the conscience of the jurors held erroneous. *Terry v. State*, 13 Ala. App. 115, 69 So. 370.

Patently Faulty.—Requested charge that the jury should not convict without a reasonable belief of defendant's guilt, and even such reasonable belief might not be sufficiently shown to exclude a reasonable doubt to the contrary, is patently faulty. *Murkison v. State*, 11 Ala. App. 105, 65 So. 684.

Too High Degree of Proof.—An instruction that the state was bound to prove the guilt of defendant fully, clearly, satisfactorily, and to a moral

certainty was properly refused, as requiring too high degree of proof. *Bullington v. State*, 13 Ala. App. 61, 69 So. 319.

An instruction that, if the mind of the jury was in a state of confusion as to defendant's guilt or innocence, he should be acquitted was properly refused because requiring too high a degree of proof. *Olive v. State*, 8 Ala. App. 178, 63 So. 36.

In a murder case, an instruction held properly refused, as exacting a too high degree of proof of guilt. *Pounds v. State* (Ala. App.), 73 So. 127.

Consideration of Only Part of Evidence.—In a murder case, instruction held properly refused, as stating in alternative that jury would be justified in acquitting defendant, based on a probability of his innocence in consideration of a part only of the evidence. *Pounds v. State* (Ala. App.), 73 So. 127.

One Fact Not Consistent with Guilt.—An instruction that if one fact was proven which was not consistent with the guilt of the defendant, he must be acquitted was properly refused as misleading. *Johnson v. State*, 13 Ala. App. 140, 69 So. 396.

Excluding to Marked Certainty Every Supposition of Guilt.—In murder trial, requested special charge that "you must find defendant not guilty, unless the evidence is such as to exclude to a marked certainty every supposition but that of his guilt" was properly refused. *Cain v. State* (Ala. App.), 77 So. 453.

"Guilty beyond Reasonable Supposition."—In a criminal prosecution, a requested charge that, "You can not find the defendant guilty unless you believe him guilty beyond all reasonable supposition" was properly refused; supposition having no legitimate sphere in judicial administration. *Dawson v. State*, 196 Ala. 593, 71 So. 722.

§ 530 (11) Proof to Satisfaction of Jury.

Charge that jury must be satisfied conclusively of defendant's guilt before they could convict is properly refused, as implying that guilt must be shown to a mathematical certainty. *Keith v. State* (Ala. App.), 72 So. 602.

§ 530 (12) Absolute Proof.

Full Proof.—*Brooks v. State*, 8 Ala. App. 277, 62 So. 569. See the title CRIMINAL LAW, § 530 (12), vol. 4, p. 381.

Argumentative Charge.—A requested charge, which required an acquittal unless the jury were convinced by the evidence of accused's guilt in such a manner that each would venture to act upon it in matters of the highest concern to themselves, was properly refused as argumentative. *Smith v. State*, 182 Ala. 38, 62 So. 184.

Exacting Too High Degree of Proof.—*Campbell v. State*, 182 Ala. 18, 62 So. 57. See the title CRIMINAL LAW, § 530 (12), vol. 4, p. 380.

§ 530 (13) Matter of Defense in General.

In a murder case, an instruction held properly refused, since the court is under no duty to give charges which instruct the jury that they may "look to" certain evidence or "consider" certain facts. *Pounds v. State* (Ala. App.), 73 So. 127.

§ 530 (14) Insanity or Intoxication.

Proof beyond Reasonable Doubt.—*Smith v. State*, 182 Ala. 38, 62 So. 184. See the title CRIMINAL LAW, § 530 (14), vol. 4, p. 381.

A charge requiring acquittal of accused, if evidence leaves in the mind of the jury a reasonable doubt of his sanity was properly refused. *James v. State*, 193 Ala. 55, 69 So. 569.

§ 531. Purpose and Effect of Evidence.

As to effect of admission of evidence, see ante, "Effect of Admission," § 440.

Directing Verdict or Declaring Law if Jury Believe Evidence.—In prosecution for grand larceny and receiving stolen goods, though there was no direct proof that property named in indictment had ever been in possession of alleged owner, defendants' requests, declaring if jury believed evidence they must find defendants not guilty, were properly refused. *Wade v. State*, 14 Ala. App. 130, 72 So. 269.

The court did not err in refusing a requested instruction which directed an acquittal unless the jury believed that de-

defendants followed the complaining witness, or went along with him to the place where the alleged robbery took place. *Boswell v. State*, 9 Ala. App. 23, 64 So. 188.

§ 532. Circumstantial Evidence.

As to weight and sufficiency, see ante, "Circumstantial Evidence," § 365. As to applicability of instructions to evidence, see post, "Circumstantial Evidence," § 558 (14).

§ 532 (2) Direct and Circumstantial Evidence.

Where^o circumstantial evidence was relied upon, the refusal of a charge that, to justify a conviction, circumstantial evidence should exclude any rational probability of innocence, and that a conviction should not be had on circumstantial evidence when direct evidence was obtainable was proper. *Webb v. State*, 11 Ala. App. 123, 65 So. 845.

§ 532 (3) Form and Sufficiency in General.

Misleading and Argumentative Instruction.—An instruction that circumstantial evidence "is always insufficient when, assuming all to be proved which the evidence tends to prove, some other reasonable hypothesis may still be true, for it is the actual exclusion of every other reasonable hypothesis which invests mere circumstances with the force of truth," is erroneous, being misleading and argumentative. *Miller v. State* (Ala. App.), 74 So. 840.

Unintelligible Instruction.—*Saulsberry v. State*, 178 Ala. 16, 59 So. 476. See the title CRIMINAL LAW, § 532 (3), vol. 4, p. 385.

"Unless No Other Person Could Have Done Act."—It is not error to refuse a requested charge, where the evidence is circumstantial, that the defendant should be acquitted, unless no other person "could have done the act," since others "could" have done it, though defendant did do it. *Cunningham v. State*, 14 Ala. App. 1, 69 So. 982.

§ 532 (5) Degree of Proof of Circumstances.

"Unerring Certainty."—Charge that, to justify conviction on circumstantial evi-

dence, it must be so strong as to lead with "unerring certainty" to conclusion of guilt, was properly refused, as evidence need show defendant's guilt only beyond reasonable doubt. *Lawson v. State* (Ala. App.), 76 So. 411.

Matters of Highest Concern to Jurors.—*Wilson v. State*, 7 Ala. App. 134, 61 So. 471. See the title CRIMINAL LAW, § 532 (5), vol. 4, p. 386.

§ 533. Credibility of Witnesses.

As to instructions invading province of jury, see ante, "Credibility of Witnesses," § 508. As to applicability of instructions to case, see post, "Credibility of Witnesses," § 558 (15).

§ 533 (1) Evidence Justifying or Requiring Instructions.

Under the evidence in a prosecution for the sale of liquor the court should have charged that, if the testimony of the sole witness for the state as to the time of the offense was so unreliable as to show a defective memory, his entire testimony could be disregarded and defendant acquitted. *Harrison v. State*, 12 Ala. App. 284, 68 So. 532.

§ 533 (2) Sufficiency in General.

Argumentative Instruction.—An instruction on the credibility of witnesses held properly refused as argumentative. *Roden v. State*, 13 Ala. App. 105, 69 So. 366.

Misleading Instruction.—In a trial for homicide, instruction that defendant could not be convicted if there was a reasonable doubt of the truth of statements as testified to by the state's witnesses as to any material fact held properly refused as misleading. *Hubbard v. State*, 10 Ala. App. 47, 64 So. 633.

Instruction that jury must believe a witness before it could convict was properly refused as requiring belief of all of his testimony. *Moore v. State* (Ala. App.), 72 So. 596.

§ 533 (3) Police Officers, and Detectives.

Argumentative Instruction.—*Harmon v. State*, 8 Ala. App. 311, 62 So. 438. See the title CRIMINAL LAW, § 533 (3), vol. 4, p. 390.

§ 533 (7) Interest or Bias.

Rejecting Entire Testimony—Mislead-

ing Instructions.—An instruction that if any of the state's witnesses have exhibited malice or anger against accused and the jury are satisfied that they have not testified truly in part, the jury may disregard their testimony altogether is properly refused as misleading. *Chestnut v. State*, 7 Ala. App. 72, 61 So. 609.

Same—Proper Instructions.—That a state's witness, a white man, on whose initiative defendant, a negress, was arrested for adultery, inconvenienced himself so greatly to obtain evidence to substantiate the rumor of her guilt, as shown by his testimony, that he, in watching her, lay at night, half an hour, under a house, in severe cold weather, nearly freezing as a result, presents such evidence of his prejudice against her, as to require the giving of her requested charge, as to disregarding his testimony, in case he had exhibited prejudice against her. *Branch v. State*, 10 Ala. App. 94, 64 So. 507.

§ 533 (8) Effect of Impeaching Evidence.

Sufficiency of Instructions as to.—A requested instruction in a larceny trial that testimony of witnesses known to be unworthy of belief or impeached in any other manner is insufficient, etc., was properly refused, because allowing the jury to determine their credibility from matters outside the evidence. *Autrey v. State* (Ala. App.), 74 So. 397.

Degrees of Impeaching Evidence.—As there are no degrees to the several methods of impeaching a witness, a requested charge speaking of the highest form of impeachment is properly refused. *Forman v. State*, 190 Ala. 22, 67 So. 583.

Contradictory Testimony.—An instruction that, where a witness has been contradicted, the jury may disregard his entire testimony, was properly refused as permitting such action, though they did not believe the contradicting evidence, and though the uncontradicted part of his testimony was undisputed. *Maxwell v. State*, 11 Ala. App. 53, 65 So. 732.

§ 533 (9) Corroboration of Impeached Witness.

An instruction in a larceny case that if certain state witnesses had been impeached, their evidence does not justify conviction without corroborating evidence

indicating defendant's guilt was properly refused as misleading and partly abstract as applied to the evidence. *Autrey v. State* (Ala. App.), 74 So. 397.

§ 533 (10) Effect of Willful False Testimony.

Contradictory Statement Concerning Material Facts.—In murder trial, there being evidence that witness had made contradictory statement concerning material facts, it was error to refuse instruction that the jury might consider such statement in determining the weight of the witness' testimony; Code 1907, § 5364, as amended by Acts 1915, p. 815, providing that refusal of a charge covered by general charge shall not be cause for reversal, not applying. *Reynolds v. State*, 196 Ala. 586, 73 So. 20.

Rejection of Entire Testimony.—On murder trial, there being evidence as to a witness' willful or corrupt false testimony as to a material fact, it was error to refuse instruction that on finding he gave such testimony the jury might disregard his entire testimony. *Reynolds v. State*, 196 Ala. 586, 73 So. 20.

Same—Only One Witness for State.—Where there was only one witness for the state in a prosecution for the sale of liquor, a requested charge that the jury might disregard his entire testimony, if they believed he knowingly testified falsely, should have been given. *Harrison v. State*, 12 Ala. App. 284, 68 So. 532.

Same — Premitting Materiality of False Testimony.—Charge that if jury "believe that any witness has sworn willfully and corruptly false, then they must disregard testimony of such witness entirely," was properly refused as premitting materiality of false testimony. *Butler v. State* (Ala. App.), 77 So. 72.

Same—Omitting Element of Willfulness.—A requested instruction that the jury might disregard a witness' entire testimony if they found he had testified falsely is improper because omitting the element of willfulness. *Ellis v. State* (Ala. App.), 72 So. 578.

Rejection of Entire Testimony, Irrespective Whether Portion Was Willfully False.—*Chestnut v. State*, 7 Ala. App. 72, 61 So. 609. See the title CRIMINAL

LAW, § 533 (10), vol. 4, p. 394.

§ 534. Credibility of Testimony or Statement of Accused.

As to instructions invading province of jury, see ante, "Credibility of Accused,"

§ 509. As to admissions and confessions, see ante, "Admissions and Confessions," § 529. As to instructions giving undue prominence to statement of accused, see post, "Credibility of Accused," § 555 (6).

§ 534 (1) Sufficiency in General.

In manslaughter case, accused's request to charge held properly refused because it was argumentative. *Tittle v. State* (Ala. App.), 73 So. 142.

§ 534 (2) Reference to Interest in Event.

Weighing Defendant's as Other Testimony.—*Descrippo v. State*, 8 Ala. App. 85, 62 So. 1004. See the title CRIMINAL LAW, § 534 (2), vol. 4, p. 395.

§ 534 (3) Effect of False Testimony.

Where material allegations in indictment for rape were proven only by testimony of victim, it was error to refuse charge based on her willful and corrupt swearing. *McKissack v. State* (Ala. App.), 75 So. 701.

Necessity That False Testimony Be Willfully False.—*Keef v. State*, 7 Ala. App. 15, 60 So. 963. See the title CRIMINAL LAW, § 534 (3), vol. 4, p. 396.

§ 535. Failure of Accused to Testify.

Code 1907, § 7894, prohibiting comment on failure of a defendant to testify, does not make it error for the court to caution the jury in reference thereto. *Brandes v. State*, 10 Ala. App. 239, 65 So. 307.

§ 537. Reasonable Doubt.

As to weight and sufficiency of evidence, see ante, "Reasonable Doubt," § 371. As to effect of good character to generate reasonable doubt, see ante, "Good Character in Connection with Other Evidence," § 523 (4b). As to determination and sufficiency of evidence, see ante, "Determination of Sufficiency of Evidence in General," § 530. As to doubt of individual juror, see post, "Doubt of Individual Juror," § 543 (2). As to excluding or ignoring evidence of

reasonable doubt, see post, "Sufficiency of Evidence and Reasonable Doubt," § 559 (8).

§ 537 (1) Sufficiency of Definitions of Reasonable Doubt in General.

Instructions Held Erroneous.—Requested charges on reasonable doubt held erroneous and properly refused. *Minor v. State* (Ala. App.), 74 So. 98; *Benjamin v. State*, 12 Ala. App. 148, 67 So. 792; *Roden v. State*, 13 Ala. App. 105, 69 So. 366.

Same—Arson.—Instruction on reasonable doubt in a prosecution for arson held properly refused. *Cunningham v. State*, 14 Ala. App. 1, 69 So. 982.

Same—Homicide.—In a homicide case, a requested charge on reasonable doubt held erroneous. *Minor v. State* (Ala. App.), 74 So. 98.

Instructions Held Argumentative.—Requested charge on reasonable doubt held argumentative and obscure. *Minor v. State* (Ala. App.), 74 So. 98.

Instructions on reasonable doubt in a prosecution for arson held bad, as argumentative. *Cunningham v. State*, 14 Ala. App. 1, 69 So. 982.

In murder trial, requested charge that "a reasonable doubt is such a doubt as leaves your mind in view of all the evidence in a state of reasonable uncertainty as to the guilt of defendant" was properly refused as argumentative. *Cain v. State* (Ala. App.), 77 So. 453.

A requested instruction that the jury should not convict without a reasonable belief of defendant's guilt, although such belief might not exclude a reasonable doubt, being self-contradictory and argumentative, was properly refused. *Moore v. State*, 12 Ala. App. 243, 67 So. 789.

Held Meaningless.—Defendant's requested charge on reasonable doubt held meaningless. *Todd v. State*, 13 Ala. App. 301, 69 So. 325.

Held Misleading.—Instruction that defendant's good character "alone," in connection with other evidence, might create a reasonable doubt, held misleading by use of the word "alone." *De Wyre v. State*, 190 Ala. 1, 67 So. 577.

Beyond Reasonable "Supposition."—A charge directing the jury to acquit unless the evidence excludes every reason-

able "supposition" except that of guilt is properly refused. *Richardson v. State*, 191 Ala. 21, 68 So. 57.

"If Jury Feel a Hesitancy of Guilt."—A requested instruction that, if the jury feel a hesitancy in arriving at a verdict of guilty, they must acquit, is bad. *Bryant v. State*, 13 Ala. App. 206, 68 So. 704.

Basing Acquittal on Reasonable Doubt of Innocence.—In trial for robbery, charge as to good character held erroneous as requiring an acquittal on a reasonable doubt of innocence, instead of reasonable doubt of guilt. *Ware v. State*, 12 Ala. App. 101, 67 So. 763.

Basing Acquittal upon Reasonable Doubt of "Guilt or Innocence."—*Smith v. State*, 182 Ala. 38, 62 So. 184. See the title CRIMINAL LAW, § 537 (1), vol. 4, p. 399.

Charge Not Predicated on All the Evidence.—A charge that if from any part of the testimony there is created in the minds of the jury a probability that accused is not guilty it is sufficient to create a reasonable doubt and accused must be acquitted, was properly refused because not predicated on all the evidence. *Dodson v. State*, 10 Ala. App. 255, 65 So. 206.

Requested charges, authorizing an acquittal because of a doubt arising from a consideration of a part only of the evidence in the case, are bad. *Hall v. State*, 11 Ala. App. 95, 65 So. 427.

Failure to State of What Jury Should Be in Doubt.—In prosecution for murder, charge failing to state of what jury should be in doubt was bad. *Smith v. State* (Ala. App.), 75 So. 829.

Doubt "as to Truth."—*McClain v. State*, 182 Ala. 67, 62 So. 241. See the title CRIMINAL LAW, § 537 (1), vol. 4, p. 398.

State's Evidence Statements Which Jury Reasonably Doubts.—*Smith v. State*, 183 Ala. 10, 62 So. 864. See the title CRIMINAL LAW, § 537 (1), vol. 4, p. 398.

Predicating Acquittal on Doubt of Guilt of Third Person.—Requested charge that, if the jury had a reasonable doubt as to who took the money, it should acquit, was faulty, in predicating an acquittal on reasonable doubt as to guilt

of third person. *Moye v. State*, 12 Ala. App. 127, 67 So. 716.

In a prosecution for larceny, defendant's requested charge that, if the jury under all the evidence had a reasonable doubt as to who took the money, whether a certain third person or defendant, it should give defendant the benefit of such doubt and acquit, was misleading as applied to the evidence, in that defendant could have been guilty of an offense within the terms of the indictment without having been the person who alone actually first took the money. *Moye v. State*, 12 Ala. App. 127, 67 So. 716.

One Single Fact Proven Inconsistent with Defendant's Guilt.—A requested instruction that, if there was one single fact proved to the satisfaction of the jury inconsistent with defendant's guilt, it was sufficient to raise a reasonable doubt should have been given where there was evidence of facts inconsistent with guilt. *Doty v. State*, 9 Ala. App. 21, 64 So. 170.

"That Jury Can Say to Themselves They Doubt."—A charge which asserts that if, after the jury have investigated the evidence and compared it in all its parts, they can say to themselves that they doubt the guilt of accused, they have a reasonable doubt, is properly refused. *Fortner v. State*, 12 Ala. App. 179, 67 So. 720.

§ 537 (2) Necessity of Instructions Requiring Proof beyond Reasonable Doubt.

Propriety of Refusal.—Refusal of charge on reasonable doubt held erroneous. *Roden v. State*, 13 Ala. App. 105, 69 So. 366.

Omission of Words "Beyond Reasonable Doubt."—In a prosecution for crime, the charge that if the jury believed the evidence they must find defendant guilty was erroneous, having omitted the words "beyond a reasonable doubt." *Kennedy v. State*, 14 Ala. App. 23, 70 So. 957.

In prosecution for trespass after warning, charge that if the jury believed the evidence they must find defendant guilty was erroneous for failing to predicate conviction upon belief of the evidence beyond a reasonable doubt. *Huff v. State* (Ala. App.), 77 So. 939.

Doubt Based on Something Extrinsic to Evidence.—A requested charge that if from the unsatisfactory character of the evidence, or for any other reason, the jury are not satisfied of defendant's guilt, they should acquit was erroneous as permitting the jury's doubt to be based on a consideration of something outside of the evidence. *Conner v. State*, 10 Ala. App. 206, 65 So. 309.

§ 537 (3) Sufficiency of Instructions as to Proof beyond Reasonable Doubt.

Held Proper.—A charge "that each and every one of you is entitled to have his own conception of what constitutes a reasonable doubt," and that before the jury could convict the evidence must convince each juror of defendant's guilt beyond a reasonable doubt, and that if any juror had a reasonable doubt defendant could not be convicted, held not erroneous. *Doty v. State*, 9 Ala. App. 21, 64 So. 170.

Properly Refused.—Requested instruction on reasonable doubt held properly refused. *Fuller v. State* (Ala. App.), 75 So. 879.

Argumentative.—Charge "that a reasonable doubt of guilt which authorizes an acquittal is one arising from a consideration of the evidence in the case, having regard for both what it shows and what it does not," was properly refused as argumentative. *Butler v. State* (Ala. App.), 77 So. 72.

Requested charge that the requirement that juries must believe defendant guilty from the evidence beyond a reasonable doubt is not a fiction of law, but is intended as a substantial shield against conviction till, etc., is argumentative. *Pinson v. State* (Ala.), 78 So. 876; *Saulsberry v. State*, 178 Ala. 16, 59 So. 476. See the title CRIMINAL LAW, § 537 (3), vol. 4, p. 406.

Stating No "Proposition of Law."—In a prosecution for homicide, defendant's requested instruction that the jury must construe every reasonable doubt in his favor was properly refused, as it stated no proposition of law; it not being possible to "construe" a reasonable doubt. *Martin v. State*, 196 Ala. 584, 71 So. 693.

Involved, Uncertain and Complicated.—*Saulsberry v. State*, 178 Ala. 16, 59 So.

476. See the title CRIMINAL LAW, § 537 (3), vol. 4, pp. 402, 403; *Olden v. State*, 176 Ala. 6, 58 So. 307. See the title CRIMINAL LAW, § 537 (3), vol. 4, p. 403.

Confusing.—In a homicide case, an instruction that a presumption of innocence surrounds the defendant throughout the trial and the jury must be convinced to a moral certainty and beyond a reasonable doubt that the defendant was not without guilt was properly refused, as the words "not without guilt" were calculated to confuse. *Daniel v. State*, 14 Ala. App. 63, 71 So. 79.

Inaccurate and Obscure.—*Johnson v. State*, 8 Ala. App. 14, 62 So. 450. See the title CRIMINAL LAW, § 537 (3), vol. 4, p. 403.

Faulty and Incomplete.—Requested charge that the presumption of innocence is intended to be a shield against conviction until accused's guilt is established from credible evidence, beyond all reasonable doubt and to a moral certainty, is faulty and incomplete. *Minor v. State* (Ala. App.), 74 So. 98.

Reasonable Doubt Must Grow Out of Whole Evidence.—*Olden v. State*, 176 Ala. 6, 58 So. 307. See the title CRIMINAL LAW, § 537 (3), vol. 4, p. 402.

Charge Failing to Set Out Elements of Self-Defense.—In a prosecution for homicide requested charge on reasonable doubt as to self-defense is properly refused, where it fails to set out the constituent elements of self-defense. *McGhee v. State*, 178 Ala. 4, 59 So. 573, overruling *Henson v. State*, 112 Ala. 41, 21 So. 79.

Innocence Consistent with Any Reasonable Hypothesis.—*Saulsberry v. State*, 178 Ala. 16, 59 So. 476. See the title CRIMINAL LAW, § 537 (3), vol. 4, p. 403.

Beyond Any and All Reasonable Chance of Mistake.—Accused's requested instruction, "the court must believe the defendant guilty beyond any and all reasonable chance of mistake before they can find the defendant guilty," held properly refused. *Smith v. State*, 197 Ala. 193, 72 So. 316.

Reasonable Doubt of Where Defendant Was.—A charge, "If you have a rea-

sonable doubt as to whether defendant was at Blankenship's saloon at the time (deceased) was killed, your verdict should be not guilty," was properly refused. *Thomas v. State*, 11 Ala. App. 85, 65 So. 863.

For What Purpose Defendant Was at Place.—In a prosecution for the unlawful manufacture of intoxicating liquors, where the state proved accused's presence at a still for the purpose of showing his connection with the manufacture of liquors, either then or at another time, the refusal of a charge that he must be acquitted unless the jury believed beyond a reasonable doubt that he was at the still to make intoxicating liquors was proper. *Gravett v. State*, 11 Ala. App. 211, 65 So. 850.

If Prosecution Has Failed to Prove Guilt.—A requested charge that if the prosecution has failed to prove the guilt of accused beyond a reasonable doubt, the jury must acquit is erroneous, where any testimony elicited from accused's witnesses tends to incriminate him. *Thomas v. State*, 11 Ala. App. 85, 65 So. 863.

§ 537 (4) Instructions Not Requiring Doubt to Be Reasonable.

"Doubt of Guilt."—A request to charge the jury to discharge defendant if they had a doubt of his guilt was objectionable for failure to require that the jury have a reasonable doubt. *Perry v. State*, 177 Ala. 1, 59 So. 150; *Givens v. State*, 8 Ala. App. 122, 62 So. 1020. See the title CRIMINAL LAW, § 537 (4), vol. 4, p. 407.

In a prosecution for robbery, a requested instruction basing an acquittal upon the jury's doubt or uncertainty of defendant's guilt, and not upon their reasonable doubt, was properly refused. *Hardeman v. State*, 14 Ala. App. 35, 70 So. 979.

Reasonable Doubt That Defendant Is "Necessarily" Guilty.—In a homicide case, an instruction, that no proof of guilt will satisfy the demands of the law if it does not convince the jury beyond a reasonable doubt that the defendant is necessarily guilty, was properly refused, as the use of the word "necessarily" in effect asserted that the evidence must

exclude all doubt of guilt. *Daniel v. State*, 14 Ala. App. 63, 71 So. 79.

Omission of Word "Reasonable."—A requested charge that good character, if proven, when taken in connection with the whole evidence may have the effect to generate such a doubt as to authorize acquittal is bad in omitting the word "reasonable" before "doubt." *Minor v. State* (Ala. App.), 74 So. 98.

Requested charge that if, after subjecting facts to test of reason, there is still doubt of guilt, the jury should acquit, is erroneous in omitting word "reasonable" before "doubt." *Minor v. State* (Ala. App.), 74 So. 98.

§ 537 (6) Moral Certainty.

A charge that before jury can convict they must believe defendant guilty to moral certainty is bad. *McMillan v. State* (Ala. App.), 75 So. 824; *Minor v. State* (Ala. App.), 74 So. 98.

It was proper to refuse to charge that if the jury was unable from all the evidence to determine beyond a reasonable doubt and to a moral certainty how the killing occurred, they should acquit. *Thomas v. State*, 11 Ala. App. 85, 65 So. 863.

But an instruction to find accused not guilty, unless, after a full consideration of all the evidence, his guilt was proven to a moral certainty, asserted a correct proposition of law. *Yorty v. State*, 11 Ala. App. 160, 65 So. 914.

Moral Certainty Legal Equivalent of Reasonable Doubt.—An instruction that to be convinced of accused's guilt to a moral certainty is the legal equivalent of a reasonable doubt held proper. *Killen v. State* (Ala. App.), 75 So. 176, certiorari denied in *Ex parte State* (Ala.), 76 So. 568.

Same—Correctness of Court's Explanation.—The court's explanation of the words "satisfied to a moral certainty," in a charge given at defendant's request, as meaning, not to an absolute, or mathematical, or irrevocable certainty, but "convinced beyond a reasonable doubt," is correct. *Hale v. State*, 10 Ala. App. 22, 64 So. 530.

Same—Failure to Explain.—Failure to explain that the phrases in a charge "beyond a reasonable doubt" and "to a

moral certainty" were synonymous was not erroneous. *Chandler v. State*, 12 Ala. App. 287, 68 So. 536.

Inconsistent with Any Other Rational Conclusion.—Charge that before conviction the jury must be satisfied to a moral certainty, not only that proof is consistent with defendant's guilt, but it is wholly inconsistent with any other conclusion, is properly refused. *Keith v. State* (Ala. App.), 72 So. 602; *Jackson v. State*, 193 Ala. 36, 69 So. 130; *Bryant v. State*, 13 Ala. App. 206, 68 So. 704.

Exclusion to Moral Certainty of Every Other Reasonable Hypothesis.—*McClain v. State*, 182 Ala. 67, 62 So. 241. See the title CRIMINAL LAW, § 537 (6), vol. 4, p. 409.

It was proper to refuse to charge that the humane provision of the law is that, upon the evidence, there should not be a conviction unless, to a moral certainty, it excluded every reasonable hypothesis other than that of guilt. *Thomas v. State*, 11 Ala. App. 85, 65 So. 863.

In a prosecution for murder in the first degree, a charge that, unless the evidence against defendant excluded to a moral certainty every hypothesis or supposition but that of guilt, the jury should not convict, was properly refused. *Moss v. State*, 190 Ala. 14, 67 So. 431.

Argumentative.—*Saulsberry v. State*, 178 Ala. 16, 59 So. 476. See the title CRIMINAL LAW, § 537 (6), vol. 4, p. 409.

An instruction that, before the jury can convict, they must be satisfied to a moral certainty, not only that the proof is consistent with defendant's guilt, but that it is wholly inconsistent with every other rational conclusion, and, unless so convinced that each would act in matters of highest importance to his own interest, then they must acquit, was properly refused as argumentative. *Phillips v. State*, 11 Ala. App. 15, 65 So. 444.

Degree of Proof.—Requested charge on degree of proof necessary to convict held properly denied. *Culliver v. State* (Ala. App.), 73 So. 556.

Degree of Moral Certainty.—In a prosecution for crime, a requested charge as to the degree of moral certainty before the jurors can convict held properly re-

fused. *Brooks v. State* (Ala. App.), 74 So. 85.

§ 537 (8) Doubt Which Would Influence Action in Private Affairs.

Requested charge that jury should acquit if they would not be willing to act on evidence as to matters most important to themselves, held bad. *Minor v. State* (Ala. App.), 74 So. 98.

Instruction that, to convict, the jury must be satisfied to a moral certainty that the proof is wholly inconsistent with every rational conclusion other than defendant's guilt, and must be convinced to the degree that they would each act on that decision in matters of the highest concern and importance in his own interest, is properly refused. *Diamond v. State* (Ala. App.), 72 So. 558, certiorari denied in *Ex parte State* (Ala.), 73 So. 1002.

Propriety of Charge as to Sufficiency of Evidence.—Instruction as to sufficiency of evidence necessary to convict held properly refused. *Jones v. State*, 181 Ala. 63, 61 So. 434. See the title CRIMINAL LAW, § 537 (8), vol. 4, p. 411.

Propriety of Argumentative Charge.—An instruction that, if the jury would not be willing to act on the evidence in relation to matters of most solemn importance to their own interest, they must find accused not guilty, is argumentative, and may be given or refused. *Chestnut v. State*, 7 Ala. App. 72, 61 So. 609.

§ 537 (11) Probability or Supposition of Innocence.

Charges Held Proper.—In murder trial, a charge that, if from the testimony there is a probability of defendant's innocence, that is just ground for reasonable doubt, entitling him to acquittal, is proper. *Mathis v. State* (Ala. App.), 73 So. 122.

In a prosecution for practicing medicine without a license, an instruction that although there may not be a probability of innocence, a reasonable doubt may exist which would entitle defendant to an acquittal, is proper. *Fealy v. Birmingham* (Ala. App.), 73 So. 296.

Objectionable Verbiage—Correct Statement of Law.—*Smith v. State*, 182 Ala.

38, 62 So. 184. See the title CRIMINAL LAW, § 537 (11), vol. 4, p. 416.

Refusal of Charge Erroneous.—*Davis v. State*, 7 Ala. App. 122, 61 So. 483. See the title CRIMINAL LAW, § 537 (11), vol. 4, p. 413.

Charges Properly Refused.—The requested instruction that unless the evidence excluded every reasonable "supposition" but that of guilt, the jury must acquit, is properly refused. *Watson v. State* (Ala. App.), 73 So. 569.

Requested charge on reasonable doubt held properly refused. *Minor v. State* (Ala. App.), 74 So. 98.

Instruction that, unless evidence is so strong and cogent as to exclude from the minds of each and every juror every reasonable supposition except that of guilt of defendant, they should acquit is properly refused. *Diamond v. State* (Ala. App.), 72 So. 558, certiorari denied in *Ex parte State* (Ala.), 73 So. 1002.

Confusing and Misleading—Charges.—Requested instructions on reasonable doubt and acquittal in case of probability of innocence held confusing and misleading. *Bryant v. State*, 13 Ala. App. 206, 68 So. 704.

Beyond All Reasonable Supposition.—*Underwood v. State*, 179 Ala. 9, 60 So. 842. See the title CRIMINAL LAW, § 537 (11), vol. 4, p. 415.

§ 537 (12) Possibility of Innocence.

Held Proper.—Instruction that if the jury believes from all the evidence beyond a reasonable doubt that defendant is guilty, although it might believe it possible that he is not guilty, it must convict him is proper. *Dickey v. State* (Ala. App.), 72 So. 608, certiorari denied in 197 Ala. 610, 73 So. 72.

Use of Word "Promptly."—*Davis v. State*, 8 Ala. App. 147, 62 So. 1027, certiorari denied in *Ex parte Davis*, 184 Ala. 26, 63 So. 1010. See the title CRIMINAL LAW, § 537 (12), vol. 4, p. 418.

§ 537 (13) Doubt Arising from Evidence or Want of Evidence.

Charges Held Proper.—In a prosecution for practicing medicine without a license, an instruction that the absence of sufficient and satisfactory evidence may afford grounds for reasonable doubt

should have been given. *Fealy v. Birmingham* (Ala. App.), 73 So. 296; *Stanton v. State*, 8 Ala. App. 221, 62 So. 387. See the title CRIMINAL LAW, § 537 (13), vol. 4, p. 419.

Argumentative and Misleading.—In a homicide case, a charge as to reasonable doubt held argumentative and misleading. *Minor v. State* (Ala. App.), 74 So. 98.

Properly Refused.—Instruction on reasonable doubt was properly refused, where it ignored rule that reasonable doubt must arise after consideration of all the evidence. *Adkins v. State* (Ala. App.), 76 So. 465; *McClain v. State*, 182 Ala. 67, 62 So. 241. See the title CRIMINAL LAW, § 537 (13), vol. 4, p. 419.

Same—Assuming Absence of Satisfying Evidence.—A requested charge that the absence of sufficiently satisfying evidence of guilt may afford ground for a reasonable doubt is erroneous as assuming an absence of satisfying evidence. *Conner v. State*, 10 Ala. App. 206, 65 So. 309.

Same—Not Confined to Evidence in Case.—Charge that if circumstances of case could be explained reasonably and consistently with accused's innocence, the jury should acquit, is erroneous, not being confined to the evidence in case. *Minor v. State* (Ala. App.), 74 So. 98.

Same—Failing to Predicate Probability of Innocence on Evidence.—A charge failing to predicate probability of innocence which would require acquittal as arising out of the evidence is properly refused. *Jones v. State* (Ala. App.), 74 So. 843, certiorari denied in 75 So. 1003.

§ 537 (14) Doubt upon Any Fact.

Proof of Single Fact.—It is not error to refuse an instruction that if there is one single fact proved to the satisfaction of the jury inconsistent with accused's guilt, it is sufficient to raise a reasonable doubt, and the jury should acquit. *Pippin v. State*, 197 Ala. 613, 73 So. 340; *Pearson v. State*, 13 Ala. App. 181, 69 So. 485; *Williams v. State*, 13 Ala. App. 133, 69 So. 376; *Moss v. State*, 190 Ala. 14, 67 So. 431; *Ex parte Davis*, 184 Ala. 26, 63 So. 1010, denying certiorari *Davis v. State*, 8 Ala. App. 147, 62 So.

1027; *Campbell v. State*, 182 Ala. 18, 62 So. 57.

Same—Homicide.—In homicide case, charge that if one fact inconsistent with guilt of accused has been proven to raise reasonable satisfaction of jury, they could not convict is improper. *Suttles v. State* (Ala. App.), 74 So. 400; *Nail v. State*, 12 Ala. App. 64, 67 So. 752.

Same—Murder.—In murder trial, an instruction that a single proven fact inconsistent with guilt was sufficient to raise reasonable doubt justifying acquittal was properly refused. *Cain v. State* (Ala. App.), 77 So. 453.

Same—Failure to Hypothesis Consideration of Other Evidence.—Instruction that, if a single fact inconsistent with guilt is proven, this is sufficient to raise reasonable doubt, and they should acquit, is faulty in not hypothesizing consideration of other evidence bearing on issue of guilt. *Pinson v. State* (Ala.), 78 So. 876.

Erroneous.—Requested charge on reasonable doubt held erroneous. *Minor v. State* (Ala. App.), 74 So. 98.

Misleading.—Requested charge, "If after considering all the evidence in this case, the jury find there is one single fact proven to their satisfaction which is inconsistent with defendant's guilt, this is sufficient to raise a reasonable doubt of his guilt," was properly refused as misleading. *Butler v. State* (Ala. App.), 77 So. 72.

Doubt upon Part of Evidence.—*Saulsberry v. State*, 178 Ala. 16, 59 So. 476. See the title CRIMINAL LAW, § 537 (14), vol. 4, p. 421.

§ 539. Principals and Accessories.

As to instructions excluding or ignoring evidence, see post, "Principals and Accessories," § 559 (11).

Sufficiency.—In a prosecution for robbery, a charge that in felony cases those punishable capitally or by imprisonment in the penitentiary, all parties concerned in its commission, or aiding or abetting its commission by words or actions giving assistance, support, or encouragement, would be equally responsible, was proper. *Ware v. State*, 12 Ala. App. 101, 67 So. 763.

An instruction that if a man assist or

encourage another by his presence consciously, knowingly, purposely, knowing that the other person understands that he is there as an encourager, he is an accomplice though he does not lift a hand, is a reasonably correct exposition of the law on the subject. *Eaton v. State*, 8 Ala. App. 136, 63 So. 41.

§ 542. Punishment.

As to instructions on punishment constituting harmless error, see post, "Instructions as to Punishment," § 780 (7). As to instructions ignoring evidence, see post, "Grade or Degree of Offense and Punishment," § 559 (12).

Punishment of Accessories.—In a prosecution for robbery, charge that the question of the punishment of accessories was left to the jury, held proper. *Ware v. State*, 12 Ala. App. 101, 67 So. 763.

Stating No Proposition of Law.—A requested instruction that the jury should give defendant the benefit of every reasonable doubt as to what punishment he should receive is properly refused as stating no proposition of law. *Bryant v. State*, 13 Ala. App. 206, 68 So. 704.

Mercy and Sentiment Not with Jury.—*Roberson v. State*, 183 Ala. 43, 62 So. 837. See the title CRIMINAL LAW, § 542, vol. 4, p. 426.

§ 543. Manner of Arriving at Verdict.

§ 543 (1) In General.

On a trial for homicide it was not error to charge that the jurors all must agree before they could render a verdict. *Hooten v. State*, 9 Ala. App. 9, 64 So. 200.

Too high a degree of certainty of the correctness of the conclusion that defendant is guilty is exacted by a requested charge that if any juror feels any uneasiness whatever as to the truth of the facts in saying guilty, and feels any desire for further evidence, he must find for an acquittal. *Hall v. State*, 11 Ala. App. 95, 65 So. 427.

§ 543 (2) Doubt of Individual Juror.

Instruction Erroneously Refused.—In murder case, where insanity was a defense, it was error to refuse to charge that the evidence must be so strong as

to convince each juror of guilt beyond a reasonable doubt, and if any single juror has a reasonable doubt of guilt defendant can not be convicted. *Russell v. State* (Ala.), 78 So. 916.

Instructions Held Erroneous.—An instruction that, "if one of you does not believe beyond a reasonable doubt that defendant is guilty, you can not find defendant guilty," is bad. *Miller v. State* (Ala. App.), 74 So. 840; *Buckhanon v. State*, 12 Ala. App. 36, 67 So. 718; *Ragsdale v. State*, 12 Ala. App. 1, 67 So. 783; *Hall v. State*, 11 Ala. App. 95, 65 So. 427; *Phillips v. State*, 11 Ala. App. 15, 65 So. 444; *Harper v. State*, 8 Ala. App. 346, 63 So. 23.

An instruction directing the jury to return a verdict of acquittal if a single member of the jury should have a reasonable doubt arising out of any part of the evidence held properly refused, as directing an acquittal on the reasonable doubt of one juror. *Smith v. State*, 197 Ala. 193, 72 So. 316.

Instruction that unless every member of the jury is convinced beyond a reasonable doubt of defendant's guilt they must acquit is properly refused as requiring acquittal on dissent of one juror, whereas it should merely have precluded conviction on such dissent. *Strother v. State* (Ala. App.), 72 So. 566.

In a prosecution for homicide, defendant's requested instruction on reasonable doubt of one juror held properly refused. *Martin v. State*, 196 Ala. 584, 71 So. 693.

A requested instruction that, if any individual juror is able to reconcile the evidence with a reasonable hypothesis of defendant's innocence, the jury can not convict, is properly refused. *Bryant v. State*, 13 Ala. App. 206, 68 So. 704; *Gaston v. State*, 179 Ala. 1, 60 So. 805. See the title CRIMINAL LAW, § 543 (2), vol. 4, p. 426.

An instruction that if, after entire jury considered the case, any individual member had reasonable doubt as to accused's guilt, jury should find defendant not guilty, even though all other members of jury had no such reasonable doubt, was properly refused. *Baader v. State* (Ala. App.), 75 So. 820.

Requested charge that juror can determine what constitutes reasonable doubt, and that to convict evidence must be so strong that it convinces each juror of guilt beyond all reasonable doubt, and if a single juror has reasonable doubt of defendant's guilt, then "you can not find him guilty," was properly refused. *Butler v. State* (Ala. App.), 77 So. 72.

It is not error to refuse to charge that it is the duty of each juror who has a reasonable doubt of the guilt of defendant not to yield his conviction simply because all the other jurors disagree with him. *Burk v. State* (Ala. App.), 75 So. 702.

Abiding Conviction.—*Davis v. State*, 8 Ala. App. 147, 62 So. 1027, certiorari denied in *Ex parte Davis*, 184 Ala. 26, 63 So. 1010. See the title CRIMINAL LAW, § 543 (2), vol. 4, p. 427.

Misleading Instructions. — *McClain v. State*, 182 Ala. 67, 62 So. 241. See the title CRIMINAL LAW, § 543 (2), vol. 4, p. 428.

Basing Verdict on Feeling or Sentiment.—In a criminal prosecution, a requested charge as to the doubt of a juror held erroneous as basing the verdict on feeling or sentiment. *Harwell v. State*, 12 Ala. App. 265, 68 So. 500.

Premitting Consideration and Deliberation of Jurors Together.—The requested instruction that before verdict of guilty each juror must be satisfied of defendant's guilt beyond reasonable doubt, and each juror must separately and segregately be so satisfied to support a conviction, is properly refused as premitting consideration and deliberation of the jurors together. *Diamond v. State* (Ala. App.), 72 So. 558, certiorari denied in *Ex parte State* (Ala.), 73 So. 1002.

§ 543 (5) Failure of Juries to Do Their Duty in Other Trials.

Propriety of Charge.—*Smith v. State*, 182 Ala. 38, 62 So. 184. See the title CRIMINAL LAW, § 543 (5), vol. 4, p. 428.

§ 544. Form of Verdict.

Instruction Properly Refused. — *Jones v. State*, 181 Ala. 63, 61 So. 434.

See the title CRIMINAL LAW, § 544, vol. 4, p. 428.

Where an indictment contains three counts, the court is not required to instruct the jury to find a verdict of not guilty as to one or all of the counts separately; and hence the denial of a general charge in favor of accused as to one count is properly refused, regardless of the evidence. *Angle v. State*, 10 Ala. App. 232, 64 So. 646.

§ 546. Definition or Explanation of Terms.

Correct Explanation of Meaning of Charges.—It is proper for the court to give of its own motion correct explanations of the meaning of charges given by it at defendant's request. *Hale v. State*, 10 Ala. App. 22, 64 So. 530.

Failure to Define Self-Defense.—A charge that, if the jury believed defendant acted in self-defense, they can not convict, but not defining self-defense, is properly refused as referring a question of law to the jury. *Chappell v. State* (Ala. App.), 73 So. 134.

A charge that, if the jury have a reasonable doubt whether accused acted in self-defense, they should acquit, is properly refused for failing to define self-defense. *Bone v. State*, 13 Ala. App. 5, 68 So. 702.

§ 547. Written Instructions.

As to written request, see post, "Written Requests," § 571.

Necessity.—Under Acts 1915, p. 815, court must charge jury in writing when requested under Code 1907, § 5363, not amended or repealed by act, amending § 5364 and, if there is no request, general charge can be delivered orally, but should be taken down by reporter. *Blackmon v. State* (Ala.), 77 So. 347.

Where trial court failed to deliver charge in writing, as required by Code 1907, § 5364, as amended by Gen. Acts 1915, p. 816, and did not have it taken down by court reporter as it was delivered, judgment of conviction must be reversed. *Richardson v. State* (Ala. App.), 75 So. 629.

§ 548. Form and Language in General.

As to construction of instructions given, see post, "Construction of Instruc-

tions Given," § 563. As to construction of charge as a whole, see post, "Construction and Effect of Charge as a Whole," § 565.

§ 548 (1) In General.

Charge Elliptical.—Requested instruction on reasonable doubt as affected by good character held properly refused as elliptical. *Fuller v. State* (Ala. App.) 75 So. 879.

Incomplete — Not Asserting Principle of Law.—A charge which is incomplete, and which does not assert a principle of law, is properly refused. *Roden v. State*, 13 Ala. App. 105, 69 So. 366.

Jury's Duty to Try Case Regardless of Consequences.—A requested instruction on the duty of the jury to try the case without regard to the consequences held properly refused. *Wilson v. State*, 191 Ala. 7, 67 So. 1010.

Modification and Explanation.—Where court after having read to the jury all written charges asked by defendant, stated they were not to be taken to explain, vary, or contradict general charge, but in connection with it such statement was not improper as qualification of written charges. *Pillar v. State* (Ala. App.), 74 So. 398.

§ 548 (1½) Reference to Other Instructions.

A requested instruction that the elements of murder "as I have given to you" must be shown beyond a reasonable doubt before the jury could find defendant guilty, dependent upon other charges, for its sense, was so involved and so likely to confuse and mislead that court would not be put in error for refusing it. *Harvey v. State* (Ala. App.), 73 So. 200.

§ 548 (2) Use of Particular Words or Terms.

"Promptly."—A requested instruction that, if it was probable that defendant was innocent, the jury should promptly acquit him was objectionable in the use of the word "promptly." *McDade v. State*, 10 Ala. App. 241, 64 So. 519.

"Beyond" for "Beyond."—Refusal of a charge containing the word "beyond" for "beyond" may be justified on that ground. *Fortner v. State*, 12 Ala. App. 179, 67 So. 720.

Making Charge Meaningless by Interpolating "By."—A requested instruction on good character of defendant, which interpolates the word "by," so as to make the instruction meaningless, is properly refused. *Donald v. State*, 12 Ala. App. 61, 67 So. 624.

§ 549. Repetition.

In a murder case, a charge correctly stating the law of self-defense was not erroneous, as failing to state that, if the jury had a reasonable doubt of defendant's guilt, they must acquit. *King v. State*, 13 Ala. App. 91, 69 So. 345.

§ 550. Argumentative Instructions.

§ 550 (1) In General.

Argumentative instructions are properly refused. *Madison v. State*, 196 Ala. 590, 71 So. 706; *Wilson v. State*, 14 Ala. App. 87, 71 So. 971; *Collins v. State*, 14 Ala. App. 54, 70 So. 995; *Burton v. State*, 194 Ala. 2, 69 So. 913; *Smith v. State*, 13 Ala. App. 399, 69 So. 402; *Roden v. State*, 13 Ala. App. 105, 69 So. 366; *Jones v. State*, 193 Ala. 10, 69 So. 66; *Anderson v. State* (Ala.), 68 So. 56; *Wise v. State*, 11 Ala. App. 72, 66 So. 128; *Mizell v. State*, 184 Ala. 16, 63 So. 1000; *Clayton v. State*, 185 Ala. 13, 64 So. 76; *Waldrop v. State*, 185 Ala. 20, 64 So. 80; *Brooks v. State*, 8 Ala. App. 277, 62 So. 569; *Saulsberry v. State*, 178 Ala. 16, 59 So. 476; *McGhee v. State*, 178 Ala. 4, 59 So. 573.

Instructions Properly Refused.—*Brock v. State* (Ala. App.), 61 So. 474; *Chestnut v. State*, 7 Ala. App. 72, 61 So. 609. See the title CRIMINAL LAW, § 550 (1), vol. 4, p. 432.

Murder—Dogs Trailing Human Being.—In prosecution for murder, instruction that if it is not shown that the dogs could take up and carry the trail of a human being after the time shown to have elapsed, the jury should not consider the trailing of the dogs as a circumstance, was properly refused as argumentative. *Jones v. State* (Ala. App.), 74 So. 843, certiorari denied in 75 So. 1003.

Same—In Nature of Lecture to Jury.—*Gaston v. State*, 179 Ala. 1, 60 So. 805. See the title CRIMINAL LAW, § 550 (1), vol. 4, p. 432.

Same—Passion as Reducing Murder to Manslaughter.—Instruction on effect of passion as reducing murder to manslaughter held properly refused as argumentative and misleading. *Newsom v. State* (Ala. App.), 72 So. 579, certiorari denied in *Ex parte Newsom* (Ala.), 73 So. 1001.

Same—Possibility That Another Could Have Killed Deceased.—Requested instruction that, if there was reasonable ground to believe from the evidence that another could have killed deceased, to find defendant not guilty is properly refused, as argumentative. *Wright v. State* (Ala. App.), 72 So. 564.

Same—Moral Certainty of Guilt.—In a trial for murder defendant's requested charges that the jury must find to a moral certainty, not only that the proof was consistent with defendant's guilt, but that it was wholly inconsistent with every other rational conclusion, and that, if the jury would not be willing to act on the evidence in matters of the most solemn importance to them, they must acquit, were properly refused as argumentative. *Bryant v. State*, 185 Ala. 8, 64 So. 333.

Homicide.—A refused instruction in a homicide case held objectionable as argumentative. *Langston v. State* (Ala. App.), 75 So. 715; *Bone v. State*, 8 Ala. App. 59, 62 So. 455. See the title CRIMINAL LAW, § 550 (1), vol. 4, p. 432.

Seduction — Resulting Pregnancy Affecting Prosecutrix's Testimony.—Requested charges that if the prosecutrix testified as she did concerning her intercourse with accused because of her resulting pregnancy are mere arguments and are properly refused. *Smith v. State*, 13 Ala. App. 399, 69 So. 402.

Relative Sizes and Ages of Deceased and Defendant.—Charges as to relative ages and sizes of deceased and defendant held argumentative. *Ragsdale v. State*, 12 Ala. App. 1, 67 So. 783.

Jurors' Own Most Important Affairs.—A requested instruction that the jury must acquit if they would act on the evidence in their own most important affairs, held argumentative and defective in omitting the word "not." *Hutchinson v. State* (Ala. App.), 72 So. 572.

Looking to Certain Facts.—Instructions that the jury may look to certain facts in the determination of designated issues are properly refused as argumentative. *Chappell v. State* (Ala. App.), 73 So. 134.

Justice Tempered with Mercy. — In prosecution for illegal sale of intoxicating liquors, requested instruction that it is a principle of law that justice should be tempered in mercy held properly refused as argumentative. *Hankins v. State* (Ala. App.), 74 So. 400.

Color of Accused.—Requested charges that the law is no respecter of persons or of color, and that the jury can not take into consideration defendant's color in making up its verdict, were properly refused as argumentative. *Johnson v. State* (Ala. App.), 73 So. 210, certiorari denied in *Ex parte Johnson* (Ala.), 73 So. 1000.

Contradictory Statement of Witness.—*McClain v. State*, 182 Ala. 67, 62 So. 241. See the title CRIMINAL LAW, § 550 (1), vol. 4, p. 432.

On What Jury Were to Decide Case.—An instruction that the jury were to decide the case upon the law given by the court and the evidence from the witnesses and nothing more was properly refused as argumentative. *West v. State* (Ala. App.), 75 So. 709.

Interest of State in Acquittal of the Innocent.—Charge that state is as much interested in acquittal of innocent as in conviction of guilty was argumentative, and properly refused. *Adkins v. State* (Ala. App.), 76 So. 465.

Witness' Identification of Defendant.—In a prosecution for a violation of the prohibition law, a requested charge as to witness' identification of defendant held argumentative. *Maxwell v. State*, 12 Ala. App. 212, 67 So. 772.

Stock Running at Large.—In a prosecution for permitting stock to be at large in a stock law district, it was not error to refuse defendant's request that, as a person not living in a stock law district has a right to let his stock run at large, and not keep a guard for them, defendant would not be guilty unless he had knowledge, because argumentative

and misleading. *Blalock v. State*, 8 Ala. App. 349, 63 So. 26.

Burden of Proof.—A requested charge that the state has the burden of convincing the jury beyond reasonable doubt of accused's guilt, and he can not be convicted because of the absence of evidence, but the jury must consider only the evidence which has been offered, is properly refused as argumentative. *James v. State*, 12 Ala. App. 16, 67 So. 773.

§ 550 (1½) Duties of Jury.

Charge that, if the jury would not act upon the evidence in matters of importance to them, they must find defendant not guilty, held properly refused as argumentative. *Moye v. State*, 12 Ala. App. 127, 67 So. 716.

Jury Not Placed in Jury Box to Convict.—A charge that the jury was not selected and placed in the jury box to convict, but to try the case under the evidence and law, is argumentative and properly refused. *Campbell v. State*, 13 Ala. App. 70, 69 So. 322.

Each Juror Deciding for Himself.—In a homicide case the court properly refused defendant's request that each juror must decide the issue, for himself, and if any one had a reasonable doubt of guilt, he must stand by his convictions and should not yield because every other juror disagreed with him, because argumentative. *Phillips v. State*, 11 Ala. App. 15, 65 So. 444.

Jurors Standing by Individual Convictions.—Requested instruction in prosecution for homicide on duties of jurors to stand by their individual convictions, held properly refused as argumentative. *White v. State*, 195 Ala. 661, 71 So. 452.

Public Peace and Good Order Promoted by Conviction.—In a prosecution for homicide, a charge that the jury are to try the case according to the law and the evidence, and not according to their opinion as to whether public peace and good order would be prompted by conviction of accused, is improper, being a mere argument. *McGhee v. State*, 178 Ala. 4, 59 So. 573.

Reasonable Doubt under Evidence.—An instruction that, if the jury would not be willing to act on the evidence in re-

lation to matters of most solemn importance to their own interest, they must find accused not guilty, is argumentative, and may be given or refused. *Chestnut v. State*, 7 Ala. App. 72, 61 So. 609.

Punishment of Innocent or Escape of Guilty.—A charge that it is better that the guilty go unpunished than that the innocent suffer is properly refused, being mere argument. *McGhee v. State*, 178 Ala. 4, 59 So. 573.

§ 550 (2) What Constitutes.

Effect of Verdict.—*McClain v. State*, 182 Ala. 67, 62 So. 241. See the title CRIMINAL LAW, § 550 (2), vol. 4, p. 436.

Effect on Trial for Manslaughter of Having Pistol or Drinking Beer.—*Kirkwood v. State*, 8 Ala. App. 108, 62 So. 1011, certiorari denied in 184 Ala. 9, 63 So. 990. See the title CRIMINAL LAW, § 550 (2), vol. 4, p. 436.

Mere Fact of Intercourse Not Showing Seduction.—Instructions that the mere fact accused had intercourse with the prosecutrix does not show seduction are argumentative. *Brand v. State*, 13 Ala. App. 390, 69 So. 379.

Witness' Right of Judgment for Money Stolen.—A charge that, if accused is convicted of stealing the witness' pocket-book, the witness would have the right to a judgment against accused for the money and his interest in testifying should be taken into account, is argumentative and has a tendency to mislead, and the court properly refused to give it for either reason. *Harper v. State*, 8 Ala. App. 346, 63 So. 23.

Defendant's Right to Be at Place of Crime.—Requested charge as to defendant's right to be at the place where the homicide occurred held not to state any proposition of law, and argumentative. *Ragsdale v. State*, 12 Ala. App. 1, 67 So. 783.

Violence Necessary for Protection against Bodily Harm.—A charge, that where a man is free from fault in bringing on a difficulty he is justified in using such violence as is necessary to protect himself against bodily harm, was argumentative and properly refused. *Murray v. State*, 13 Ala. App. 175, 69 So. 354.

Degree of Intoxication to Reduce Murder to Manslaughter.—A charge that, in order to reduce the offense from murder in the first degree to a lower degree, it is not essential that accused should have been intoxicated to such a degree as to be unconscious of his acts is properly refused, being argumentative. *Wal-drop v. State*, 185 Ala. 20, 64 So. 80; *Kirkwood v. State*, 8 Ala. App. 108, 62 So. 1011, certiorari denied in 184 Ala. 9, 63 So. 990. See the title CRIMINAL LAW, § 550 (2), vol. 4, p. 437.

Possibility of Another Committing the Crime.—A requested charge that the humane provisions of the law is that upon the evidence there should not be a conviction unless, to a moral certainty, it excludes every reasonable hypothesis other than guilt, that, no matter how strong the evidence, yet, if it might be reconciled with the theory that some other person had committed the offense, then defendant's guilt was not shown by the measure of proof which the law requires, was argumentative. *Ware v. State*, 12 Ala. App. 101, 67 So. 763.

No Proof of Partnership.—*Kinsaul v. State*, 8 Ala. App. 405, 62 So. 990. See the title CRIMINAL LAW, § 550 (2), vol. 4, p. 438.

Two Reasonable Constructions Deducible from Testimony.—A charge that, if there are two reasonable constructions which can be given on facts proved, one favorable and the other unfavorable to accused, the jury must accept that which is favorable rather than that which is unfavorable, is argumentative and an invasion of the province of the jury, and is properly refused. *Rector v. State*, 11 Ala. App. 333, 66 So. 857.

Illegal Sale of Whisky—Defendant's Connection with Sale.—In a prosecution for violating the prohibition law, a requested instruction that, if defendant's only connection with the sale was in depositing a package behind a counter, and in changing a dollar for the negro who sold the whisky, and, if he in no way aided in the sale or delivery, the jury should find for defendant, held not objectionable as argumentative. *Thomas v. State*, 12 Ala. App. 298, 68 So. 549.

Same — Moral Certainty—Matters of Highest Concern.—Requested charges in a trial for robbery that, before the jury could find defendant guilty, they must be satisfied to a moral certainty not only that the proof was consistent with his guilt, but that it was wholly inconsistent with every other reasonable conclusion, and that, unless so satisfied that they would act upon that decision in matters of the highest concern to themselves, they must acquit, and that, if the testimony was such that two conclusions could be reasonably drawn from it, the one favoring innocence, and the other establishing guilt, the law and justice demanded that the jury adopt the former and acquit, were argumentative. *Ware v. State*, 12 Ala. App. 101, 67 So. 763.

Moral Certainty—Reasonable Doubt.—A request to charge that defendant could not be convicted unless every juror was reasonably satisfied of his guilt, and was so satisfied from the evidence alone beyond all reasonable doubt, and to a moral certainty, was not argumentative. *McDade v. State*, 10 Ala. App. 241, 64 So. 519.

§ 551. Reading or Quoting Authorities or Reported Cases.

An instruction on dying declarations, although literally quoted from an opinion of supreme court, was properly refused as argumentative. *Harper v. State* (Ala. App.), 75 So. 829.

Stating Facts in a Former Case.—*McGuffin v. State*, 178 Ala. 40, 59 So. 635. See the title CRIMINAL LAW, § 551, vol. 4, p. 439.

§ 553. Confused or Misleading Instructions.

Requested charges, which are confused or misleading, are properly refused. *Burton v. State*, 194 Ala. 2, 69 So. 913; *Fortner v. State*, 12 Ala. App. 179, 67 So. 720; *Hale v. State*, 10 Ala. App. 22, 64 So. 530; *Olden v. State*, 176 Ala. 6, 58 So. 307.

Stating No Principle of Law.—Instruction that jury under the evidence were authorized to acquit held properly refused as misleading, stating no principle of law, and hypothesizing no facts

as a predicate for the instruction, and might have misled the jury to the conclusion that it was their duty to acquit. *Kimbrough v. State*, 13 Ala. App. 188, 68 So. 673.

Right of Jury to Convict.—Requested charge on right of jury to convict held incomplete, and not to state a proposition of law. *Minor v. State* (Ala. App.), 74 So. 98.

Meaningless Instruction.—Instruction as to burden resting on state before jury could find defendant guilty of any degree "or" homicide held properly refused as meaningless, or likely to be misunderstood. *Hill v. State*, 194 Ala. 11, 69 So. 941.

Incomplete Sentences.—*Johnson v. State*, 8 Ala. App. 14, 62 So. 450. See the title CRIMINAL LAW, § 553, vol. 4, p. 439.

Omission of Word.—In a prosecution for crime, the charge, "then a strong presumption arises there was no felonious intent," was elliptical and misleading for the omission of "that" after "arises." *Spinks v. State*, 14 Ala. App. 75, 71 So. 623.

Improper Use of Words.—Charges which use words improperly for other words, and thus are rendered unintelligible, are properly refused. *Miller v. State* (Ala. App.), 72 So. 506.

Necessity of Physical Participation Where Evidence Shows Conspiracy.—*McClain v. State*, 182 Ala. 67, 62 So. 241. See the title CRIMINAL LAW, § 553, vol. 4, p. 440.

Belief in Evidence beyond Reasonable Doubt.—An instruction, that if the jury do not believe the evidence beyond a reasonable doubt they must acquit accused, was properly refused as misleading. *Spelce v. State*, 10 Ala. App. 196, 65 So. 199.

Two Theories Arising from Evidence.—Requested instruction that, if from all the evidence there arose two theories, one consistent with defendant's innocence, and the other with his guilt, the jury should adopt the theory of innocence, was properly refused as misleading. *Harvey v. State* (Ala. App.), 73 So. 200.

One Single Fact Inconsistent with Defendant's Guilt.—A charge that if one single thing or fact was proved to the jury's satisfaction, inconsistent with defendant's guilt, it was sufficient to raise a reasonable doubt for acquittal, was properly refused as misleading. *Thomas v. State*, 13 Ala. App. 246, 68 So. 799.

Requested instruction that if one single fact was proven to the jury's satisfaction which was inconsistent with defendant's guilt, it was sufficient to raise a reasonable doubt, and the jury should acquit, was misleading. *Cowan v. State* (Ala. App.), 72 So. 578.

Identity of Hide of Animal Stolen.—On trial for grand larceny, instruction to find accused not guilty, unless hide of animal seen by witness was the hide of the animal claimed to have been lost by a party, held properly refused as involved and misleading. *Yorty v. State*, 11 Ala. App. 160, 65 So. 914.

Witness' Right to Judgment for Money Stolen.—A charge that, if accused is convicted of stealing the witness' pocket-book, the witness would have the right to a judgment against accused for the money, and his interest in testifying should be taken into account, has a tendency to confuse or mislead and the court properly refused to give it for either reason. *Harper v. State*, 8 Ala. App. 346, 63 So. 23.

Minds of Jury Left in Confusion.—Requests predicated upon the minds of the jury, being left in a state of confusion or doubt, will be refused. *Moton v. State*, 13 Ala. App. 43, 69 So. 235.

Murder.—Instruction in prosecution for murder held properly refused as confusing and misleading. *White v. State*, 195 Ala. 681, 71 So. 452.

On Passion Reducing Murder to Manslaughter.—Instruction on effect of passion as reducing murder to manslaughter held properly refused as misleading. *Newsom v. State* (Ala. App.), 72 So. 579, certiorari denied in *Ex parte Newsom* (Ala.), 73 So. 1001.

§ 554. Inconsistent or Contradictory Instructions.

Self-Contradictory.—A charge that, if from the evidence there is a probability

of accused's innocence, the jury should find him not guilty, even though it has no reasonable doubt from the evidence that accused is guilty, should be refused, being self-contradictory. *Davis v. State*, 188 Ala. 59, 66 So. 67.

Employing Two Negatives.—Instruction that, if state had not shown that death of deceased did not result from alleged blow, it could not convict defendant, employing two negatives charging diametrically opposite to what was evidently intended, was incorrect and involved and properly refused. *Harvey v. State* (Ala. App.), 73 So. 200.

§ 555. Undue Prominence of Particular Matters.

§ 555 (1) In General.

Instructions are properly refused, which give undue prominence to certain portions of the evidence. *Lawson v. State* (Ala. App.), 76 So. 411; *Miller v. State* (Ala. App.), 75 So. 819; *Burton v. State*, 194 Ala. 2, 69 So. 913; *Pollard v. State*, 12 Ala. App. 82, 68 So. 494; *Ragsdale v. State*, 12 Ala. App. 1, 67 So. 783; *Rector v. State*, 11 Ala. App. 333, 66 So. 857; *Henderson v. State*, 11 Ala. App. 37, 65 So. 721; *Clayton v. State*, 185 Ala. 13, 64 So. 76; *Brooks v. State*, 8 Ala. App. 277, 62 So. 569; *Jones v. State*, 181 Ala. 63, 61 So. 434; *Parker v. State*, 7 Ala. App. 9, 60 So. 995.

Arson.—An instruction in prosecution for arson held bad for singling out and giving an undue prominence to portions of the evidence. *Cunningham v. State*, 14 Ala. App. 1, 69 So. 982.

Assault with Intent to Murder.—In prosecution for assault with intent to murder a peace officer, charges held properly refused as singling out and giving undue prominence to part of the evidence. *Ezzell v. State*, 13 Ala. App. 156, 68 So. 578.

Murder—Defendant's Presence on His Own Premises.—In a prosecution of a landlord for killing his tenant, a request to charge that defendant's presence on his own premises to transact lawful business with the tenant could not be regarded as an unfavorable circumstance against him held properly refused; the

court not being required to charge on a particular fact alone. *Maxwell v. State*, 11 Ala. App. 53, 65 So. 732.

Insanity.—An instruction on insanity held properly refused, as singling out evidence, without stating any proposition of law. *James v. State*, 193 Ala. 55, 69 So. 569.

Violation of Prohibition Law.—In a prosecution for a violation of the prohibition law, a requested charge as to witness' identification of defendant held bad, as singling out a portion of the testimony. *Maxwell v. State*, 12 Ala. App. 212, 67 So. 772.

Robbery.—In a prosecution for robbery, a requested charge that if the victim was on the private premises of defendant at night, and was ordered by defendant to leave and refused to do so, he became a trespasser, was properly refused, as singling out a part of the evidence. *Hardeman v. State*, 14 Ala. App. 35, 70 So. 979.

Seduction.—In a prosecution for seduction, a charge that a conviction should not be had on certain facts held erroneous as giving undue prominence to them. *Brand v. State*, 13 Ala. App. 390, 69 So. 379.

Good Character.—An instruction that, under the uncontradicted evidence, defendant was a man of general good character, was defective, as singling out evidence, and stating a fact, and not a rule. *De Wyre v. State*, 190 Ala. 1, 67 So. 577.

A requested instruction that in a criminal case evidence of accused's previous good character is admissible for him, not only where a doubt exists of his guilt, but where it is sought to create a doubt of guilt, is properly refused, because singling out a part of the evidence. *Clayton v. State*, 185 Ala. 13, 64 So. 76.

Undue Prominence to Testimony of Certain Witness.—A requested charge that, as the state had introduced a certain witness, and vouched for his evidence, the jury had the right to consider the evidence of the witness for a certain purpose was properly refused, because giving undue prominence to the testimony of the witness. *Olive v. State*, 8 Ala. App. 178, 63 So. 36.

Where several witnesses had testified as to defendant's guilt, an instruction that the jury might disregard the testimony of a named person if he had sworn falsely in a material matter held properly refused, as emphasizing the evidence of a single witness. *Bullington v. State*, 13 Ala. App. 61, 69 So. 319.

Undue Prominence to Defendant's Testimony.—Instruction that if defendant has stated that cow was received by him in manner testified to you must acquit him pretermits consideration of all the evidence, and gives undue prominence to defendant's testimony, and was properly refused. *Franklin v. State* (Ala. App.), 78 So. 411.

Asserting Correct Principle of Law.—It is proper to refuse a requested instruction, though it asserts a correct principle of law, if it give undue prominence to a certain part of the evidence. *Eaton v. State*, 8 Ala. App. 136, 63 So. 41.

Instruction Stating Only One Proposition of Law.—While instructions singling out particular facts or theories and requesting a verdict based thereon are properly refused, a charge should not be refused because it states only one proposition of law or one theory or fact only. *Ex parte Pollard*, 193 Ala. 320, 69 So. 425.

§ 555 (2) Weight and Effect of Evidence of Particular Facts in General.

A requested instruction which singles out, and gives undue prominence to, a part of the evidence, and predicates an acquittal on a consideration of the fact singled out, is properly refused. *McWilliams v. State*, 12 Ala. App. 92, 67 So. 735; *Chappell v. State* (Ala. App.), 73 So. 134; *Coplon v. State* (Ala. App.), 73 So. 225, certiorari denied in 74 So. 1005; *Madison v. State*, 196 Ala. 590, 71 So. 706; *Watts v. State*, 8 Ala. App. 264, 63 So. 18.

Good Character.—Instructions held objectionable as singling out and giving undue prominence to proof of good character and pretermittting its consideration with the other evidence. *Pippin v. State*, 197 Ala. 613, 73 So. 340.

Blackmail—Conviction on Admission of Coconspirator.—In blackmail trial under Code 1907, § 6391, where evidence tended

to show defendant acted with another, who published a paper, an instruction that defendant could not be convicted on evidence that his coconspirator admitted that he threatened the victim with publication of the proposed article was properly refused, as giving undue prominence to testimony. *Brown v. State* (Ala. App.), 72 So. 757, writ of certiorari denied in 73 So. 999.

Conspiracy.—*McClain v. State*, 182 Ala. 67, 62 So. 241. See the title CRIMINAL LAW, § 550 (2), vol. 4, p. 443.

Homicide.—On trial for homicide, an instruction held properly refused as singling out a particular feature of the evidence and instructing the jury to weigh the evidence on that subject. *Hooten v. State*, 9 Ala. App. 9, 64 So. 200.

Doubt Whisky Found on Premises Kept for Sale.—*Dunn v. State*, 8 Ala. App. 382, 62 So. 379. See the title CRIMINAL LAW, § 552 (2), vol. 4, p. 443.

Threats to Get Even with Accused When Grand Jury Met.—*Jefferson v. State*, 8 Ala. App. 364, 62 So. 313. See the title CRIMINAL LAW, § 555 (2), vol. 4, p. 443.

Weight of Admitted Statement of Absent Witness.—An instruction that the statement admitted as to what an absent witness would have testified was entitled to the same consideration as if the witness had testified to such statement was improper, as giving undue prominence to a part of the evidence. *Thomas v. State*, 11 Ala. App. 85, 65 So. 863.

§ 555 (4) Particular Defensive Circumstances.

Defendant's Fault in Bringing on Difficulty.—Requested charge on singled out evidence as to a fact in dispute, whether defendant was not at fault in bringing on difficulty, held bad as invading province of jury. *Madry v. State* (Ala.), 78 So. 866.

Self-Defense — Violent Character of Deceased.—In a prosecution for murder, a requested instruction that defendant could take more decisive means of defense if deceased was of a violent character held properly refused as invading the province of the jury in singling out

the question of character. *Donald v. State*, 12 Ala. App. 61, 67 So. 624.

Unlawfully Practicing Medicine—Practicing Religion.—In prosecution for unlawfully practicing medicine, an instruction held vicious as singling out and unduly emphasizing testimony that defendant was practicing his religion. *Fealy v. Birmingham* (Ala. App.), 73 So. 296.

Publicity of Place Where Liquor Sold.—Instruction that in determining guilt of defendant jury can look to the publicity of the place where the offense of selling liquor was charged, is properly refused as giving undue prominence to a particular phase of the testimony. *Strother v. State* (Ala. App.), 72 So. 566.

Insanity.—*Jones v. State*, 181 Ala. 63, 61 So. 434; *Smith v. State*, 182 Ala. 38, 62 So. 184. See the title CRIMINAL LAW, § 555 (4), vol. 4, p. 445.

§ 555 (5) Credibility of Witnesses.

Instruction held erroneous, as singling out testimony. *Herring v. State*, 14 Ala. App. 93, 71 So. 974.

Weight to Be Given Particular Witness' Testimony.—The charge, "I charge you that you must give the same weight to the evidence of S. M. as to the evidence of other witnesses," was improper as on the weight of the evidence. *Coplon v. State* (Ala. App.), 73 So. 225, certiorari denied in 74 So. 1005.

Instruction that jury must believe a witness before it could convict was properly refused because singling out his testimony. *Moore v. State* (Ala. App.), 72 So. 596.

Manslaughter.—In manslaughter case, accused's request to charge held properly refused because it singled out and emphasized accused's testimony. *Tittle v. State* (Ala. App.), 73 So. 142.

§ 555 (6) Credibility of Accused.

Charge Properly Refused.—An instruction held properly refused as giving undue prominence to testimony of defendant. *Smith v. State* (Ala. App.), 75 So. 192.

Character.—*Reid v. State*, 181 Ala. 14, 61 So. 324. See the title CRIMINAL LAW, § 555 (6), vol. 4, p. 447.

Willfully and Corruptly Testifying

Falsely to Material Facts.—A charge that, if defendant had willfully and corruptly testified falsely as to any material fact, the jury might disregard any part or all of his testimony, was not erroneous as singling out a particular witness and giving undue prominence to his testimony. *Carpenter v. State*, 193 Ala. 51, 69 So. 531.

§ 557. Abstract Instructions in General.

See post, "Application of Instructions to Case," § 558.

Abstract instructions are properly refused. *Minor v. State* (Ala. App.), 74 So. 98; *Osborn v. State* (Ala.), 73 So. 985; *Jones v. State*, 193 Ala. 10, 69 So. 66; *Anderson v. State* (Ala.), 68 So. 56; *Forman v. State*, 190 Ala. 22, 67 So. 583; *Kirkwood v. State*, 184 Ala. 9, 63 So. 990, denying certiorari 8 Ala. App. 108, 62 So. 1011; *Smith v. State*, 183 Ala. 10, 62 So. 864; *Chestnut v. State*, 7 Ala. App. 72, 61 So. 609.

Illustrations of Abstract Instructions—Bias or Prejudice.—Where a state's witness, a physician who had treated accused professionally at her voluntary request, did not show any unfriendliness to her or prejudice or bias against her, a charge that if the state's witnesses exhibited prejudice or anger against accused, and did not testify truly, the jury could disregard their testimony, was abstract, and it was not error to refuse it. *Chestnut v. State*, 7 Ala. App. 72, 61 So. 609.

Same—Reasonable Doubt.—Requested charge that, while it is often true that a preponderance of the evidence will lead the mind to a conclusion, yet when human life or liberty is at stake, reasonable doubt is not always essential to a necessary conclusion is properly refused. *Culliver v. State* (Ala. App.), 73 So. 556.

Same—Carrying Concealed Pistol.—In a prosecution for carrying a concealed pistol, instruction that, "Unless you believe beyond a reasonable doubt that he had it concealed about his person, you can not convict defendant" was abstract and properly refused. *Adkins v. State* (Ala. App.), 76 So. 465.

Same—Possibility of Another Killing Deceased.—Requested instruction that, if there was reasonable ground to believe

from the evidence that another could have killed deceased, to find defendant not guilty is properly refused, as abstract and speculative. *Wright v. State* (Ala. App.), 72 So. 564.

Same—Homicide.—A refused instruction in a homicide case held objectionable as abstract. *Langston v. State* (Ala. App.), 75 So. 715.

Same — Deceased's Right to Pursue Course of Conduct.—In a prosecution for homicide, the question at issue is the right of accused, and not of deceased; hence an instruction on the right of deceased to pursue a course of conduct is abstract. *Pollard v. State*, 12 Ala. App. 82, 68 So. 494.

Same—Reward for Arrest or Conviction.—*Campbell v. State*, 182 Ala. 18, 62 So. 57. See the title CRIMINAL LAW, § 557, vol. 4, p. 449.

Same — Corroboration of Witness.—*Tennison v. State*, 183 Ala. 1, 62 So. 780. See the title CRIMINAL LAW, § 557, vol. 4, p. 448.

Same—Proof of Partnership.—*Kinsaul v. State*, 8 Ala. App. 405, 62 So. 990. See the title CRIMINAL LAW, § 557, vol. 4, p. 449.

Embezzlement—Failure of Defendant to Return Money.—In a prosecution for embezzlement, defendant's requested charge that a mere failure to return money intrusted to an agent without evidence of a fraudulent disposition is not sufficient to constitute the offense was abstract, and properly refused. *Lacy v. State*, 13 Ala. App. 267, 69 So. 244, judgment affirmed in *Ex parte Lacy*, 195 Ala. 668, 70 So. 272.

Illustrations of Instructions Not Abstract—Malice.—Instruction that malice may be presumed from use of a deadly weapon such as a loaded pistol, though not applied to the facts of the case, is not erroneous. *Newsom v. State* (Ala. App.), 72 So. 579, certiorari denied in *Ex parte Newsom* (Ala.), 73 So. 1001.

Same—Mental Disease.—Charges that, if the jury was satisfied from the preponderance of the evidence that if, at the time of the killing, defendant was afflicted with a mental disease by reason of which he had lost the power to choose between

right and wrong and to resist the killing which was the result solely of such mental disease, he was not guilty were not objectionable as being abstract. *Mizell v. State*, 184 Ala. 16, 63 So. 1000.

§ 558. Application of Instructions to Case.

See ante, "Abstract Instructions in General," § 557.

§ 558 (1) Applicability to Issues in General.

Instructions not within the issues and not supported by the evidence are properly refused. *Miller v. State* (Ala. App.), 75 So. 819; *Davis v. State*, 188 Ala. 59, 66 So. 67; *Hudson v. State*, 11 Ala. App. 116, 65 So. 732; *Gunn v. State*, 7 Ala. App. 132, 61 So. 468; *Watson v. State*, 8 Ala. App. 414, 62 So. 997; *Granberry v. State*, 182 Ala. 4, 62 So. 52; *Brooks v. State*, 8 Ala. App. 277, 62 So. 569; *McClain v. State*, 182 Ala. 67, 62 So. 241.

Hypothesizing Existence of Non-Existent Condition.—Where the state's evidence did not consist of the testimony of a single witness, the court was not required to give a charge which hypothesized the existence of such a condition. *Price v. State*, 10 Ala. App. 67, 65 So. 308.

Identity of Defendant.—Where a witness testified that, in his best judgment, the person from whom he bought beer was defendant, a requested charge that the mere fact that the beer was bought at defendant's house and the party who sold it looked like defendant did not warrant a conviction was abstract. *Maxwell v. State*, 12 Ala. App. 212, 67 So. 772.

Assault with Intent to Murder—Marshal's Authority to Seize Liquor.—In prosecution for assault with intent to murder, alleged to have been committed upon a town marshal after he had killed accused's father while seizing liquors found in his possession, refusal of requested charges that the marshal had no lawful authority to seize liquors without a warrant was proper. *Dickey v. State* (Ala. App.), 72 So. 608, certiorari denied in 197 Ala. 610, 73 So. 72.

Carrying Concealed Pistol—Instruction on Count Not Elected.—In prosecution

for carrying concealed pistol, where the complaint alternatively alleged carrying the pistol on the street car, on the street, and about premises not the defendant's own, where the state elected to prove on the street count a charge that if the jury believed the evidence it could not convict defendant of carrying a pistol on premises not his own, held properly refused. *Johnson v. State* (Ala. App.), 75 So. 278.

§ 558 (2) Evidence Justifying Instructions in General.

Prejudice or Anger of State's Witnesses.—A requested instruction, that if any state's witness "has exhibited prejudice or anger against defendant, and satisfied you he has not testified truly, and is unworthy of belief, * * * you may disregard it," not being abstract as applied to the evidence, should be given. *Stinson v. State*, 10 Ala. App. 110, 64 So. 507.

§ 558 (3) Matters Not Sustained by Evidence in General.

Instructions predicated on an hypothesis not raised by the evidence, are properly refused as abstract. *Mitchell v. State*, 14 Ala. App. 104, 71 So. 982; *Lambert v. State*, 13 Ala. App. 289, 69 So. 261; *Williams v. State*, 13 Ala. App. 133, 69 So. 376; *Smith v. State*, 13 Ala. App. 399, 69 So. 402; *Hooten v. State*, 9 Ala. App. 9, 64 So. 200.

No Evidence of Threats.—*Kirkwood v. State*, 8 Ala. App. 108, 62 So. 1011, certiorari denied in 184 Ala. 9, 63 So. 990. See the title CRIMINAL LAW, § 558 (3), vol. 4, p. 453.

Grand Jury's Knowledge of Defendant's Name.—Instruction as to effect of knowledge on part of grand jury, when returning indictment, of defendant's true name, they nevertheless naming him otherwise, held properly refused in the absence of evidence that the averment was untrue. *Oliveri v. State*, 13 Ala. App. 348, 69 So. 359.

Burglary Committed by One Other than Accused.—*Gunn v. State*, 7 Ala. App. 132, 61 So. 468. See the title CRIMINAL LAW, § 558 (3), vol. 4, p. 452.

Committee Placing Embezzled Funds in Defendant's Hands.—Where there was no evidence that the money claimed to

have been embezzled was placed in defendant's hands by any committee of the Sunday school owning the funds, instructions on that issue were properly refused. *Peters v. State*, 12 Ala. App. 133, 67 So. 723.

Self-Defense — Hypothesizing Wrong Place of Attack.—A requested instruction on self-defense hypothesizing the attack as at defendant's place of business, when such was not the case, held erroneous. *De Wyre v. State*, 190 Ala. 1, 67 So. 577.

Where it was not a necessary conclusion from the evidence that defendant was within his curtilage at the time of the killing, a charge that accused was within his curtilage, and not bound to retreat, was properly refused. *Hubbard v. State*, 10 Ala. App. 47, 64 So. 633.

Possession of Stolen Property.—A requested charge that unless the jury believed that defendant was in possession of the anvil alleged to have been stolen and in determining whether he was in possession they could look to the evidence that the anvil in evidence was the only one in defendant's shop during that time, and if they find that witnesses did so testify the jury must acquit, held properly refused; there being also evidence that the stolen anvil had been in his shop. *Murphey v. State*, 10 Ala. App. 106, 64 So. 520.

No Evidence of Conspiracy. — *Tennison v. State*, 183 Ala. 1, 62 So. 780. See the title CRIMINAL LAW, § 558 (3), vol. 4, p. 454.

§ 558 (6) Intent, Malice, and Motive.

Disregarding Testimony of Witnesses Exhibiting Anger.—Where the record does not show that any of the state's witnesses exhibited anger, a requested charge that if such witnesses exhibited malice or anger, or have testified to contradictory statements, and satisfied the jury that they have not testified truthfully, the jury might disregard their testimony was properly refused. *Conner v. State*, 10 Ala. App. 206, 65 So. 309.

Disregarding Testimony of Witnesses Exhibiting Malice. — Where there was nothing in the evidence affording an inference that any witness exhibited at the trial or elsewhere any prejudice or anger

against accused, charges on the right to disregard the testimony of witnesses exhibiting prejudice or anger are properly refused as abstract. *Davis v. State*, 188 Ala. 59, 66 So. 67.

§ 558 (7) Time and Place of Offense.

The bill of exceptions stating that all questions of venue were admitted, complaint may not be made of the refusal of an instruction on venue. *Watts v. State*, 8 Ala. App. 264, 63 So. 18.

§ 558 (8) Matters of Defense in General.

Possibility of Another Killing Deceased. — Instruction on possibility of killing having been done by another, held properly refused in the absence of evidence that any other than defendant killed deceased. *Jones v. State* (Ala. App.), 74 So. 843, certiorari denied in 75 So. 1003.

Wife's Adultery Justifying Abandonment.—Charge on justification of abandonment by adultery of wife held properly refused as abstract. *Gobel v. State* (Ala. App.), 72 So. 756, writ of certiorari denied in 73 So. 1000.

Wife's Adultery after Abandonment.—Where evidence as to wife's adultery after abandonment was excluded, charge making such adultery justification of abandonment was properly refused. *Gobel v. State* (Ala. App.), 72 So. 756, writ of certiorari denied in 73 So. 1000.

§ 558 (9) Insanity or Intoxication.

Requested charges, predicated on insanity, a question not in issue, are properly refused, as abstract. *Goodman v. State* (Ala. App.), 72 So. 687.

Insanity a Year after Act.—Requested instructions as to insanity as a defense are abstract; there being no testimony of his being insane, except a year, or a time not specified, after the act. *Granberry v. State*, 184 Ala. 5, 63 So. 975.

Two Pleas—Charge Not Limited to Proper Plea.—Where accused filed a plea of not guilty and another plea of not guilty because of insanity, the refusal of a requested charge that there could be no conviction unless each juror was convinced beyond a reasonable doubt of accused's guilt was not error, where the charge was not limited to the plea of not

guilty. *Newton v. State*, 11 Ala. App. 157, 65 So. 697.

Hypothesizing Mental Incapacity to Contract.—Requested instructions hypothesizing mental incapacity of H. to understand his acts, or his having been non compos mentis, when he executed a contract, were abstract; there having been only hearsay evidence, "They say H. didn't have much sense," and it not even appearing that related to the time of the execution of the contract, or but what he had enough sense to understand the nature and obligation of the contract. *Lambert v. State*, 13 Ala. App. 289, 69 So. 261.

§ 558 (12) Testimony of Accomplice.

Where the witness was an infant only a little over 7 years of age, accused, being bound to show the witness an accomplice, is not entitled to an instruction on accomplice testimony in the absence of proof of the child's capacity. *Darden v. State*, 12 Ala. App. 165, 68 So. 550.

§ 558 (14) Circumstantial Evidence.

Positive Evidence.—Where evidence is positive, refusal to grant a requested charge on circumstantial evidence is not error. *Miller v. State* (Ala. App.), 74 So. 840; *Davis v. State*, 8 Ala. App. 147, 62 So. 1027, certiorari denied in *Ex parte Davis*, 184 Ala. 26, 63 So. 1010. See the title CRIMINAL LAW, § 558 (14), vol. 4, p. 457.

Evidence of Eyewitnesses.—Where a conviction is sought on the testimony of eyewitnesses, a requested charge on circumstantial evidence is properly refused. *Cowart v. State*, 11 Ala. App. 102, 65 So. 666.

§ 558 (15) Credibility of Witnesses.

Whether Prosecuting Witness Was Drinking.—Where the evidence did not require a charge that whether prosecuting witness was drinking at the time of the alleged assault on him was a material fact, the court could not be put in error for refusing to so charge as a matter of law. *Pearson v. State*, 13 Ala. App. 181, 69 So. 485.

Conviction on Single Witness' Testimony Whose Veracity Doubted.—Where

the indictment charged several offenses in the alternative, and only one of the four witnesses testified as to defendant's guilt of one of the offenses charged, it was error to refuse a charge that the jury can not find a verdict of guilty on the testimony of a single witness if they have reasonable doubt as to its truth. *Conner v. State*, 10 Ala. App. 206, 65 So. 309.

§ 559. Instructions Excluding or Ignoring Issues, Defenses, or Evidence.

§ 559 (1) In General.

A charge which ignores material evidence, or attempts to withdraw it from the consideration of the jury, or to divert their attention from it, is properly refused. *Wiggins v. State* (Ala. App.), 78 So. 413; *Minor v. State* (Ala. App.), 74 So. 98; *Bullington v. State*, 13 Ala. App. 61, 69 So. 319; *Campbell v. State*, 13 Ala. App. 70, 69 So. 322; *Norman v. State*, 13 Ala. App. 337, 69 So. 362; *Roden v. State*, 13 Ala. App. 105, 69 So. 366; *Howerton v. State*, 191 Ala. 13, 67 So. 979; *Clayton v. State*, 185 Ala. 13, 64 So. 76; *Brooks v. State*, 8 Ala. App. 277, 62 So. 569; *Campbell v. State*, 182 Ala. 18, 62 So. 57.

Instructions Held Erroneous.—Requested instructions that the jury must acquit if they can reasonably reconcile the evidence with the fact that the state's witnesses are mistaken held erroneous, as ignoring a consideration of the evidence. *Bryant v. State*, 13 Ala. App. 206, 68 So. 704, certiorari denied in 193 Ala. 673, 69 So. 1017.

Disregarding Testimony of Witness Swearing Falsely.—Where several witnesses had testified as to defendant's guilt, an instruction that the jury might disregard the testimony of a named person if he had sworn falsely in a material matter held properly refused, as ignoring evidence. *Bullington v. State*, 13 Ala. App. 61, 69 So. 319.

Ignoring Tendency of Evidence to Show Defendant an Accomplice.—Defendant's requested charges held properly refused as ignoring the tendencies of the evidence that defendant was an accomplice of some one who might have actually inflicted the blow which caused

the death of the deceased. *Jones v. State*, 13 Ala. App. 10, 68 So. 690.

Embezzlement — Instructions Held Proper.—In a prosecution for embezzlement, where there was evidence supporting the state's contention that any sale to defendant had been a conditional sale, and defendant's contention of a sale to him, charges predicated acquittal on the jury's belief of a sale to defendant held not to exclude the idea of a conditional sale. *Freeman v. State*, 10 Ala. App. 120, 64 So. 514.

Same—Instructions Held Improper.—In a prosecution for embezzlement, where the jury might have inferred that defendant was the servant or agent of another, instructions to the contrary held properly refused. *Freeman v. State*, 10 Ala. App. 120, 64 So. 514.

Carrying Concealed Pistol — Instruction Held Elliptical.—In a prosecution for carrying a concealed pistol, instruction that, "Unless you believe beyond a reasonable doubt that he had it concealed about his person, you can not convict defendant" was elliptical and properly refused. *Adkins v. State* (Ala. App.), 76 So. 465.

Conspiracy—Aiding and Abetting.—A requested charge held properly refused because defendant's guilt did not depend solely on the theory of conspiracy, but one theory of the state was that defendant was an aider and abettor, and the evidence was admissible on that theory. *Eaton v. State*, 8 Ala. App. 136, 63 So. 41.

Self-Defense — Ignoring Abusive Language Used by Person Assaulted.—A charge as to self-defense held not objectionable because ignoring the question of abusive language used by the person assaulted towards defendant, as provided in Code 1907, § 6308, where the evidence did not show that defendant committed the offense because of such provocation. *Blankenship v. State*, 11 Ala. App. 125, 65 So. 860.

Acquittal Because of Conflicts in State's Evidence.—An instruction authorizing an acquittal on the ground of conflicts in the state's evidence is properly refused because ignoring the whole evidence. *James v. State*, 12 Ala. App. 16, 67 So. 773.

Ignoring or Withdrawing Material Evidence.—*Harris v. State*, 177 Ala. 17, 59 So. 205. See the title CRIMINAL LAW, § 559 (1), vol. 4, p. 458.

§ 559 (2) Assumption as to Facts.

Where judge does not undertake to tell jury what evidence was, he has a right in his charge to assume facts for purposes of illustrating the law of the case. *Miller v. State* (Ala. App.), 74 So. 840.

§ 559 (3) Issues.

Assault with Intent to Murder—Charges Held Improper.—In prosecution for assault with intent to murder a peace officer, charges held properly refused as ignoring theories supported by evidence upon which defendant would be guilty, notwithstanding that the officer had no right to arrest him at the time of the shooting. *Ezzell v. State*, 13 Ala. App. 156, 68 So. 578.

Carrying Concealed Weapons — Misstating Place of Offense.—In prosecution for carrying concealed weapons, which is a continuing offense, a charge that defendant was not being tried for an offense committed on a street car, the state having elected to prosecute for an offense committed on the street, was properly refused. *Johnson v. State* (Ala. App.), 75 So. 278.

Practicing Medicine without License—Practicing Religion.—In a prosecution for practicing medicine without a license, an instruction held faulty as hypothesizing an acquittal on belief that accused practiced religion, pretermitted question whether the acts of treatment were denounced by statute. *Fealy v. Birmingham* (Ala. App.), 73 So. 296.

§ 559 (4) Elements and Incidents of Offense.

Whether Accused Was Intentionally Pointing Pistol at Deceased.—In a prosecution for homicide, an instruction predicated an acquittal on a theory of accidental shooting, which ignored the question whether accused was intentionally pointing the pistol at deceased, was properly refused. *James v. State*, 12 Ala. App. 16, 67 So. 773.

Freedom from Fault in Bringing on Difficulty.—In a prosecution for assault

and battery defendant's requested instructions ignoring the element of his freedom from fault in bringing on the difficulty held properly refused. *Blankenship v. State*, 11 Ala. App. 125, 65 So. 860.

Presence of Codefendant Aiding and Abetting in Killing.—*Harris v. State*, 177 Ala. 17, 59 So. 205. See the title CRIMINAL LAW, § 559 (4), vol. 4, p. 459.

§ 559 (6) Testimony of Accomplices.

Ignoring Corroboration.—Where there was evidence corroborating the testimony of accused's accomplice, a requested charge that a defendant can not be convicted on the uncorroborated testimony of an accomplice was properly refused. *Ward v. State* (Ala. App.), 72 So. 754.

Where defendant was jointly indicted with others for homicide, but separately tried, and one theory of the state was that defendant conspired with his codefendants to commit the murder, defendant's request to instruct the jury not to consider evidence that one codefendant shortly before the killing had given to another codefendant a box of cartridges, unless the evidence showed there was a conspiracy prior in point of time between defendant and his codefendants was properly refused because it proposed to instruct as to the effect of only a part of the evidence of conspiracy, and would obscure consideration of other parts of the evidence bearing on the same subject. *Eaton v. State*, 8 Ala. App. 136, 63 So. 41.

Blackmail—Ignoring Evidence of Acting with Another.—In blackmail trial under Code 1907, § 6391, where evidence tended to show defendant acted with another, who published a paper, an instruction that defendant could not be convicted on evidence that his coconspirator admitted that he threatened the victim with publication of the proposed article was properly refused, as ignoring evidence. *Brown v. State* (Ala. App.), 72 So. 757, writ of certiorari denied in 73 So. 999.

§ 559 (8) Sufficiency of Evidence and Reasonable Doubt.

It was proper to refuse an instruction on reasonable doubt, which pretermitted

consideration by the jury of all the evidence. *West v. State* (Ala. App.), 75 So. 709; *Edmonds v. State* (Ala. App.), 75 So. 873; *Herring v. State*, 14 Ala. App. 93, 71 So. 974.

Defendant's Testimony Tending to Incriminate.—*Davis v. State*, 8 Ala. App. 147, 62 So. 1027, certiorari denied in *Ex parte Davis*, 184 Ala. 26, 63 So. 1010. See the title CRIMINAL LAW, § 559 (8), vol. 4, p. 462.

Good Character.—Requested instruction that the jury might consider the good character of the defendant to generate a reasonable doubt after it considered all the testimony is properly refused, as indicating that the jury may consider character evidence apart from other evidence. *Watson v. State* (Ala. App.), 72 So. 569.

Homicide—Probability of Accused's Innocence.—A charge, in a homicide case, directing the jury to acquit if there was a probability of accused's innocence is properly refused, not being predicated on the evidence. *Davis v. State*, 188 Ala. 59, 66 So. 67.

Larceny.—A requested instruction in a larceny case that, "If you believe from any part of the evidence in this case, after considering all the evidence in the case," etc., was properly refused because authorizing the jury to base their verdict on part of the evidence. *King v. State* (Ala. App.), 72 So. 552.

Violating Prohibition Law.—In a prosecution for violating the prohibition law, a requested instruction as to the effect of keeping prohibited liquor held erroneous as ignoring evidence. *Harwell v. State*, 12 Ala. App. 265, 68 So. 500.

§ 559 (11) Principals and Accessories.

Homicide.—*Campbell v. State*, 182 Ala. 18, 62 So. 57. See the title CRIMINAL LAW, § 559 (11), vol. 4, p. 463.

Larceny from the Person.—In a prosecution for larceny from the person, where there was evidence authorizing the inference that defendant was a guilty participant with others in a conspiracy to commit the offense, charges that, unless the jury believed from the evidence that defendant took from the person of the robbed individual the pocketbook in which was the money described in the indictment, they could not convict, and

that they should acquit were properly refused, as ignoring the possibility that defendant, without having actually taken the money himself, might have done so through another, or others, with whom he conspired. *Lane v. State*, 14 Ala. App. 40, 70 So. 982.

Murder. — Under Code 1907, § 6219, as to accessories being principals in a murder trial where there was evidence to show that accused, his wife, and stepdaughter were all accessories to the killing, and that accused could have been guilty though he did not personally fire the shot that proved fatal, requested instructions predicated his guilt on his having personally fired the fatal shot or having killed the victim were properly refused. *Walling v. State* (Ala. App.), 73 So. 216, certiorari denied in *Ex parte Walling* (Ala.), 73 So. 1003.

Requested instruction that, if there was reasonable ground to believe from the evidence that another could have killed deceased, to find defendant not guilty is properly refused, being too broad, and pretermittting consideration of accused's connection with the crime. *Wright v. State* (Ala. App.), 72 So. 564.

§ 560 (12) Grade or Degree of Offense and Punishment.

Where accused was indicted and convicted of assault with intent to murder, requested instructions to acquit, unless the intent was proved, were properly refused, for, under Code 1907, § 7315, accused could be convicted of lesser crime in which the intent to kill was not an ingredient. *Ellis v. State* (Ala. App.), 72 So. 578.

§ 562. Withdrawal of Instructions or Remarks.

Curing of Error. — *Redden v. State*, 7 Ala. App. 33, 60 So. 992. See the title CRIMINAL LAW, § 562, vol. 4, p. 464.

§ 563. Construction of Instructions Given.

Hypercriticism should not be indulged in, in construing the charge of the court in a criminal prosecution, where the charge was expressed in plain language that is susceptible of the ordinary understanding. *Addington v. State* (Ala. App.), 74 So. 846.

The test of severe grammatical criticism is not the proper rule of construction to apply to the general charge of the court in a criminal prosecution. *Addington v. State* (Ala. App.), 74 So. 846.

§ 564. Inadvertent Errors and Omissions.

§ 564 (1) Errors in General.

A charge held erroneous in using the wrong word. *Murray v. State*, 13 Ala. App. 175, 69 So. 354.

§ 564 (2) Omissions.

A requested instruction to acquit if the jury would act on the evidence in their own most important affairs held defective in omitting the word "not." *Hutchinson v. State* (Ala. App.), 72 So. 572.

§ 565. Construction and Effect of Charge as a Whole.

Necessity. — A part of a charge excepted to should be construed in connection with the whole charge. *Ex parte Cowart* (Ala.), 78 So. 879; *Dempsey v. State* (Ala. App.), 72 So. 773; *Harris v. State*, 8 Ala. App. 33, 62 So. 477.

Same — Oral Charge. — Part of oral charge to which exception is reserved must be considered in connection with remainder, for the charge must be considered as a whole. *Thompson v. State* (Ala. App.), 78 So. 309.

Effect of Isolated Portions of Oral Charge Being Incorrect. — *White v. State*, 8 Ala. App. 43, 62 So. 454. See the title CRIMINAL LAW, § 565, vol. 4, p. 466.

Oral and Written Charges. — *Roberson v. State*, 183 Ala. 43, 62 So. 337. See the title CRIMINAL LAW, § 565, vol. 4, p. 466.

Elements and Incidents of Offense. — Where the oral charge is complete, failure of the written charge to include all the elements is not error, since the oral and written charges must be considered together and as a whole. *Newsom v. State* (Ala. App.), 73 So. 579, certiorari denied in *Ex parte Newsom* (Ala.), 73 So. 1001.

Reasonable Doubt. — Instruction that a reasonable doubt is one based upon a reasonable foundation is not reversible error, especially where a preceding portion of the instruction stated that such doubt was not a whimsical, possible, or

speculative doubt. *Brown v. State* (Ala. App.), 74 So. 733.

If instructions viewed as a whole, are not prejudicial, a reversal is not authorized, though when taken from the context and viewed independently they are. *Barber v. State*, 11 Ala. App. 119, 65 So. 842.

§ 566. Error in Instruction Cured by Withdrawal or Giving Other Instructions.

§ 566 (1) In General.

Perjury. — Error in the oral charge in a prosecution for perjury was cured where the court thereafter stated that the charge was erroneous, and gave a correct charge. *Mullens v. State*, 12 Ala. App. 206, 68 So. 533.

Curing Harmful Results of Erroneous Charge — Statute.—In view of Acts 1915, p. 815, the harmful results from giving an erroneous charge are not cured by a correct statement of the law in the oral charge. *Smith v. State* (Ala. App.), 74 So. 755.

§ 566 (1½) Curing Invasion of Province of Jury.

Portion of the charge remarking there was no direct evidence connecting a certain person with the crime held cured by withdrawal and instruction to disregard. *Johnson v. State* (Ala. App.), 73 So. 748.

§ 566 (1½a) Elements and Incidents of Offense in General.

A defective instruction defining manslaughter held cured by an instruction that defendant could not be convicted unless he "unlawfully" took the life of deceased. *Langston v. State* (Ala. App.), 75 So. 715.

§ 566 (1½b) Intent, Malice, and Motive.

Malice. — An instruction that accused's malice "may be inferred from the shooting," held not prejudicial, in view of other portions of the charge. *Murphy v. State*, 14 Ala. App. 78, 71 So. 967.

Embezzlement—Omitting Essential Ingredient of Fraudulent Intent.— In prosecution under Code 1907, § 6831, for embezzlement as trustee or bailee of the state, error in a charge omitting the essential ingredient of fraudulent intent, not cured by other charges and not

elsewhere corrected by the trial court in its charge, was reversible error. *Ex parte Cowart* (Ala.), 78 So. 879.

§ 566 (2) Matters of Defense.

Self-Defense. — Defendant held not harmed by oral charge on self-defense that "there must have been no way of retreat open," where in his given requested charges he had the advantage of more satisfactory statements thereof. *Madry v. State* (Ala.), 78 So. 866.

Burden and Sufficiency of Proof. — *Roberson v. State*, 183 Ala. 43, 62 So. 837. See the title CRIMINAL LAW, § 566 (2), vol. 4, p. 466.

§ 566 (2½) Character.

Error in the court's remarks during the trial, as to character of deceased in relation to his wife not giving anybody right to kill him, was cured by the court subsequently withdrawing the remarks from the consideration of the jury. *Henderson v. State*, 11 Ala. App. 37, 65 So. 721.

§ 566 (4) Weight and Sufficiency of Evidence.

Keeping Liquor in Place Not Private Residence.—*Dunn v. State*, 8 Ala. App. 410, 62 So. 996. See the title CRIMINAL LAW, § 566 (4), vol. 4, p. 467.

(H) REQUESTS FOR INSTRUCTIONS.

§ 567. Necessity in General.

Purpose and Effect of Evidence. — Under Code 1907, § 5362, in murder case, court was not authorized to charge effect of evidence without having been requested to do so by party. *Winford v. State* (Ala. App.), 75 So. 819.

Reasonable Doubt. — One accused of murder must request a definition of the doctrine of reasonable doubt in relation to other specific charges. *White v. State*, 195 Ala. 681, 71 So. 452.

§ 568. Further or More Specific Instructions.

See post, "Written Requests," § 571.

§ 568 (1) In General.

Misleading Instructions. — Where an instruction correctly states the law, but accused fears it may mislead the jury, he

should request an explanatory charge. *Murphy v. State*, 14 Ala. App. 78, 71 So. 967.

Where an abstract instruction, not applied to the facts of the case, is given, it is defendant's right and duty to invoke consideration of the matter by requesting appropriate written charges. *Newsom v. State* (Ala. App.), 72 So. 579, certiorari denied in *Ex parte Newsom* (Ala.), 73 So. 1001.

§ 568 (3) Defenses.

Error in a part of the charge on self-defense correctly stated elsewhere in the charge held merely misleading, and not cause for reversal; no additional charges being requested. *Reeves v. State*, 13 Ala. App. 1, 68 So. 569.

§ 569. Time for Asking Instructions.

Request for Charge during Solicitor's Closing Argument. — Demand for charge in writing, made for the first time during the closing argument of the solicitor, is too late, being required by Code 1907, § 5363, before argument is commenced. *Osborn v. State* (Ala.), 73 So. 985.

Request to Charge after Retirement of Jury. — *Key v. State*, 8 Ala. App. 2, 62 So. 335. See the title CRIMINAL LAW, § 569, vol. 4, p. 468.

Other Written Charges Requested before Jury's Retirement. — Under Code 1907, § 5364, the fact that before the argument defendant's counsel had submitted a number of charges did not justify the court in refusing to consider other written charges requested at the conclusion of the court's oral charge, and before the jury retired. *Vinson v. State*, 10 Ala. App. 61, 64 So. 639.

§ 570. Form and Requisites of Requests.

See post, "Erroneous Requests," § 573.

Incomplete. — A charge not complete within itself was properly refused. *Jones v. State*, 13 Ala. App. 10, 68 So. 590.

Elliptical. — In trial for robbery, defendant's requested charge as to jury's taking statement to jury room and considering it, held objectionable as elliptical. *Ware v. State*, 12 Ala. App. 101, 67 So. 763.

Wrong Designation of Parties. — *Underwood v. State*, 179 Ala. 9, 60 So. 842.

See the title CRIMINAL LAW, § 570, vol. 4, p. 469.

§ 571. Written Requests.

Affirmative Charge. — A general affirmative charge was properly refused, where it was not requested in writing as required by Code 1907, § 5364, as amended Acts 1915, p. 815. *Foote v. State* (Ala. App.), 75 So. 728.

General affirmative charge for state as to defendant's first plea of not guilty, not having been requested in writing by state, was reversible error. *Winford v. State* (Ala. App.), 75 So. 819.

Illegible Written Charge. — It was not error to refuse requested charge, so carelessly written and defaced with erasures and interlineations as to be illegible. *Eaton v. State*, 8 Ala. App. 136, 63 So. 41.

Written Requests Covered — Propriety of Refusing Oral Charges. — In trial for murder, where court had instructed jury as to each matter requested by defendant in writing, and defendant had not requested fuller or more specific instructions in writing, refusal to give his oral requests was not reviewable. *Oldacre v. State*, 196 Ala. 690, 72 So. 303.

§ 572. Instructions Already Given.

§ 572 (1) In General.

There is no error in refusing a requested instruction substantially and fairly covered by the charge given. *Fuller v. State* (Ala. App.), 75 So. 879; *Butler v. State* (Ala. App.), 77 So. 72; *Cain v. State* (Ala. App.), 77 So. 453; *Miller v. State* (Ala. App.), 75 So. 319; *Smith v. State* (Ala. App.), 75 So. 192; *Langston v. State* (Ala. App.), 75 So. 715; *Norris v. State* (Ala. App.), 75 So. 718; *Coplon v. State* (Ala. App.), 73 So. 225, certiorari denied in 74 So. 1005; *Autrey v. State* (Ala. App.), 74 So. 397; *Hall v. State* (Ala. App.), 74 So. 731; *Miller v. State* (Ala. App.), 74 So. 840; *Suttles v. State* (Ala. App.), 74 So. 400; *Minor v. State* (Ala. App.), 74 So. 98; *Mathis v. State* (Ala. App.), 73 So. 122; *Palmer v. State* (Ala. App.), 73 So. 139, certiorari denied in 73 So. 1001; *Osborn v. State* (Ala.), 73 So. 985; *Huguley v. State* (Ala. App.), 72 So. 764; *Keith v. State* (Ala. App.), 72 So. 602; *Thomas v. State* (Ala. App.), 72 So. 688; *Diamond v. State* (Ala. App.), 72 So. 558, certiorari

denied in *Ex parte State* (Ala.), 73 So. 1002; *Madison v. State*, 196 Ala. 590, 71 So. 706; *Collins v. State*, 14 Ala. App. 54, 70 So. 995; *Ex parte Lacy*, 195 Ala. 668, 70 So. 272; *Prater v. State*, 195 Ala. 40, 69 So. 539; *King v. State*, 13 Ala. App. 91, 69 So. 345; *Sharp v. State*, 193 Ala. 22, 69 So. 122; *Bullington v. State*, 13 Ala. App. 61, 69 So. 319; *Campbell v. State*, 13 Ala. App. 70, 69 So. 332; *Roden v. State*, 13 Ala. App. 105, 69 So. 366; *Williams v. State*, 13 Ala. App. 133, 69 So. 376; *Brand v. State*, 13 Ala. App. 390, 69 So. 379; *Johnson v. State*, 13 Ala. App. 140, 69 So. 396; *Smith v. State*, 13 Ala. App. 399, 69 So. 402; *Jones v. State*, 193 Ala. 10, 69 So. 66; *Jackson v. State*, 193 Ala. 36, 69 So. 130; *Ludlum v. State*, 13 Ala. App. 278, 69 So. 255; *Ezzell v. State*, 13 Ala. App. 156, 68 So. 578; *Bryant v. State*, 13 Ala. App. 206, 68 So. 704; *Darden v. State*, 13 Ala. App. 165, 68 So. 550; *Richardson v. State*, 191 Ala. 21, 68 So. 57; *Ware v. State*, 12 Ala. App. 101, 67 So. 763; *Patterson v. State*, 191 Ala. 16, 67 So. 997; *Rudder v. State*, 12 Ala. App. 72, 67 So. 738; *Nail v. State*, 12 Ala. App. 64, 67 So. 732; *Buckhanon v. State*, 12 Ala. App. 36, 67 So. 718; *Moss v. State*, 190 Ala. 14, 67 So. 431; *Wise v. State*, 11 Ala. App. 72, 66 So. 128; *Francis v. State*, 188 Ala. 59, 65 So. 969; *Spicer v. State*, 188 Ala. 9, 65 So. 972; *Kirk v. State*, 10 Ala. App. 216, 65 So. 195; *Boice v. State*, 10 Ala. App. 100, 65 So. 83; *Newsum v. State*, 10 Ala. App. 124, 65 So. 87; *Dodson v. State*, 10 Ala. App. 255, 65 So. 206; *Bell v. State*, 11 Ala. App. 214, 65 So. 688; *Newton v. State*, 11 Ala. App. 157, 65 So. 697; *Turner v. State*, 11 Ala. App. 1, 65 So. 719; *Henderson v. State*, 11 Ala. App. 37, 65 So. 721; *Webb v. State*, 11 Ala. App. 123, 65 So. 845; *Hubbard v. State*, 10 Ala. App. 47, 64 So. 633; *Howell v. State*, 10 Ala. App. 1, 64 So. 522; *Bonner v. State*, 185 Ala. 670, 64 So. 592; *Bryant v. State*, 185 Ala. 8, 64 So. 333; *Clayton v. State*, 185 Ala. 13, 64 So. 76; *Mizell v. State*, 184 Ala. 16, 63 So. 1000; *Kirkwood v. State*, 184 Ala. 9, 63 So. 990, denying certiorari 8 Ala. App. 108, 62 So. 1011; *Fowler v. State*, 8 Ala. App. 168, 63 So. 40; *McClain v. State*, 182 Ala. 67, 62 So. 241; *Dunn v. State*, 8 Ala. App. 382, 62 So. 379; *White v. State*, 8 Ala. App. 43, 62 So. 454; *Bone v. State*, 8 Ala. App.

59, 62 So. 455; *Grantland v. State*, 8 Ala. App. 319, 62 So. 470; *Brooks v. State*, 8 Ala. App. 277, 62 So. 569; *Smith v. State*, 182 Ala. 38, 62 So. 184; *Harris v. State*, 8 Ala. App. 33, 62 So. 477; *Bigham v. State*, 184 Ala. 673, 62 So. 762; *Kirkwood v. State*, 8 Ala. App. 108, 62 So. 1011; *Wilson v. State*, 7 Ala. App. 134, 61 So. 471; *Gunn v. State*, 7 Ala. App. 132, 61 So. 468; *Chestnut v. State*, 7 Ala. App. 72, 61 So. 609; *Bishop v. State*, 181 Ala. 85, 61 So. 320; *Brown v. State*, 7 Ala. App. 26, 61 So. 12; *Underwood v. State*, 179 Ala. 9, 60 So. 842; *Parker v. State*, 7 Ala. App. 9, 60 So. 995; *Godan v. State*, 179 Ala. 27, 60 So. 908.

Where every proposition of law attempted to be stated in defendant's requested instruction was fully covered by one or more of defendant's given instructions, they were properly refused. *Burton v. State*, 194 Ala. 2, 69 So. 913.

It is not error to refuse a requested charge, the subject of which is covered as favorably to defendant as he is entitled to require in the instructions given. *Bell v. State*, 11 Ala. App. 214, 65 So. 688.

Character.—Defendant could not complain of refusal of requested instructions on character, fully covered by other instructions given at his request. *De Wyre v. State*, 190 Ala. 1, 67 So. 577.

Under Acts 1915, p. 815, so providing, refusal of charge stating correct principal of law will not work reversal of judgment if same rule was substantially and fairly given jury in general charge or in charges given at request of parties. *Tarwater v. State* (Ala. App.), 75 So. 816; *Garner v. State* (Ala.), 75 So. 462; *Smith v. State* (Ala. App.), 75 So. 627; *Davis v. State*, 197 Ala. 677, 73 So. 369; *Murphy v. State*, 14 Ala. App. 78, 71 So. 967.

In a homicide case, it was not error to refuse an instruction fully covered by other instructions. *Daniel v. State*, 14 Ala. App. 63, 71 So. 79.

In prosecution for murder, refusal of correct written charge was not reversible error, where, in its oral charge, the court correctly stated each of the propositions set out in the refused charge, which was substantially covered by others given. *Randall v. State*, 14 Ala. App. 122, 72 So. 214.

Charges Partly Covered by Party's Previous Requests.—Where a charge states several distinct propositions of law, the court may properly refuse it if some of them are fully covered by special charges given at the instance of the same party. *Burk v. State* (Ala. App.), 75 So. 702.

Correct Statements of Law and Appropriate to Issues.—It is not error to refuse instructions containing correct statements of the law and appropriate to the issues, where the court correctly states the law in other instructions given. *Williams v. State*, 13 Ala. App. 133, 69 So. 376.

§ 572 (2) Elements and Incidents of Offense.

Legal Obligation of Accused to Retreat.—Where the court charged that accused was under no legal obligation to retreat, but could repel the attack if one was made, refusal to charge that accused, having been employed as night watchman at the place where the difficulty occurred, was under no obligation to retreat, but might resist an attack made on him, was not erroneous. *Francis v. State*, 188 Ala. 39, 65 So. 969.

Single Sale of Whisky.—Where the evidence showed a single sale of whisky by the defendant, and the court charged that, unless they found such sale was made, they should find for defendant, the refusal of a requested charge that the evidence would not support a conviction for offering for sale could not mislead the jury to believe that they could convict the defendant of some offense without finding that he made the particular sale. *Slaten v. State*, 10 Ala. App. 185, 65 So. 85.

§ 572 (3) Self-Defense.

Where the court had previously instructed that the evidence did not show that defendant brought on the difficulty, it was harmless error to refuse defendant's request that threats, made by deceased, could be considered in determining who brought on the difficulty. *Olive v. State*, 8 Ala. App. 178, 63 So. 36.

§ 572 (4) Presumptions and Burden of Proof.

Presumption of Innocence.—*Davis v.*

State, 8 Ala. App. 147, 62 So. 1027, certiorari denied in *Ex parte Davis*, 184 Ala. 26, 63 So. 1010. See the title CRIMINAL LAW, § 572 (4), vol. 4, p. 470.

Where the legal presumption of defendant's innocence and the necessity for unanimity of belief as to his guilt and the degree of proof required were fully covered by given charges, the refusal of a requested charge thereon was not reversible error. *Lacy v. State*, 13 Ala. App. 267, 69 So. 244, judgment affirmed in *Ex parte Lacy*, 195 Ala. 668, 70 So. 272.

Burden of Proof.—*Davis v. State*, 8 Ala. App. 147, 62 So. 1027, certiorari denied in *Ex parte Davis*, 184 Ala. 26, 63 So. 1010. See the title CRIMINAL LAW, § 572 (4), vol. 4, p. 470.

§ 572 (4½) Sufficiency of Evidence in General.

In a criminal prosecution, defendant's requested charge on corroboration held fully covered by the charge given for defendant. *Herring v. State*, 14 Ala. App. 93, 71 So. 974.

§ 572 (5) Reasonable Doubt.

The refusal of a requested charge on reasonable doubt, substantially covered by the given charges, does not require the reversal of a conviction. *Johnson v. State* (Ala. App.), 73 So. 210, certiorari denied in *Ex parte Johnson* (Ala.), 73 So. 1000. *Smith v. State*, 197 Ala. 193, 72 So. 316; *Moye v. State*, 12 Ala. App. 127, 67 So. 716.

In a trial for murder defendant could not complain of the refusal to charge that, before he could be convicted, the proof should be inconsistent with every other reasonable supposition except his guilt, and that the jury should be so convinced that each would be willing to act on such evidence in matters of the highest concern and importance to themselves, where the court charged to acquit unless all the evidence excluded to a moral certainty every reasonable hypothesis but that of defendant's guilt. *Howell v. State*, 10 Ala. App. 1, 64 So. 522.

Satisfaction of Jury.—*Davis v. State*, 8 Ala. App. 147, 62 So. 1027, certiorari denied in *Ex parte Davis*, 184 Ala. 26, 63

So. 1010. See the title CRIMINAL LAW, § 572 (5), vol. 4, p. 471.

Equivalence of "Supposition" and "Hypothesis."—A requested charge to acquit unless the evidence excluded every reasonable supposition but that of defendant's guilt held covered by a charge to acquit, unless it excluded to a moral certainty every reasonable hypothesis but that of defendant's guilt, since the words "supposition" and "hypothesis" were equivalent. *Howell v. State*, 10 Ala. App. 1, 64 So. 522.

Reasonable Probability of Innocence.—A request to instruct an acquittal, if there was reasonable probability in any part of the evidence that defendant was innocent, held properly refused, where already covered. *Sharp v. State*, 193 Ala. 22, 69 So. 122.

In a murder case, refusal of an instruction on the probability of innocence, arising out of a consideration of the evidence authorizing an acquittal, held not error, where it was covered by given charges to same effect on reasonable doubt of guilt. *Pounds v. State* (Ala. App.), 73 So. 127.

Theory that Another Committed Act.—*Wilson v. State*, 7 Ala. App. 134, 61 So. 471. See the title CRIMINAL LAW, § 572 (5), vol. 4, p. 471.

As to Who Inflicted Wound.—Error in refusing an instruction that, if the jury has a reasonable doubt as to who inflicted the wound causing death, it should acquit, was cured by further instruction to acquit unless convinced beyond a reasonable doubt that accused was guilty. *Edmonds v. State* (Ala. App.), 75 So. 873.

§ 573. Erroneous Requests.

A requested special charge which needs qualification, modification, or restriction should be refused. *Brewer v. State* (Ala. App.), 74 So. 764.

Misuse of Words.—In a prosecution for seduction, the use of the word "segregatory" for "segregately" justified the refusal of defendant's instruction that before the jury could convict each juror must separately and "segregatory" be satisfied beyond reasonable doubt of his guilt. *Herring v. State*, 14 Ala. App. 93, 71 So. 974.

In a criminal prosecution, a requested instruction that, if the jurors desired more evidence before they can "never" get an abiding conviction they have a reasonable doubt, was manifestly erroneous. *Harwell v. State*, 12 Ala. App. 265, 68 So. 500.

Confusing and Misleading Charges.—*Perry v. State*, 8 Ala. App. 7, 62 So. 392. See the title CRIMINAL LAW, § 573, vol. 4, p. 471.

Elliptical Charge.—In prosecution for practicing medicine without a license, instruction on reasonable doubt held properly refused as elliptical. *Fealy v. Birmingham* (Ala. App.), 73 So. 296.

Unintelligible Charge.—A requested charge in a seduction case held unintelligible, and properly refused. *Brand v. State*, 13 Ala. App. 390, 69 So. 379.

Instructions Requested in Aggregate.—Where special charges requested were upon different subjects together in one document, a refusal of all of them was not erroneous. *Mancill v. State* (Ala. App.), 75 So. 705.

Where a charge states several distinct propositions of law, the court may properly refuse all if any of them is unsound. *Burk v. State* (Ala. App.), 75 So. 702.

A charge presented with another on the same piece of paper and refused as "one charge" will be condemned, where the other charge was bad. *Ragsdale v. State*, 12 Ala. App. 1, 67 So. 783.

A statement in the bill of exceptions that the court gave five written charges, which were set out, imports that it was a single request that the five charges be given, and where one of them was bad the court did not err in refusing the request as made. *Woods v. State*, 10 Ala. App. 96, 64 So. 508.

Refusal of charges held not justified because bad in form, where they did not attempt to direct any particular form of verdict but simply required an acquittal on the facts hypothesized; it being for the trial court to instruct as to the form of verdict. *Mizell v. State*, 184 Ala. 16, 63 So. 1000.

§ 576. Modification by Court.

§ 576 (1) In General.

Written or Requested Charges.—*Roberson v. State*, 183 Ala. 43, 62 So. 837.

See the title CRIMINAL LAW, § 576 (1), vol. 4, p. 473.

§ 576 (2) Necessity of Giving in Language of Requests.

Where the court gives a requested charge in a criminal case, it is erroneous to qualify it. *Brewer v. State* (Ala. App.), 74 So. 764.

Explanation of Charge.—*Glass v. State*, 8 Ala. App. 417, 62 So. 1013. See the title CRIMINAL LAW, § 576 (2), vol. 4, p. 474.

Oral remarks by the court after giving defendant's instruction that, if the jury did not believe the testimony of an alleged accomplice, and found no other evidence connecting accused with the crime, he could not be convicted, held not a qualification of the instruction, but a proper explanatory instruction. *Newsum v. State*, 10 Ala. App. 124, 65 So. 87.

§ 578. Noting Disposition of Requests.

Under Code 1907, § 5364, the fact that before the argument defendant's counsel had submitted a number of charges did not justify the court in refusing to write "given" or "refused" on written charges requested at the conclusion of the court's oral charge, and before the jury retired. *Vinson v. State*, 10 Ala. App. 61, 64 So. 639.

(I) OBJECTIONS TO INSTRUCTIONS OR REFUSAL THEREOF, AND EXCEPTIONS.

As to necessity for purpose of review, see post, "Instructions," § 685.

§ 582. Time for Objection or Exception.

Necessity of Reserving Exception in Presence of Jury.—*Meadows v. State*, 182 Ala. 51, 62 So. 737. See the title CRIMINAL LAW, § 582, vol. 4, p. 475.

§ 583. Sufficiency and Scope of Exceptions to Instructions Given.

Mere Description of Subject Treated by Court.—An exception, merely describing the subject treated by the court in an oral charge, is insufficient. *Cowart v. State* (Ala. App.), 75 So. 711.

Merely Designating Beginning of Objectionable Part.—Exception merely describing subject treated by court in an oral charge is bad, and hence exception merely designating beginning parts of

oral charge excepted to is insufficient. *Ex parte Cowart* (Ala.), 77 So. 349.

An exception, merely designating the beginning of parts of oral charge objected to, without showing the conclusion of such parts, is insufficient. *Cowart v. State* (Ala. App.), 75 So. 711.

Designating Beginning and End of Objectionable Portion.—An exception to oral charge, designating beginning of portion objected to and end of such portion, is insufficient. *Ex parte Cowart* (Ala.), 77 So. 349.

An exception to a portion of the charge in a criminal prosecution is of no avail as showing error, unless every proposition stated in that portion is erroneous. *Addington v. State* (Ala. App.), 74 So. 846; *Dunn v. State*, 8 Ala. App. 382, 62 So. 379. See the title CRIMINAL LAW, § 583, vol. 4, p. 475.

General Exceptions to Charge Involving Distinct Instructions.—*Sanders v. State*, 181 Ala. 35, 61 So. 336; *McGhee v. State*, 178 Ala. 4, 59 So. 573. See the title CRIMINAL LAW, § 583, vol. 4, p. 475.

Exceptions Bad in Part.—*Kirkwood v. State*, 9 Ala. App. 108, 62 So. 1011, certiorari denied in 184 Ala. 9, 63 So. 990. See the title CRIMINAL LAW, § 583, vol. 4, p. 475.

Questions Presented.—Where accused particularized the ground of his exception to a portion of the court's charge; the appellate court is not authorized to go beyond the stated ground. *Addington v. State* (Ala. App.), 74 So. 846.

Former Jeopardy — Charge Indefinite.—An exception to an instruction on the plea of former jeopardy held not sufficiently definite to point out any particular part of the charge excepted to. *Curtis v. State*, 9 Ala. App. 36, 63 So. 745.

Exception within Exception.—An exception to a portion of the charge in a criminal prosecution held not an exception to a smaller portion, on the ground that it assumed that one of several false pretenses was a misrepresentation as to a fact. *Addington v. State* (Ala. App.), 74 So. 846.

§ 584. Sufficiency and Scope of Exceptions to Failure or Refusal to Instruct.

An exception reserved to the whole of

a portion of the court's oral charge can not be sustained, where the portion excepted to contained as a separate proposition a correct statement of the law applicable. *Kirk v. State*, 10 Ala. App. 216, 65 So. 195.

(J) CUSTODY, CONDUCT, AND DELIBERATIONS OF JURY.

As to necessity of bill of exceptions presenting grounds for review, see post, "Matters Relating to Petit Jury," § 712 (3).

§ 585. Separation.

Refusal to Quash Panel Not Error.—*Sanders v. State*, 181 Ala. 35, 61 So. 336. See the title CRIMINAL LAW, § 585 (2), vol. 4, p. 477.

§ 586. Taking Papers or Articles to Jury Room.

Documents or Demonstrative Evidence.—It was within discretion of trial court to allow or not to allow jury to take written showing with them to their deliberations. *Coplon v. State* (Ala. App.), 75 So. 184.

In a criminal trial it is error for the court to permit the jury to take with them the complete report of the testimony on the former trial, part of which had been admitted because of the absence of witnesses. *Harwell v. State*, 12 Ala. App. 265, 68 So. 500.

§ 588. Instructions after Submission of Cause.

Where the jury merely requested further instructions as to justification of deceased in firing on defendant when he discovered him on his premises late at night, it was unnecessary to define the doctrine of reasonable doubt. *White v. State*, 195 Ala. 681, 71 So. 452.

§ 588½. Communications between Judge and Jury.

The trial court should refrain from having any communication with the jury in reference to the case on trial, without affording to a party an opportunity to have his counsel present when such communication is made. *Harwell v. State*, 11 Ala. App. 188, 65 So. 702, cited in note in Ann. Cas. 1917A, 410.

§ 589. Urging or Coercing Agreement.

"Verdict."—*Meadows v. State*, 182 Ala. 51, 62 So. 737. See the title CRIMINAL LAW, § 589, vol. 4, p. 478.

Instructions as to Duties.—*Meadows v. State*, 182 Ala. 51, 62 So. 737. See the title CRIMINAL LAW, § 589, vol. 4, p. 478.

§ 590. Manner of Arriving at Verdict.

As to instructions, see ante, "Manner of Arriving at Verdict," § 543.

Where length of sentence in criminal case is arrived at by the quotient method, it can not stand. *Rikard v. State* (Ala. App.), 76 So. 317.

§ 592. Objections and Exceptions.

Time for Exception to Reprimand to Jury.—*Meadows v. State*, 182 Ala. 51, 62 So. 737. See the title CRIMINAL LAW, § 592, vol. 4, p. 479.

(K) VERDICT.

As to conformity of sentence to verdict, see post, "Conformity to Verdict," § 652. As to directing verdict, see ante, "Direction of Verdict," § 504. As to discharge of jury without verdict as bar to subsequent prosecution, see ante, "Discharge of Jury without Verdict," § 94. As to form of verdict, see ante, "Form of Verdict," § 544. As to manner of arriving at verdict, see ante, "Manner of Arriving at Verdict," § 590. As to necessity of objections for purpose of review, see post, "Verdict," § 687. As to presumptions on appeal, see post, "Verdict," § 751 (13). As to conclusiveness of verdict, see post, "Conclusiveness of Verdict," § 765.

§ 595. Polling Jurors.

Sufficiency of Replies.—Despite Code 1907, § 7315, authorizing the jury to be sent out for further deliberation when one or more jurors denies that the verdict is his, it was not error to receive a verdict where a juror stated that he agreed to it, although he wished a lighter punishment. *Rudder v. State*, 12 Ala. App. 72, 67 So. 738.

On a poll of the jury, one juror's affirmative nod of head and statement, "I consented to it," held to sufficiently indicate that he agreed to and acquiesced

in the verdict. *Bails v. State*, 13 Ala. App. 273, 69 So. 250.

§ 599. Codefendants.

On trial of several, a verdict, "We, the jury, find defendant guilty of manslaughter in the first degree, and fix as their punishment five years in the penitentiary," held not invalid. *Ex parte Davis*, 184 Ala. 26, 63 So. 1010, denying certiorari *Davis v. State*, 8 Ala. App. 147, 62 So. 1027, overruling *Robertson v. State*, 175 Ala. 15, 57 So. 829 (headnote 4); *Simmons v. State*, 158 Ala. 8, 48 So. 606 (headnote 10); *Walker v. State*, 153 Ala. 31, 45 So. 640 (headnote 10).

Assessment of Punishment.—*Davis v. State*, 8 Ala. App. 147, 62 So. 1027, certiorari denied in *Ex parte Davis*, 184 Ala. 26, 63 So. 1010. See the title CRIMINAL LAW, § 599, vol. 4, p. 482.

§ 600. Several Counts.

§ 600 (2) Construction, Operation, and Sufficiency of General Verdict.

In a criminal prosecution, overruling of demurrer to counts subject to demurrer would not work a reversal of a judgment of conviction following a general verdict not specifying the count under which it was found as the verdict would be referred to a good count. *Hancock v. State*, 14 Ala. App. 91, 71 So. 973.

Where Either Count in Indictment Charges Offense.—Where there was a general verdict of guilty on an indictment containing one count for burglary, one for grand larceny, and one for receiving stolen goods, the court could properly adjudge the defendant guilty of burglary. *Hughes v. State*, 11 Ala. App. 307, 66 So. 644.

Where an indictment contains a count good as against any attack made against it, a general verdict of guilty will be referred to the good count. *Phillips v. State*, 13 Ala. App. 325, 69 So. 356.

In the trial of an indictment containing two counts, a general verdict of guilty, not specifying the count under which defendant was convicted, where the affirmative charge was requested only to the indictment as a whole, was referable to the good count. *Norman v. State*, 13 Ala. App. 337, 69 So. 362.

In a prosecution for a violation of

prohibition law, where three counts of complaint were conceded to be good, a general verdict of guilty will be referred to one of good counts. *Cunningham v. State* (Ala. App.), 74 So. 747.

§ 600 (3) Acquittal or Conviction under One of Several Counts.

A conviction under one count of an indictment only operates as an acquittal as to the other counts. *Cowart v. State* (Ala. App.), 75 So. 711.

Verdict, responding to only one count, acquits as to other counts. *Brown v. State* (Ala. App.), 72 So. 757, writ of certiorari denied in 73 So. 999.

Where defendant was convicted of one count of a complaint for violation of prohibition law, this was an acquittal as to charges embodied in other counts. *Oldacre v. State* (Ala. App.), 75 So. 827.

§ 602. Sufficiency.

§ 603. — General Verdict.

Where an indictment charges living in adultery or fornication, in the form prescribed by Code 1907, p. 672, form 69, the jury were not required, in finding the defendant guilty, to specify which of the alternative related charges contained in the indictment they found to be true. *Stone v. State*, 9 Ala. App. 66, 64 So. 158.

Responsiveness to Issue.—Where issue was joined on the pleas of misnomer and not guilty, and the court directed finding on both pleas verdict of guilty and assessing a fine held not responsive to the plea of misnomer. *Hayes v. State* (Ala. App.), 72 So. 577.

A general verdict of guilty was not responsive to a plea of former conviction, but only to the plea of not guilty, and the failure to dispose of the plea of former conviction is reversible error. *Toney v. State*, 10 Ala. App. 220, 65 So. 92.

Agree to Disagree.—*Meadows v. State*, 182 Ala. 51, 62 So. 737. See the title CRIMINAL LAW, § 603, vol. 4, p. 483.

§ 605. Specification of Offense or Grade or Degree Thereof.

Where, in a prosecution for disposing of personal property to defraud a lienholder, in violation of Code 1907, § 7342, the verdict was "guilty as charged," it

would be construed as finding the value of the property to be as charged in determining whether the offense was a felony or a misdemeanor. *Courtney v. State*, 10 Ala. App. 141, 65 So. 433.

§ 606. Assessment of Punishment.

Joint Indictment and Trial.—Where defendants were jointly indicted and tried for larceny, jury was not authorized to fix penalty against them. *Grantham v. State* (Ala. App.), 75 So. 183.

Place of Imprisonment. — *London v. State* (Ala. App.), 61 So. 611. See the title CRIMINAL LAW, § 606, vol. 4, p. 485.

§ 606½. Surplusage.

Fixing Place or Character of Confinement.—Under Code 1907, § 7620, fixing the place and character of confinement to which the judge shall sentence a convicted defendant according to the length of imprisonment fixed by the jury, if the verdict also improperly fixes the place or character of confinement, that part may be treated as surplusage, and the judge may sentence the accused in accordance with the statute. *Ex parte Robinson*, 183 Ala. 30, 63 So. 177, denying certiorari in *Robinson v. State*, 6 Ala. App. 13, 60 So. 558, cited in note in *Ann. Cas.* 1916D, 369.

"And Costs."—In a verdict assessing a fine "and costs," the quoted words are mere surplusage, and do not make it invalid. *Pappenburg v. State*, 10 Ala. App. 224, 65 So. 418, certiorari denied in *Ex parte Pappenburg*, 188 Ala. 3, 66 So. 32; *McDaniel v. State*, 10 Ala. App. 79, 64 So. 641.

§ 607. Amendment or Correction.

§ 609. — By Jury.

As to Matter of Form.—The action of the court in having the jury correct their verdict as to a matter of form held not error. *Wilson v. State*, 191 Ala. 7, 67 So. 1010.

To Include Place of Punishment.—The correction of a verdict to include the place of punishment of the convicted defendant was not error, since the law fixed the place of punishment. *Cunningham v. State*, 14 Ala. App. 1, 69 So. 982.

Time to Complete and Verify Verdict.—It is not error to permit a verdict to

be completed and verified by the jury after it has been discharged, where it is recalled before having left the courtroom. *Cunningham v. State*, 14 Ala. App. 1, 69 So. 982.

§ 610. — By Court.

Where defendant was indicted for assault to murder, under Code 1907, § 6309, court had right to disregard so much of verdict as fixed punishment, and fix punishment upon verdict of guilty. *Ex parte Morrisette* (Ala.), 76 So. 430.

§ 611. Construction and Operation.

A verdict can not be aided by intentment or reference to extrinsic facts, but it becomes the act of the court and not that of the jury. *Ex parte State*, 197 Ala. 419, 73 So. 35, denying certiorari *Brooms v. State* (Ala. App.), 72 So. 691.

(L) WAIVER AND CORRECTION OF IRREGULARITIES AND ERRORS.

§ 614. Ruling as to Admissibility of Evidence.

Error in excluding a question inquiring whether decedent, whose dying declaration was questioned, would have been entitled to belief as a witness, held not waived by defendant's failure to call the witness as his own witness as to declarant's unworthiness of belief. *Carter v. State*, 191 Ala. 3, 67 So. 981.

Impeaching Question Based on Insufficient Predicate.—The objection that an impeaching question was based on insufficient predicate is waived by assigning other objections thereto. *Mathis v. State* (Ala. App.), 73 So. 122.

Attempted Rebuttal of Evidence Ruled Out.—Accused who attempted to rebut evidence of the state, after it had been stricken out, as to matters occurring after the seduction, can not complain as to the admission of such evidence. *Brand v. State*, 13 Ala. App. 390, 69 So. 379.

§ 615. Rulings as to Weight and Sufficiency of Evidence.

Waiver of Error.—*Sandlin v. State*, 8 Ala. App. 396, 62 So. 386. See the title CRIMINAL LAW, § 615, vol. 4, p. 486.

XIII. MOTIONS FOR NEW TRIAL AND IN ARREST.

As to ordering new trial by appellate

court on reversal of judgment, see post, "Ordering New Trial," § 793. As to review of discretion of trial court in granting or refusing new trial, see post, "New Trial," § 762. As to review and rulings on motion for new trial as dependent on presentation of grounds by record, see post, "Grounds for New Trial," § 734. As to scope and extent of review of rulings on motion, see post, "Rulings on Motion for New Trial," § 742 (3).

§ 618. Grounds for New Trial in General.

Function of motion for new trial is to set up error of law in trial, or that defendant has newly discovered evidence: *Benton v. State* (Ala. App.), 76 So. 476.

Availability of Statutory Defense. — Defense given by Code 1907, § 6231, to accused charged with killing an animal, must be shown on the trial, and not by motion for new trial. *Inglis v. State*, 13 Ala. App. 184, 68 So. 583.

Matter Dealt with on Trial.—Motion for new trial was properly overruled, where no matter was presented which was not dealt with on trial; there having been ample evidence to support verdict and conviction. *Bell v. State* (Ala. App.), 75 So. 181, certiorari denied in *Ex parte Bell* (Ala.), 76 So. 1.

§ 622. Disqualification of Jurors.

Though a juror, on his voir dire examination by the court, stated he was a resident of the county, and appellant did not discover the contrary until after verdict, the verdict can not then be impeached. *Carson v. Pointer*, 11 Ala. App. 462, 66 So. 910.

§ 623. Misconduct of or Affecting Jurors.

§ 626½. — Misconduct of Bystanders.

Where trial court's action was not invoked because of applause of spectators before entering upon trial, and where defendant did not move for continuance on that ground, denial of his motion for a new trial was not an abuse of discretion. *Dempsey v. State* (Ala. App.), 72 So. 773.

§ 627½. Verdict Contrary to Evidence.

Weight and Sufficiency.—In a prosecution for murder, a motion for new trial for insufficiency of evidence to convict is properly refused; there being

some evidence that crime was committed without any excuse or justification. *Johnson v. State* (Ala.), 78 So. 805.

§ 628. Newly Discovered Evidence.

§ 629. — In General.

Discretion of Court.—*Aaron v. State*, 181 Ala. 1, 61 So. 812. See the title CRIMINAL LAW, § 629, vol. 4, p. 488.

§ 630. — Diligence.

Due diligence on the part of a defendant is essential to favorable action on his motion for a new trial, based on newly discovered evidence. *Dempsey v. State* (Ala. App.), 72 So. 773.

§ 631. Application for New Trial.

§ 633½. — Statements, Affidavits, and Testimony of Jurors.

Admissibility to Impeach Verdict.—An affidavit of a juror is not admissible to impeach verdict on motion for new trial after conviction. *Norris v. State* (Ala. App.), 74 So. 394.

Misconduct of Jurors. — Verdict of manslaughter could not be impeached by testimony by jurors, that one juror said to his fellow jurors that defendant was a man of bad character, and "he ought to have ten years, or he ought to be punished." *Harper v. State* (Ala. App.), 75 So. 829.

Denying or Explaining Assent to Verdict.—Jurors can not be examined in a criminal case to show that they arrived at the length of a sentence by the quotient method. *Rikard v. State* (Ala. App.), 78 So. 317.

§ 634. — Affidavits as to Newly Discovered Evidence.

Diligence.—Where defendant's statements in his affidavits as to his knowledge of the newly discovered evidence were in direct conflict, motion for new trial was properly overruled. *Campbell v. State* (Ala. App.), 78 So. 715.

§ 635½. — Determination.

The court, in considering the evidence alleged to have been discovered after the trial of the case, properly considered it together with the evidence on the trial, which was in the breast of the court for that purpose. *Dempsey v. State* (Ala. App.), 72 So. 773.

§ 638. Grounds for Arrest of Judgment.

As to motions in arrest, see post, "Motions in Arrest of Judgment," § 643.

§ 639. — In General.**§ 639 (1) In General.**

Arrest of a circuit court's judgment of conviction of petit larceny, not based on indictment or appeal from lower court, should be granted on motion. *Russau v. State* (Ala. App.), 72 So. 596.

§ 639 (8) Defects in Record.

Where the record in a criminal cause shows all the preliminary steps requisite to a legal trial for murder in the first degree, with a verdict and a judgment thereon, a motion for arrest of judgment for error apparent of record was properly overruled. *Travis v. State*, 176 Ala. 25, 58 So. 270.

§ 642. — Matter Not Apparent of Record in General.

Parsons v. State, 179 Ala. 23, 60 So. 864. See the title CRIMINAL LAW, § 642, vol. 4, p. 491.

§ 643. Motions in Arrest of Judgment.

Time for Making.—*Travis v. State*, 176 Ala. 25, 58 So. 270. See the title CRIMINAL LAW, § 643, vol. 4, p. 491.

XIV. JUDGMENT, SENTENCE, AND FINAL COMMITMENT.

As to matters to be shown by record on appeal, see post, "Verdict, Judgment, and Sentence," § 708 (13). As to reversal of judgment in appellate court, see post, "In General," § 790.

§ 644. Power and Duty of Court in General.

The submission by defendant to an illegal sentence did not cure the illegality, or give the court jurisdiction to impose another sentence at a subsequent term, unless the continuity of the proceedings was preserved by an appeal. *Ex parte Adams*, 187 Ala. 10, 65 So. 514, denying certiorari in *Adams v. State*, 9 Ala. App. 89, 64 So. 371; *Ex parte Minto*, 187 Ala. 671, 65 So. 516.

§ 648. Sentence of Codefendants.

Where two defendants were jointly indicted, tried, and convicted of grand larceny, and verdict found them guilty

as charged, judgment adjudging defendants guilty and separately sentencing each of them to a term in penitentiary held proper. *Grantham v. State* (Ala. App.), 75 So. 183.

§ 649. Calling on Defendant to Show Cause Why Sentence Should Not Be Pronounced.

Upon conviction of the misdemeanor of committing assault and battery, the defendant need not be asked "why the sentence of the law should not now be imposed upon him." *Cranford v. State* (Ala. App.), 75 So. 274.

§ 650. Requisites and Sufficiency of Sentence.

See post, "Requisites and Sufficiency of Record of Judgment," § 655.

§ 651. — In General.

A judgment of conviction of both, on trial of one only of two jointly indicted, is a nullity as to the one not tried. *Agee v. State*, 190 Ala. 19, 67 So. 411.

§ 652. — Conformity to Verdict.

Propriety of Fine Where Jury Imposed None.—Under Laws 1909 (Sp. Sess.) p. 9, § 3, and Code 1907, § 7630, the court can not impose a fine on one convicted of violating the prohibition law, where the jury imposed none. *Harkey v. State*, 13 Ala. App. 201, 68 So. 698.

Where the verdict found the defendant guilty without assessing a fine, it was error for the court to sentence him to pay a fine as a predicate to a sentence to hard labor for the county. *Harkey v. State*, 13 Ala. App. 203, 68 So. 699.

Wrong Place of Confinement.—If the verdict improperly fixes the place of confinement, and the judge, in accordance therewith, sentences the prisoner to a place other than that directed by Code 1907, § 7620, the error is in the sentence and not the judgment of conviction, as that part of the verdict fixing the place of confinement should have been rejected as surplusage. *Ex parte Robinson*, 183 Ala. 30, 63 So. 177, denying certiorari *Robinson v. State*, 6 Ala. App. 13, 60 So. 558.

§ 654. Entry and Record of Judgment.

Upon the jury's return of a verdict of

guilty it was not necessary to enter up a formal adjudication of guilt, where there was a sentence in compliance with the verdict. *Thames v. State*, 12 Ala. App. 307, 68 So. 474.

§ 655. Requisites and Sufficiency of Record of Judgment.

§ 655 (1) Form.

A judgment sentencing accused to hard labor on default in payment of fine and costs, and also to hard labor as a punishment, held sufficient. *Franklin v. State*, 11 Ala. App. 305, 66 So. 875.

Omission of Formal Words Adjudging Defendant Guilty.—A judgment entry on conviction in recorder's court with an appropriate sentence to hard labor for default in payment of fine and costs, though containing no formal word adjudging defendant guilty, held sufficient. *Ex parte Rodgers*, 12 Ala. App. 218, 67 So. 710.

Specifying Beginning and End of Sentence.—Part of the judgment entry in a criminal prosecution, specifying the day of the month and the year on which the sentence of imprisonment shall commence and expire, is surplusage and, being inappropriate as applied to changed conditions as to time, due to the suspension of the sentence pending appeal, can be stricken and the judgment corrected. *Chaney v. State*, 9 Ala. App. 45, 63 So. 693.

A provision at the end of an appropriate sentence that the sentence shall begin on a certain day and expire on a certain subsequent day was surplusage. *Perkins v. State* (Ala. App.), 63 So. 692.

Specifying Time for Labor to End.—That part of a sentence to perform hard labor for the county for specified periods to pay the fine and costs, which stated the time for the labor to end, is surplusage. *Ellis v. State*, 11 Ala. App. 300, 66 So. 913.

§ 655 (2) Matters of Substance in General.

The statutes requiring a capital case to be specially set for trial and the entry of an order for service of copy of indictment and jury list upon defendant are mandatory, and the record, to sustain a conviction, must show compliance

therewith, and practice rule 27 (175 Ala. xx, 61 So. vii) does not obviate such necessity. *Hardaman v. State*, 14 Ala. App. 27, 70 So. 961.

Necessity of Showing Plea to Indictment.—Judgment of conviction must affirmatively show that defendant pleaded to indictment or that, standing mute, court caused plea of not guilty to be entered for him. *Bray v. State* (Ala. App.), 78 So. 463.

Judgment, reciting that "issue was joined," held conclusive that proper plea was interposed. *Clayton v. State* (Ala. App.), 78 So. 462.

Drawing Petty Jurors.—*Gibbs v. State*, 7 Ala. App. 30, 60 So. 999. See the title CRIMINAL LAW, § 655 (2), vol. 4, p. 497.

Same—Sufficiency of Judgment Entry.—*Gaston v. State*, 179 Ala. 1, 60 So. 805. See the title CRIMINAL LAW, § 655 (2), vol. 4, p. 497.

Presence of Accused.—*Harris v. State*, 177 Ala. 17, 59 So. 205. See the title CRIMINAL LAW, § 655 (2), vol. 4, p. 496.

Necessity of Showing Prisoner's Opportunity to Oppose Sentence.—Since under Code 1907, §§ 6585, 6756, a conviction of keeping a gaming table is for a felony, a judgment of conviction must recite that defendant was asked if he had anything to say why sentence should not be passed upon him. *Bryant v. State*, 13 Ala. App. 206, 68 So. 704.

Judgment of Guilt Sufficiently Implied.—Where the judgment entry shows a judgment for the recovery of a fine and costs in accordance with the verdict and a further judgment of sentence by the court for an additional punishment of six months' hard labor for the county, the recitals are sufficient to imply the necessary judgment of guilt. *Walker v. State*, 12 Ala. App. 229, 67 So. 719.

§ 655 (3) Description of Offense.

A judgment showing sentence to hard labor to work out the costs of prosecution not determining the time required to work out such costs as required by Code 1907, § 7635, held defective so as to require a reversal as to such part of the judgment. *Wright v. State*, 9 Ala. App. 79, 64 So. 173.

§ 655 (4) Definiteness and Certainty as to Punishment or Specification Thereof.

Sufficiency.—A sentence, not showing whether the sentence to four months' hard labor is for payment of fine and costs, or is additional punishment for the offense, is irregular. *Du Bose v. State* (Ala. App.), 73 So. 121.

Same—Failure to Show Time of Service.—Under Code 1907, § 7635, providing for the imposition of additional hard labor under a conviction, in lieu of the payment of costs, a judgment of conviction, not showing the court's determination of the time required to work out the costs at the rate of 75 cents per day, held erroneous. *Woods v. State*, 10 Ala. App. 96, 64 So. 508.

Imposition of Two Fines for One Crime.—Recital, in minute entry, of finding of guilty and assessment of fine, followed by sentence to hard labor for failure to pay or confess judgment for the fine, held not to show the imposition of two fines upon one finding of guilt. *Wright v. State*, 9 Ala. App. 79, 64 So. 173.

§ 655 (7) Contradiction of Record.

Judgment of conviction, reciting that defendant pleaded "not guilty," can not be contradicted by recitals in bill of exceptions. *Bray v. State* (Ala. App.), 78 So. 463.

§ 656. Amendment or Correction of Record.

As to amendment on appeal, see post, "Amendments," § 746.

§ 656 (1) In General.

Power to Make Entry Conform to Verdict.—Where the verdict found defendant guilty in the second degree, and the minute entry showed a finding of guilty in the first degree, the court was warranted in correcting it to conform to the verdict. *Lewis v. State*, 10 Ala. App. 31, 64 So. 537.

Original Verdict Lost. — Where the original verdict is shown to be lost, the court, on motion to amend the judgment, had inherent power to substitute that paper on proper evidence of its contents. *Lewis v. State*, 10 Ala. App. 31, 64 So. 537, cited in note in Ann. Cas. 1916D, 252.

§ 656 (2) Time for Amendment.

Where, on a motion to amend a judgment nunc pro tunc in two particulars, one only of which could be corrected, defendant did not question the sufficiency of the showing made by a separate feature seeking correction as to the other, it was not error to overrule a demurrer to it as a whole. *Lewis v. State*, 10 Ala. App. 31, 64 So. 537.

Judgment of conviction held to be read as corrected by an order, on a motion to amend nunc pro tunc, and it was not necessary that the order should be a complete judgment of conviction in itself without reference to the original judgment. *Yorty v. State*, 11 Ala. App. 160, 65 So. 914.

Void Sentence Partly Executed—Power to Correct.—Where a judgment was void in that it contained a void sentence, the court could at the same term correct the judgment so as to impose a valid sentence, notwithstanding a part of the void sentence was executed. *Minto v. State*, 9 Ala. App. 95, 64 So. 369, cited in notes in 51 L. R. A., N. S., 386; Ann. Cas. 1916D, 369, on reconsideration, reversing in part 8 Ala. App. 306, 62 So. 376, certiorari denied in *Ex parte Minto*, 187 Ala. 671, 65 So. 516.

Clerical Error—Pendency of Appeal.—Trial court held to have inherent power to correct a clerical error in a judgment nunc pro tunc, notwithstanding the pendency of an appeal. *Yorty v. State*, 11 Ala. App. 160, 65 So. 914.

Same—Miscopying Verdict. — Recitation in the minute entry of the rendition of a verdict and its contents is performance of a clerical function, and miscopying the verdict is a clerical error, which may be corrected nunc pro tunc pursuant to Code 1907, § 4140, authorizing amendment of such an error. *Lewis v. State*, 10 Ala. App. 31, 64 So. 537.

Adjudging defendant guilty in the first degree on a verdict of guilty in the second degree can not be treated as a clerical misprision, or be corrected by a nunc pro tunc entry, but is an error or mistake of the court in exercise of its judicial function which can not be corrected at a subsequent term. *Lewis v. State*, 10 Ala. App. 31, 64 So. 537.

Incorrect judicial action can not be corrected by judgment *nunc pro tunc* at a subsequent term, and hence a trial court can not so correct its original entry as to the degree of the offense of which defendant was adjudged guilty. *Lewis v. State*, 10 Ala. App. 31, 64 So. 537.

XV. APPEAL AND ERROR, AND CERTIORARI.

(A) FORM OF REMEDY, JURISDICTION, AND RIGHT OF REVIEW.

§ 660. Nature and Scope of Remedy in General.

The right of appeal is purely statutory. *Upshaw v. State*, 11 Ala. App. 310, 66 So. 821.

Substantiality of Right.—*Campbell v. State*, 182 Ala. 18, 62 So. 57. See the title CRIMINAL LAW, § 660, vol. 4, p. 501.

§ 661. Constitutional and Statutory Provisions.

Refusal of new trial, in case tried prior to the date when Acts 1915, p. 722, became operative, held not reviewable. *Turney v. State* (Ala. App.), 75 So. 726.

Code 1907, § 6256, as amended by the act approved September 22, 1915 (Acts 1915, p. 708), specifically authorizing omission from transcript on appeal of order for special venire to be drawn as in case of capital felonies, took effect from and after its passage as to all matters to be reviewed on appeal, irrespective of date of trial. *Price v. State*, 14 Ala. App. 89, 71 So. 972.

Power of Supreme Court to Adopt Rules.—*Campbell v. State*, 182 Ala. 18, 62 So. 57. See the title CRIMINAL LAW, § 661, vol. 4, p. 501.

§ 662. Proper Mode of Review.

§ 667. — Certiorari.

Nature of Writ. — The common-law writ of "certiorari" is an extraordinary writ, and its office is to afford a review by a court of supervisory power of the proceedings of an inferior tribunal or officer exercising judicial functions that proceed in a summary manner and not in accordance with the common law. *Ex parte Rodgers*, 12 Ala. App. 218, 67 So. 710.

Judicial Discretion.—The discretion of a court as to the grant or refusal to a

writ of certiorari held a sound judicial discretion depending on settled legal principles. *Ex parte Rodgers*, 12 Ala. App. 218, 67 So. 710.

Where a writ of certiorari is applied for by an individual, its grant or denial is in the discretion of the court, although it is granted as a matter of right when applied for by the state. *Ex parte Rodgers*, 12 Ala. App. 218, 67 So. 710.

When Writ Granted.—*Ex parte Livingston*, 181 Ala. 94, 61 So. 885. See the title CRIMINAL LAW, § 667, vol. 4, p. 502.

Certiorari will not be awarded to an individual, where public inconvenience or detriment will likely ensue, or where the applicant has been guilty of laches, or where other adequate remedies exist. *Ex parte Rodgers*, 12 Ala. App. 218, 67 So. 710.

Remedy by Appeal.—A judgment of the circuit court entered on appeal from a conviction in recorder's court held sufficient to support an appeal, and hence to defeat certiorari to review it. *Ex parte Rodgers*, 12 Ala. App. 218, 67 So. 710.

Remedy by Habeas Corpus.—Certiorari held not to lie to review a judgment of a circuit court, conceding it invalid because no appeal was filed from a recorder's court, where habeas corpus was an adequate remedy. *Ex parte Rodgers*, 12 Ala. App. 218, 67 So. 710.

§ 668. Successive Appeals or Other Proceedings.

Under Code 1907, § 6244, no appeal lies from a sentence to hard labor pronounced by the trial court pursuant to a mandate of the court of appeals. *Wright v. State*, 12 Ala. App. 253, 67 So. 798.

Right to Writ.—*Ex parte Livingston*, 181 Ala. 94, 61 So. 885. See the title CRIMINAL LAW, § 668, vol. 4, p. 502.

§ 669. Appellate Jurisdiction.

§ 670. — Nature and Grounds in General.

A circuit court's conviction of petit larceny, not based on indictment or appeal from a lower court, will support an appeal, since the offense is one over which that court has original jurisdiction. *Russau v. State* (Ala. App.), 72 So. 596.

§ 670½. — Courts Invested with Jurisdiction.

Under Gen. Acts 1911, pp. 95, 96, the court of appeals was without jurisdiction to pass on a motion to affirm on a certificate of appeal showing that defendant was convicted of murder in the first degree and sentenced to life imprisonment. *Holmes v. State*, 14 Ala. App. 661, 70 So. 982.

§ 672. Decisions Reviewable.

§ 674. — Appealable Judgments and Orders.

§ 674 (1) In General.

The judgment of sentence alone will not support an appeal to the court of appeals. *Bryant v. State*, 14 Ala. App. 28, 70 So. 961.

A sentence in accordance with the verdict of guilty, implies a judgment of guilty, sufficient to support appeal. *Thomas v. State*, 12 Ala. App. 278, 68 So. 524.

§ 674 (2) On Motion for New Trial.

The refusal of a new trial in a criminal case is not reviewable on appeal. *Bolin v. State*, 11 Ala. App. 35, 65 So. 433, certiorari denied in *Ex parte Bolin*, 187 Ala. 669, 65 So. 1032; *Burton v. State*, 194 Ala. 2, 69 So. 913; *McDaniel v. State*, 10 Ala. App. 79, 64 So. 641.

Applicability of Acts 1915, p. 722, to Criminal Cases.—Motions for new trial in a criminal case could not be reviewed by the appellate courts prior to Acts 1915, p. 722, but under such act they are required to review them in criminal as well as in civil cases, without distinction. *Rikard v. State* (Ala. App.), 78 So. 317.

Applicability of Code 1907, § 2846, to Criminal Cases.—*Sandlin v. State*, 8 Ala. App. 396, 62 So. 386. See the title CRIMINAL LAW, § 674 (8), vol. 4, p. 505.

Same—As Amended by Acts 1911, p. 198.—Code 1907, § 2846, as amended by Acts 1911, p. 198, did not authorize appeal from judgment overruling motion for new trial. *Trice v. State* (Ala. App.), 72 So. 601.

§ 676. Right of Defendant to Review.

Effect of Plea of Guilty.—A plea of guilty does not preclude accused from

complaining of the judgment and sentence unless voluntary, not induced by fear or the holding out of false hopes, or made through inadvertence. *State v. Thomas*, 9 Ala. App. 1, 63 So. 668.

Where accused was but 16 years old and was not represented by counsel when he was convicted on his plea of guilty, his conviction did not require a finding that the plea was voluntary so as to deprive him of the right to appeal. *State v. Thomas*, 9 Ala. App. 1, 63 So. 668.

(B) PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.

§ 678. Necessity of Objections.

§ 680. — In Preliminary Proceedings.

§ 680 (2) Summoning, Impanelling, and Organization of Grand Jury.

The mandatory requirement of Jury Law (Gen. Acts 1909 [Sp. Sess.] pp. 318, 319) § 32, held not waived by failure to seasonably object to venire at trial. *Mayo v. State* (Ala. App.), 73 So. 141.

§ 680 (3) Arraignment and Plea.

Where criminal case is tried on plea of former jeopardy, defective in substance, without objection to manner in which issue is raised, question of its sufficiency can not be raised in court of appeals. *Coster v. State* (Ala. App.), 76 So. 475.

§ 681. — Indictment or Information.

Defect Involving Element of Offense.

—It is duty of court of appeals to notice defect in indictment of substance which involves element of offense, though no objection was taken below. *Mehaffey v. State* (Ala. App.), 75 So. 647.

Since one of the alternatives was good under the statute, the indictment was not void, and was sufficient to support a judgment of conviction, and the defect did not warrant an arrest of judgment or reversal of the case by the appellate court in the absence of the point being appropriately raised in the trial court. *Ex parte State* (Ala. App.), 76 So. 445.

§ 681½. — Jurisdiction and Venue.

There being nothing in record to indicate that question whether larceny was committed in county where defendant

was prosecuted was brought to attention of trial court before argument of case was completed, defendant would not be entitled to reversal, in view of Court Rule 35 (175 Ala. xxi). *Houston v. State* (Ala. App.), 78 So. 415.

§ 682. — Proceedings at Trial in General.

§ 682 (½) In General.

The irregularity of trying at the same time pleas of former jeopardy and not guilty is waived by defendant without objection going to trial on both. *Toney v. State* (Ala. App.), 72 So. 508.

§ 682 (2) Course and Conduct of Trial in General.

The trial court's failure to require an election under a liquor law indictment can not be reviewed, where the point was not raised below either by motion or objection. *Barefield v. State*, 14 Ala. App. 638, 72 So. 293.

§ 682 (4) Summoning and Impaneling Jury.

Necessity of Objection and Exception Below.—Objection to impaneling of jury must be taken below, and exception reserved, in order that the matter may be reviewed. *Hendley v. State* (Ala.), 76 So. 904.

Matters relating to special venire and organization of jury, not being raised below, can not be raised on appeal, and should not, under Supreme Court practice rule 27 (175 Ala. xx, 61 South. vii), be included in the transcript. *Moton v. State*, 13 Ala. App. 43, 69 So. 235.

Venire Containing Jurors Who Had Been Excused.—*Gibbs v. State*, 7 Ala. App. 30, 60 So. 999. See the title CRIMINAL LAW, § 682 (4), vol. 4, p. 508.

Venire for and Organization of Petit Jury.—*Davis v. State*, 7 Ala. App. 122, 61 So. 483. See the title CRIMINAL LAW, § 682 (4), vol. 4, p. 508.

§ 683. — Evidence.

§ 683 (½) In General.

Res Gestæ of Offense against Another.—Where accused on trial for robbery of one person made no objection to the evidence of the *res gestæ* of the offense

against another, he could not complain on appeal. *Washington v. State*, 188 Ala. 101, 66 So. 34.

Failure to Object to Changed Form of Question.—Where a question asked accused on cross-examination and objected to was not answered, the solicitor changing the form of the question, and no objection being interposed to the changed form, no error appeared. *Belk v. State*, 10 Ala. App. 70, 64 So. 515.

Objections to refusal to exclude evidence, when no objection is shown to the questions, are unavailing to show error. *Coplon v. State* (Ala. App.), 73 So. 225, certiorari denied in 74 So. 1005.

§ 683 (1) Admissibility and Materiality.

No Objection Below—Permitting Witness to Testify.—The alleged error in permitting a witness to testify was not reviewable, where no objection was made or ruling of the court invoked with respect to the giving of his testimony. *Belk v. State*, 10 Ala. App. 70, 64 So. 515.

Same—Competency of Testimony.—Where defendant did not object to testimony offered at the trial, the competency of any part of it could not be questioned for the first time on appeal. *Brindley v. State*, 193 Ala. 43, 69 So. 536; *Williams v. State*, 7 Ala. App. 124, 62 So. 294. See the title CRIMINAL LAW, § 683 (1), vol. 4, p. 509.

Same—Consideration of Admissibility.—No objection to testimony or exception to ruling thereon being shown, its admissibility can not be considered on appeal. *Frazier v. State*, 9 Ala. App. 50, 64 So. 162.

Same—Exclusion of Evidence.—Accused can not complain of the court's refusal to exclude testimony given in response to a question to which no objection was made. *Kirk v. State*, 10 Ala. App. 216, 65 So. 195.

Same—No Proper Predicate Laid for Impeaching Testimony.—Defendant, not having objected, can not complain of proper predicate not having been laid for evidence of statements by his witness contradictory of his testimony. *Terry v. State*, 13 Ala. App. 115, 69 So. 370.

Motion to Exclude after Evidence before Jury.—*Smith v. State*, 183 Ala. 10, 62

So. 864. See the title CRIMINAL LAW, § 683 (1), vol. 4, p. 509.

§ 683 (2) Sufficiency of Evidence.

Where no motion was made to set aside a verdict of guilty as contrary to the weight of the evidence, nor was the general charge in behalf of the defendant requested at the trial, the question of the weight of the evidence is not presented on the record for review. *Brooks v. State* (Ala. App.), 74 So. 85.

Venue.—In a murder case, under direct provision of circuit court rule 35 (175 Ala. xxi), where it was not shown that trial court's attention was directed to fact that general charge was requested upon ground of failure of proof of venue, trial court can not be put in error for refusal of the general charge predicated on that ground. *Pounds v. State* (Ala. App.), 73 So. 127.

Failure of the evidence to show that the offense was committed in the county within 12 months before finding of indictment, will not avail to make the refusal of the general affirmative charge error, it not appearing the omission in evidence was called to the trial court's attention, as required by the supreme court's new rules. *Thomas v. State*, 12 Ala. App. 278, 68 So. 524.

Larceny of Property or Its Ownership.—In the absence of any showing of a request for a charge, defendant, convicted of concealing stolen goods, can not have review of the question of sufficiency of the evidence to show larceny of the property, or its ownership as alleged. *Frazier v. State*, 9 Ala. App. 50, 64 So. 162.

§ 685. — Instructions.

§ 685 (1½) Failure to Instruct in General.

Failure of court in its oral charge to instruct on lesser offenses included in charge of robbery could not be considered for the first time on appeal. *Ross v. State* (Ala. App.), 78 So. 309.

§ 685 (2) Necessity of Requests.

Court's Language in Excluding Negative Answer.—Where court's language in excluding a negative answer was not, in opinion of defendant's counsel, suffi-

cient to remove its impression on the jury, he should have brought it to court's attention and asked for a further instruction. *Evans v. State* (Ala. App.), 73 So. 562, certiorari denied in 73 So. 999.

Failure to instruct orally as to law involved held not reviewable; the remedy being, in case of such failure, to request special written instructions according to Code 1907, § 5362, and § 5364, as amended by Gen. Acts 1915, p. 815. *McPherson v. State* (Ala. App.), 73 So. 387.

Incomplete Oral Charge.—Accused can not complain that the oral explanations of requested charge were incomplete, where he requested no additional charges. *Scott v. State* (Ala. App.), 73 So. 212.

Time of Requesting Charge.—*Brigman v. State*, 8 Ala. App. 400, 62 So. 980. See the title CRIMINAL LAW, § 685 (2), vol. 4, p. 510.

§ 685 (3) Necessity of Written Requests.

Failure of trial court to have oral charge taken down by reporter as delivered, so that it could be made part of record, held harmless, where there was no objection made to it, and no charges were refused. *Blackmon v. State* (Ala.), 77 So. 347.

§ 687. — Verdict.

Objection below to verdict or action of the court thereon is necessary for review. *Morrisette v. State* (Ala. App.), 75 So. 177, certiorari denied in *Ex parte Morrisette* (Ala.), 76 So. 430.

Conclusiveness of Recitals.—*Jefferson v. State*, 8 Ala. App. 364, 62 So. 313. See the title CRIMINAL LAW, § 687, vol. 4, p. 511.

§ 688. Scope and Effect of Objections.

§ 688 (1) In General.

Ground Unintelligently Stated. — In a criminal prosecution, where ground of a motion for the general charge for defendant is so unintelligently stated as not to apprise the court as to point sought to be raised or to raise any point of law, there is nothing to review. *Stadt v. State*, 14 Ala. App. 116, 72 So. 212.

No Objection to Question Till Answered.—Admission of answer responsive to an objectionable question not objected

to until after answer is not reviewable. *Farrior v. State*, 12 Ala. App. 123, 67 So. 633.

Question Objectionable—No Objection to Answer.—A conviction will not be reversed for error in allowing an objectionable question, where the answer is not also objected and excepted to. *Tiller v. State* (Ala. App.), 64 So. 653.

§ 688 (2) Necessity of Specific Objection.

In a prosecution for crime, the court can not be put in error in its ruling on evidence to which only general objection was interposed, unless question on its face called for illegal evidence. *English v. State*, 14 Ala. App. 636, 72 So. 292.

Objection to Further Statement by Witness.—An objection not addressed to any particular question, but to any further statement by the witness, is unavailable for any purpose. *Wasserleben v. State*, 184 Ala. 2, 63 So. 520.

Evidence Partly Admissible.—Accused can not complain of the admission of evidence which was partly admissible, where his objections were to the whole. *Wilson v. State*, 12 Ala. App. 97, 68 So. 543.

Failure to Point Out Objectionable Portion.—*Harris v. State*, 8 Ala. App. 33, 62 So. 477. See the title CRIMINAL LAW, § 688 (2), vol. 4, p. 571.

Demurrer Failing to Point Out Defect.—Where no ground of the demurrer filed to a count of an indictment pointed out what would have been a defect in the count, the court could not be put in error for overruling the demurrer. *Norman v. State*, 13 Ala. App. 337, 69 So. 362.

Leading Question.—An objection that a question propounded to a state's witness was leading could not be considered, where the defect was not pointed out by the objection below. *Thomas v. State*, 11 Ala. App. 85, 65 So. 863.

A general objection to testimony that is not patently immaterial is unavailing as a basis for error on accused's appeal. *Stokes v. State*, 13 Ala. App. 294, 69 So. 303.

Charge Erroneous in Only One Part.—*Swain v. State*, 8 Ala. App. 26, 62 So. 446. See the title CRIMINAL LAW, § 688 (2), vol. 4, p. 571.

§ 688 (3) Adding to or Changing Grounds of Objection.

Assignment of a single objection to a question propounded to a witness is waiver of all other objections not assigned. *Harbin v. State* (Ala. App.), 72 So. 594.

§ 689. Necessity of Motion Presenting Objection.

Where evidence on the theory that the deceased was struck or shot with a pistol was disproved by subsequently admitting evidence as to the injury, the question of its relevancy could only be presented by motion to exclude. *Jones v. State*, 13 Ala. App. 10, 68 So. 690.

Contents of Paper Proved by Witness Unable to Read.—Though it appeared that a witness who had testified as to the contents of a paper picked up at the scene of a robbery could not read, there was no available error in the admission of the evidence, where no motion was made to exclude it. *Johnson v. State* (Ala. App.), 78 So. 716.

Incomplete Answer to Proper Question.—Where a proper question is asked, an incompetent answer can not be complained of where no motion was made to exclude it. *Pruitt v. State* (Ala. App.), 77 So. 916.

Objection to Question—No Motion to Exclude Answer.—In a trial before the court, defendant's objection to a question was overruled, and the witness allowed to answer, whereupon the court announced that he would investigate, before deciding the case, and if he found he was wrong, would exclude the answer. Defendant's counsel made no motion to exclude the answer, and it does not appear that the court ever finally passed upon the matter. Held, that the question would not be reviewed. *Putnam v. State* (Ala. App.), 76 So. 408.

Remarks of Solicitor.—Objections to remarks made by the state's solicitor can not be considered where there was no motion to exclude. *Jackson v. State*, 11 Ala. App. 303, 66 So. 877, cited in note in Ann. Cas. 1916A, 558.

Improper remark of the solicitor is not available on the main appeal, but only on motion for new trial; the court having

ruled in favor of defendant on objection thereto. *Casemus v. State* (Ala. App.), 75 So. 267.

Improper Indorsement by Clerk.—*Boyett v. State*, 8 Ala. App. 93, 62 So. 984. See the title CRIMINAL LAW, § 689, vol. 4, p. 512.

Failure to Properly Limit Testimony.—Error can not be predicated upon failure to properly limit testimony where accused did not request any instruction or move to limit it, but only made objections going to the entire testimony. *Walling v. State* (Ala. App.), 73 So. 216, certiorari denied in *Ex parte Walling* (Ala.), 73 So. 1003.

§ 690. Necessity of Ruling on Objection or Motion.

A motion to exclude evidence on which no ruling was made presents nothing for review. *Carroll v. State* (Ala. App.), 78 So. 717.

§ 691. Necessity of Exceptions.

As to necessity of bill of exceptions, see post, "Necessity," § 712.

§ 692. — In General.

Manner of Making Exception.—*State v. Carter*, 7 Ala. App. 1, 60 So. 941. See the title CRIMINAL LAW, § 692, vol. 4, p. 512.

§ 694. — Review of Rulings as to Indictment or Plea.

The striking of accused's plea setting up the pendency of another prosecution for the same offense was not presented for review where no exception was reserved thereto. *Walker v. State*, 11 Ala. App. 198, 65 So. 713.

§ 694½. — Review of Rulings as to Continuance.

The record not showing an exception reserved, ruling on motions for continuance is not presented for review. *Hardin v. State*, 8 Ala. App. 215, 63 So. 18.

§ 695. — Review of Proceedings at Trial in General.

Where no exception was reserved, the action of the court in commanding accused's counsel to resume his seat can not be reviewed on appeal. *Doby v. State* (Ala. App.), 74 So. 724.

§ 696. — Review of Rulings on Evidence.

Admission of Evidence.—The admission of evidence will not be reviewed, where no exception was reserved to any ruling relative thereto. *Phillips v. State*, 11 Ala. App. 168, 65 So. 673; *Smith v. State*, 183 Ala. 10, 62 So. 864. See the title CRIMINAL LAW, § 696 (1), vol. 4, p. 513.

Rulings on Evidence.—Where it does not appear on appeal that defendant reserved exceptions to rulings on evidence, error alleged need not be discussed. *Smith v. State* (Ala. App.), 75 So. 192.

Limitation of Purpose of Evidence.—An exception was necessary to a limitation of the purpose of evidence introduced, before the ruling could be reviewed on appeal. *Cogbill v. State*, 8 Ala. App. 223, 62 So. 406. See the title CRIMINAL LAW, § 696 (1), vol. 4, p. 514.

Testimony on Former Trial.—*Kirkwood v. State*, 8 Ala. App. 108, 62 So. 1011, certiorari denied in 184 Ala. 9, 63 So. 990. See the title CRIMINAL LAW, § 696 (1), vol. 4, p. 514.

§ 697. — Review of Rulings as to Arguments or Conduct of Counsel.

Where no exception was taken to the remarks of the state's solicitor about an absent witness, there is nothing before the court of appeals for review therein. *Coplon v. State* (Ala. App.), 73 So. 225, certiorari denied in 74 So. 1005.

§ 698. — Review of Instructions and Failure or Refusal to Give Instructions.

§ 698 (1) In General.

A court's charge can not be reviewed, where no exceptions were reserved. *Roden v. State* (Ala. App.), 72 So. 605; *Sanford v. State*, 8 Ala. App. 245, 62 So. 317.

Portion of Charge.—*Smith v. State*, 7 Ala. App. 55, 62 So. 301. See the title CRIMINAL LAW, § 698 (1), vol. 4, p. 514.

Oral Charge.—Exception to the oral charge is necessary for review thereof. *Morrisette v. State* (Ala. App.), 75 So. 177, certiorari denied in *Ex parte Morrisette* (Ala.), 76 So. 430; *Walling v. State*

(Ala. App.), 73 So. 216, certiorari denied in *Ex parte Walling* (Ala.), 73 So. 1003; *Spigener v. State*, 11 Ala. App. 296, 66 So. 896; *Pryor v. State*, 186 Ala. 27, 65 So. 331.

Correctness of oral charge of the court, when not questioned by appropriate exception before the jury retired, will not be reviewed. *Dickey v. State* (Ala. App.), 72 So. 608, certiorari denied in 197 Ala. 610, 73 So. 72.

§ 698 (2) Statutory Provisions.

Accused must, during the trial and before the jury retires, call the court's attention to instructions complained of, and specifically point out the portions to which exceptions are reserved, and under Const. 1901, § 6, he then has the right to be heard thereon. *Chandler v. State*, 12 Ala. App. 287, 68 So. 536.

§ 699. Scope and Effect of Exception.

§ 699 (1) In General.

Disjointed and Disconnected Remarks of Solicitor.—Exceptions to disjointed and disconnected remarks of the solicitor, not setting out enough for the court to pass upon, are not well taken. *Brannon v. State* (Ala. App.), 76 So. 991.

Materially Misstating Charge.—Exceptions complaining of the charge of the court which materially misstate the charge will not be considered on appeal. *Murray v. State*, 13 Ala. App. 175, 69 So. 354.

Evidence.—*Watson v. State*, 181 Ala. 53, 61 So. 334. See the title CRIMINAL LAW, § 699 (1), vol. 4, p. 515.

§ 699 (2) Necessity of Specific Exception.

An exception "to each and every paragraph and sentence of the court's charge" presents nothing for review. *Phelps v. State* (Ala. App.), 75 So. 877.

Exceptions "to the foregoing testimony of the witness Riles," not shown to have been made to the questions when asked or before answered, or to have been made to any particular ruling in admitting evidence, were too general to be considered. *Ludlum v. State*, 13 Ala. App. 278, 69 So. 255.

"Each Sentence Thereof Separately and Severally."—An exception to a por-

tion of a charge as a whole, "and to each sentence thereof separately and severally," amounts to a mere general exception, presenting for consideration only the portion of the charge as a whole, and not any particular part thereof; it not being wholly bad. *Hall v. State*, 11 Ala. App. 95, 65 So. 427.

Partially Defective Answer of Character Witness.—In a prosecution for homicide, where defendant took only a general exception to the answer of his character witness on cross-examination which was but partially defective, error could not be predicated on its admission. *Lewis v. State*, 13 Ala. App. 31, 68 So. 792.

§ 699½. Exceptions to Decision on Motion for New Trial or Arrest.

Necessity.—It is essential to the right to review a ruling on a motion for new trial that an exception should be reserved in view of Acts 1915, p. 722. *King v. State* (Ala. App.), 75 So. 692.

Error in overruling motion for new trial can not be reviewed, unless exception be reserved, as required by Acts 1915, p. 722. *Ross v. State* (Ala. App.), 78 So. 309.

In view of Acts 1915, p. 722, as to preserving alleged errors in overruling motion for new trial, such errors can not be considered in the absence of reservation of exceptions to the ruling. *Foster v. State* (Ala. App.), 78 So. 721.

Under Code 1907, § 2846, as amended by Acts 1911, p. 198, and again amended by Acts 1915, p. 722, it is essential to the right to review ruling on motion for new trial that exception be reserved. *Britton v. State* (Ala. App.), 74 So. 721.

(C) PROCEEDINGS FOR TRANSFER OR CAUSE, AND EFFECT THEREOF.

As to summary proceedings, see ante, "Proceedings for Review," § 144 (4). As to presumptions on appeal, see post, "Proceedings for Review," § 751 (15).

§ 701. Proceedings in General.

Jurisdiction of Court of Appeals.—*Ex parte Williams*, 182 Ala. 34, 62 So. 63. See the title CRIMINAL LAW, § 701, vol. 4, p. 516.

§ 702. Time of Taking Proceedings.**§ 702 (1) In General.**

Manner of Taking.—*Campbell v. State*, 182 Ala. 18, 62 So. 57. See the title CRIMINAL LAW, § 702 (1), vol. 4, p. 516.

Petition for Certiorari Not Made for Year after Denial.—*Ex parte Barlew*, 181 Ala. 88, 61 So. 912, denying certiorari *Barlew v. State*, 5 Ala. App. 290, 57 So. 601. See the title CRIMINAL LAW, § 702 (1), vol. 4, p. 517.

§ 702 (4) Effect of Delay.

Dismissal on Motion.—Where the certificate of appeal shows a conviction and sentence in February, 1915, with notice of appeal in October, but no further steps to perfect the appeal appear, it will be dismissed on motion on regular call in January, 1916. *McBride v. State*, 14 Ala. App. 662, 70 So. 950; *Sanders v. State*, 14 Ala. App. 12, 70 So. 949; *Smith v. State*, 14 Ala. App. 662, 70 So. 950.

Defendant on August 18, 1915, was convicted of violating the prohibition law, on August 24, 1915, took an appeal, on September 23, 1915, filed certificate of appeal, and on January 13, 1916 was granted a continuance. Held, that where no further steps were taken to perfect the appeal, such appeal was subject to dismissal on a motion made June 1, 1916. *Hawkins v. State*, 14 Ala. App. 667, 72 So. 271.

Where defendant on April 22, 1915, was convicted, and on April 23, 1915, gave notice of appeal, and on June 18, 1915, filed a certificate of appeal, such appeal was subject to dismissal on June 1, 1916, where nothing further had been done to perfect the same. *Cooley v. State*, 14 Ala. App. 666, 72 So. 270.

Appeal, without further steps taken to perfect it, by filing a transcript or otherwise, after the time for presenting and filing bill of exceptions had expired, and on the regular call of the case, will be dismissed on motion. *Tice v. State*, 14 Ala. App. 661, 70 So. 967.

§ 702½. Parties.

Where accused dies after the submission of his appeal, the appeal is abated. *Browning v. State* (Ala. App.), 68 So. 545.

§ 702½a. Announcement or Allowance in Open Court.

Under Acts 1915, p. 712, § 7, the entry of judgment of conviction, reciting that defendant made known his desire to prosecute an appeal therefrom, shows that defendant complied with the statutory requirements necessary to review. *Sherman v. State* (Ala. App.), 72 So. 755, certiorari denied in *Ex parte Sherman* (Ala.), 73 So. 1002.

§ 702½b. Petition or Prayer.

Under Code 1907, §§ 6243, 6247, 6264, 6255, and Supreme Court rule 43 (175 Ala. xx, 61 South. viii), failure of defendants to file written request for appeal as required by the rule held not to call for dismissal, where the certificate of appeal and the transcript were not delayed thereby. *Rivers v. State*, 13 Ala. App. 362, 69 So. 387.

§ 703. Bonds or Other Securities to Perfect Proceedings.

Sufficiency of Compliance with Statute and Practice Rules.—The filing of an appeal bond stating that an appeal had been prayed for, etc., held a sufficient compliance with the statute and rules of practice regulating appeals. *Mazett v. State*, 11 Ala. App. 317, 66 So. 871.

Appeal from Recorder's Court—Appeal Bond Not Jurisdictional.—The purpose of the bail bond on an appeal from a conviction in recorder's court is not to confer jurisdiction on the circuit court, but to enable defendant to release himself from custody pending appeal. *Ex parte Rodgers*, 12 Ala. App. 218, 67 So. 710.

Same—Jurisdiction of Circuit Court—Certiorari.—Under Acts 1909 (Sp. Sess.), p. 92, § 32, making applicable to recorder's court the law governing appeals from county courts, and Code 1907, §§ 6725, 6726, authorizing an appeal from county court without filing bond, a circuit court has jurisdiction of an appeal from a judgment of conviction in recorder's court of an offense which it had concurrent jurisdiction over though no appeal bond was given, but only an appearance bond which defendant complied with, and hence certiorari would not lie to review the judgment of the

circuit court. *Ex parte Rodgers*, 12 Ala. App. 218, 67 So. 710.

§ 703½. Nature of Appeal.

Noncompliance with Supreme Court Practice, rule 43 (175 Ala. xxi, 61 South. viii), requiring filing of written notice of appeal, held not ground for dismissal, where the cause was submitted on the merits, and the bill of exceptions showed questions of law reserved. *Chandler v. State*, 12 Ala. App. 287, 68 So. 536.

§ 704. Entry or Docketing.

Where no certificate of appeal from a judgment of conviction was filed, and no record was filed within the term at which the appeal was returnable, there was a discontinuance of the appeal. *Upshaw v. State*, 11 Ala. App. 310, 66 So. 821.

Time for Taking Proceeding.—*Swain v. State*, 7 Ala. App. 5, 60 So. 961. See the title CRIMINAL LAW, § 704, vol. 4, p. 517.

§ 705. Effect of Transfer or Proceedings Therefor.

The trial court is without jurisdiction to entertain a motion for new trial after appeal taken. *Sherman v. State* (Ala. App.), 72 So. 755, certiorari denied in *Ex parte Sherman* (Ala.), 73 So. 1002.

Powers and Jurisdiction of Court of Appeals.—Before the transcript reaches the court of appeals, if a certificate of appeal is before the court, it has sufficient jurisdiction to authorize dismissal for want of prosecution, for negligence in bringing up the transcript, also to authorize certiorari to the clerk below to send up the transcript, and, if he fails, to authorize contempt proceedings against him. *Rivers v. State*, 13 Ala. App. 362, 69 So. 387.

(D) RECORD AND PROCEEDINGS NOT IN RECORD.

As to affirmance or error not being apparent in record, see post, "Affirmance," § 786. As to presumptions, see post, "Facts or Proceedings Not Shown by Record," § 751.

§ 707. Matters to Be Shown by Record.

§ 708. — Necessity in General.

§ 708 (1) Proceedings Sustaining Judgment or Order in General.

Organization of Court.—Where the rec-

ord does not show any organization of the court as provided by Supreme Court rule 26 (175 Ala. xix, 61 So. vii), the appeal must be dismissed. *Pesnell v. State*, 13 Ala. App. 676, 69 So. 259; *Clark v. State*, 8 Ala. App. 105, 62 So. 987.

Setting Capital Case Specially—Ordering Special Venire.—Under Code 1907, § 6256, as amended by Acts 1915, pp. 708, 709, it is no longer necessary that the record of a prosecution for a capital offense should show an order setting the case specially for trial and an order for special venire, unless some question was raised thereon before the trial court. *Burks v. State* (Ala. App.), 73 So. 824.

The statute requiring a capital case to be specially set for trial and a special venire drawn is mandatory, and without a showing of waiver under Code 1907, § 7264, the record to sustain a conviction must show compliance therewith, and rule 27 (175 Ala. xx, 61 So. vii) does not obviate such necessity. *Harper v. State*, 13 Ala. App. 47, 69 So. 302.

Defective Indictment.—Where there was no evidence that indictment on which accused was tried was regularly returned, and it did not appear to be valid, indorsed "A true bill," or to have been signed by the foreman of a grand jury, as required by Code 1907, § 7300, it was insufficient to sustain a conviction. *Smiley v. State*, 11 Ala. App. 67, 65 So. 916.

Refusal of General Charge.—Though the evidence did not show when the offense was committed, error in refusal of the general charge is, under circuit court rule No. 63, adopted by the supreme court June 23, 1913, not shown; the record not showing this was called to the trial court's attention. *Hendricks v. State*, 11 Ala. App. 207, 65 So. 682.

§ 708 (2) Jurisdiction of Lower Court.

Organization of Court for Special Term.—Where no question was made on the trial against the organization of the court to try the cause at special term, it is not necessary under rule 26 (175 Ala. xix, 61 South. vii), circuit court practice, to set out the order for the special term. *Keith v. State* (Ala. App.), 72 So. 602.

Under the state of the transcript, held, the appeal would be dismissed for failure

of the record to show the judgment was rendered by a court organized pursuant to law. Supreme Court rule 26 (175 Ala. xix, 61 So. vii). *Ogden v. State*, 13 Ala. App. 205, 68 So. 701.

Necessity to Show Order for Special Term.—In a prosecution under an indictment preferred at special term, it is not necessary for the record to show the order for the special term. *Norwood v. State* (Ala. App.), 74 So. 729.

Circuit Court's Jurisdiction on Appeal.—The failure of the transcript to show that the circuit court had jurisdiction to try a prosecution for violating the prohibition law on appeal to it would require a dismissal of the appeal by the supreme court. *Lee v. State*, 10 Ala. App. 191, 64 So. 637.

No appeal originally to the circuit court was shown on appeal from that court by record containing what purported to be a certified copy of judgment of a mayor's court in a case similarly entitled, and containing no certificate of appeal or appeal bond. *Russau v. State* (Ala. App.), 72 So. 596.

§ 708 (7) Indictment, Information, or Complaint.

The bench note of the trial judge overruling a motion to quash, which was but a memorandum for the clerk, is not a sufficient entry of record of the ruling on appeal. *Smith v. State* (Ala. App.), 73 So. 824.

No Demurrer or Ruling on Demurrer Shown.—Where no demurrer to the indictment is set out in the record, and no ruling on demurrer is shown in the judgment of the trial court, argument of counsel predicated on such assumed ruling is inapt. *Turner v. State*, 14 Ala. App. 29, 70 So. 971.

§ 708 (9) Matters Relating to Petit Jury.

Motion to Quash Special Venire.—Where the motion to quash a special venire did not appear in the bill of exceptions, and it was not shown that any ruling was invoked thereon, there is nothing for the appellate court to review. *Banks v. State*, 13 Ala. App. 41, 69 So. 242.

Order for Special Venire — Fixing Trial Day.—Under Acts 1915, p. 708, amendatory of Code 1907, § 6256, the transcript should not contain the order of the court for the special venire, or the order fixing the day for the trial, where no action thereon was raised below. *Paitry v. State*, 196 Ala. 598, 72 So. 36.

Indictment Not Showing Compliance with Jury Law.—A conviction upon an indictment for robbery, which, under Code, § 7746, may be punished capitally, could not be supported, where the record does not show a compliance with Jury Law § 32 (Laws Spec. Sess. 1909, pp. 305, 318), requiring the summoning in such a case of not less than 50 or more than 100 jurors including the regular panel. *Smith v. State*, 11 Ala. App. 153, 65 So. 693.

§ 708 (10) Proceedings at Trial in General.

Motion to Reduce Fine.—The record not showing an exception reserved, ruling on motions to reduce a fine is not presented for review. *Hardin v. State*, 8 Ala. App. 215, 63 So. 18.

Objections to Answer of Witnesses.—*Kennedy v. State*, 182 Ala. 10, 62 So. 49. See the title CRIMINAL LAW, § 708 (10), vol. 4, p. 522.

Record Not Showing Motion to Strike Counts.—*Glass v. State*, 8 Ala. App. 417, 62 So. 1013. See the title CRIMINAL LAW, § 708 (10), vol. 4, p. 522.

§ 708 (13) Verdict, Judgment, and Sentence.

Where the record shows no finding of guilt by the jury, no judgment of guilt or sentence by the court, and consequently, no judgment of conviction, the appeal must be dismissed. *Holland v. State*, 10 Ala. App. 238, 64 So. 649.

Where there is nothing save the bill of exceptions to show that accused has ever been tried, and no judgment of conviction appears, the appeal must be dismissed. *Arrington v. State*, 12 Ala. App. 209, 67 So. 620.

§ 708 (14) Presentation and Reservation of Grounds for Review.

Where the record shows objection to a question and an exception by accused's

counsel, but did not disclose the ruling, there is no question for review. *Graham v. State*, 11 Ala. App. 113, 65 So. 717.

Where the bill of exceptions does not disclose the grounds of accused's objection to testimony, nothing is presented for review. *Murphy v. State*, 14 Ala. App. 78, 71 So. 967.

Adverse Ruling on Written Motion. — Acts 1915, p. 598, automatically giving appellant an exception to the court's adverse ruling upon a written motion, also requires the ruling to be made part of the record. *Moran v. State* (Ala. App.), 73 So. 748.

Remarks of State's Counsel. — The record showing only that objection was made to remarks of the state's counsel, and not what, if any, action the court took thereon, nothing is presented for review. *Henderson v. State*, 11 Ala. App. 37, 65 So. 721.

Ruling on Motion for New Trial. — Under Code 1907, § 2846, as amended by Acts 1911, p. 198, and again amended by Act 1915, p. 722, it is essential to the right to review ruling on motion for new trial that exception be reserved, and with the evidence and ruling, be incorporated in the bill of exceptions; act approved September 18, 1915 (Acts 1915, p. 598), not applying to motions for new trial. *Britton v. State* (Ala. App.), 74 So. 721.

Failure to Show Ruling on Demurrer. — On appeal, where transcript shows demurrers to indictment, but no ruling thereon is shown in record, it presents no question on the demurrers for review. *Yarbrough v. State* (Ala. App.), 73 So. 630.

The admissibility of evidence will not be reviewed unless the record affirmatively shows both objection to the evidence and exception to the ruling. *Thomas v. State*, 12 Ala. App. 278, 68 So. 524.

Where motion in arrest of judgment was in writing, so that exception was automatically given by statute upon court's ruling thereon, order or ruling should also be made to appear on appeal by the record proper. *Stass v. State* (Ala. App.), 73 So. 749.

§ 710. Scope and Contents of Record.

As to defects and objections, see post,

"Defects and Objections," § 721. As to presumptions, see post, "Matters Shown by Record," § 750. As to matters not shown by record, see ante, "Necessity in General," § 708. As to review dependent on presentations by record, see post, "Questions Presented for Review," § 725.

§ 710 (1) In General.

Though recital of the judgment entries show demurrers to the indictment have been overruled, there can be no review; what the demurrers were not appearing, none being shown in the transcript. *Tarpey v. State*, 6 Ala. App. 432, 63 So. 17.

§ 710 (1½) Indictment, Information or Complaint.

Substitution of Complaint. — Whether the substitution of the complaint on which defendant was tried was properly allowed is not presented for review; ruling in that regard not being shown by the record proper, but appearing only in the bill of exceptions. *Wiley v. State*, 10 Ala. App. 249, 65 So. 204.

Entries of clerk in transcript that demurrers were sustained held not to authorize review, where record did not show judgment on demurrers. *Ward v. State* (Ala. App.), 74 So. 727.

§ 710 (3) Motions.

While a bill of exceptions need not present the trial court's ruling on a motion in arrest of judgment, such motion reaching only error apparent on the face of the record, the record should show some ruling on the motion. *Moran v. State* (Ala. App.), 73 So. 748.

§ 710 (4) Arraignment and Plea.

A recital in the record that defendant "is arraigned and pleads not guilty" shows defendant's presence; to "arraign" being to call a person to the bar of the court to answer the indictment. *Tiller v. State* (Ala. App.), 64 So. 653.

Assignments of error, predicated on order overruling demurrers to pleas, can not be considered when the demurrers are not in the record. *Moss v. State* (Ala. App.), 75 So. 179.

§ 710 (7) Instructions.

Reviewability of Charges Not Appearing in Record. — Although charges appear

only in the bill of exceptions, and not in the record proper as required by Acts 1915, p. 815, they will be reviewed on appeal. *Russell v. State* (Ala.), 78 So. 916.

Not Marked "Refused" Nor Signed by Judge. — Special-requested charges set out in the record as refused, not being marked "Refused" and signed by the trial judge, as required by Code 1907, § 5364, as amended by Acts 1915, p. 815, are not part of the record. *Mason v. State* (Ala. App.), 78 So. 321.

Validity of Agreement between Counsel to Omit Charges. — In view of Code 1907, § 635, subsec. 3, requiring the instructions to be included in the transcript, and under Acts 1915, p. 815, agreement between solicitor of trial court and defendant's attorneys to omit from record the written charges given at defendant's request was invalid. *Johnson v. State* (Ala. App.), 72 So. 766.

§ 710 (7½) Verdict, Judgment or Sentence.

Where the judgment entry on conviction of a felony combined the cases of two defendants tried on separate indictments, that the entry concluded with an incomplete recital as to the proceedings on the trial of one of the defendants was immaterial and did not vitiate the recitals of the entry as to the other defendant. *Stewart v. State*, 195 Ala. 670, 70 So. 719.

§ 710 (8) Bill of Exceptions.

A bill of exceptions presented within 90 days from ruling on motion for new trial may be considered a part of the record to review the questions presented by that motion, although too late to be considered in reviewing rulings at the trial. *Sherman v. State* (Ala. App.), 72 So. 755, certiorari denied in *Ex parte Sherman* (Ala.), 73 So. 1002.

Motions invoking the rulings of the court made during the progress of the cause are not parts of the record proper, and the ruling thereon can only be reviewed when the motions and rulings are made a part of the record by incorporation in the bill of exceptions. *Salley v. State*, 9 Ala. App. 82, 64 So. 185.

A bill of exceptions not presented to the trial judge within the statutory time

can not be considered in reviewing the rulings at the trial. *Sherman v. State* (Ala. App.), 72 So. 755, certiorari denied in *Ex parte Sherman* (Ala.), 73 So. 1002.

§ 710 (10) Effect of Incorporating Matters of Record in Bill of Exceptions.

See ante, "Motions," § 710 (3).

Instructions. — Unless, as required by Acts 1915, p. 815, the general charge and the refused and given charges are made a part of the record proper, rather than merely incorporated in the bill of exceptions, they are not reviewable. *Pilcher v. State* (Ala. App.), 77 So. 75; *Dempsey v. State* (Ala. App.), 72 So. 773.

Refusal of written charges required by Acts 1915, p. 815, to be made part of record proper, is not reviewable, where charges appear only in bill of exceptions. *Carter v. State* (Ala. App.), 76 So. 468.

Charges appearing only in bill of exceptions, and not in record proper, as required by law, are not reviewable. *Malone v. State* (Ala. App.), 76 So. 469.

Demurrer. — Although the judgment showed that a demurrer to the complaint was overruled, where the demurrer itself was not in the record but appeared only in the bill of exceptions, the questions sought to be raised by it were not presented for review. *Glenn v. Prattville*, 14 Ala. App. 621, 71 So. 75.

Affidavit. — Where original affidavit charging a violation of prohibition laws appeared only in the bill of exceptions and not in the record, trial court's allowance of an amendment by inserting the word "alias" after defendant's name could not be reviewed by court of appeals. *Crawley v. State* (Ala. App.), 73 So. 222.

§ 711. Bill of Exceptions.

As to amendment or correction in appellate court, see post, "Amendment or Correction," § 722. As to defects and objections, see post, "Defects and Objections," § 721. As to presumptions on appeal, see post, "Matters Shown by Record," § 750.

§ 712. — Necessity.

§ 712 (1) In General.

In the absence of a bill of exceptions in the transcript, a conviction will be affirmed where no error appears on the

record. *Long v. State* (Ala.), 62 So. 517; *Williams v. State* (Ala. App.), 77 So. 19; *Smyer v. State*, 14 Ala. App. 665, 72 So. 208; *Franklin v. State*, 11 Ala. App. 305, 66 So. 875.

Where there is no bill of exceptions, and nothing in the record to show that the proceedings on which a conviction for a capital offense was based were irregular, there is nothing to review under Acts 1915, p. 708. *Smith v. State* (Ala. App.), 73 So. 824.

Where the transcript contained no bill of exceptions and the time for filing bill of exceptions had expired, and the record proper showed the judgment entry, etc., in all respects regular, no reviewable question was presented. *Gibson v. State* (Ala. App.), 73 So. 747; *Howard v. State*, 181 Ala. 670, 61 So. 804.

Duty of Court to Examine Record.—By statute, it is the duty of the court of appeals to examine the record for error prejudicial to appellant, although there is no bill of exceptions. *Mitchell v. State* (Ala. App.), 72 So. 507.

§ 712 (1½) Preliminary Proceedings.

A ruling on a motion to quash the warrant and affidavit is not reviewable, without a bill of exceptions. *Glover v. State*, 11 Ala. App. 287, 66 So. 877.

The court will not review an order admitting one indicted to bail, in the absence of bill of exceptions where the record appears to be in all things regular. *State v. Fuller* (Ala. App.), 73 So. 125.

§ 712 (1½a) Indictment, Information and Complaint.

Motion to Quash.—Where the transcript contains no bill of exceptions, ruling on accused's motion to quash is not reviewable. *Mitchell v. State* (Ala. App.), 73 So. 507; *Clark v. State*, 14 Ala. App. 633, 72 So. 291; *Weyms v. State*, 13 Ala. App. 297, 69 So. 310.

Defendant appealing on record proper without bill of exceptions, overruling of motion to quash indictment, or to quash venire because true copy of indictment was not served, or overruling of objections to being put on trial because of such defect can not be reviewed. *Sager v. State* (Ala.), 76 So. 927.

Amendment.—An objection and excep-

tion to the court's action in allowing the state to amend an affidavit charging defendant with carrying concealed weapons, etc., can not be reviewed without a bill of exceptions. *Nelson v. State* (Ala. App.), 72 So. 510, certiorari denied in *Ex parte Nelson* (Ala.), 73 So. 1001.

§ 712 (1½b) Arraignment and Plea.

The action of the trial court in striking the defendant's plea of not guilty because not filed in time can not be reviewed without a bill of exceptions. *McGay v. State*, 183 Ala. 41, 63 So. 70.

The ruling of the court on the state's motion to strike a special plea is not reserved for consideration, in the absence of a bill of exceptions. *Thomas v. State* (Ala. App.), 72 So. 769.

§ 712 (2) Evidence.

Sufficiency to Warrant Submission to Jury.—*Blackwell v. State*, 8 Ala. App. 430, 62 So. 1034. See the title CRIMINAL LAW, § 712 (2), vol. 4, p. 527.

§ 712 (3) Matters Relating to Petit Jury.

Accused's motion to quash the venire will not be reviewed, in the absence of a bill of exceptions. *Anderson v. State*, 10 Ala. App. 66, 65 So. 262.

In the absence of bill of exception, the overruling of defendant's motion, made on grounds dehors the record proper, to quash the venire served on him is not presented for review. *Mathis v. State*, 9 Ala. App. 47, 63 So. 737.

§ 712 (4) Instructions.

Refusal to Charge.—Where the transcript on appeal of a criminal case contains no bill of exceptions, the court's refusal to give certain instructions will not be reviewed. *Moran v. State* (Ala. App.), 73 So. 748; *Yarbrough v. State* (Ala. App.), 73 So. 830; *Jackson v. State* (Ala. App.), 73 So. 756; *Payne v. State*, 10 Ala. App. 85, 65 So. 262.

Where time for signing and filing bill of exceptions has expired, and there is no bill of exceptions in the record, court will not review charges given and refused. *Richey v. State* (Ala. App.), 76 So. 471.

Refusal of special charges can not be reviewed without bill of exceptions. *Ward v. State* (Ala. App.), 74 So. 727.

Bill of exceptions is necessary for re-

view of refusal to defendant of the general affirmative charge. *Graham v. State* (Ala. App.), 75 So. 635.

Same—Propriety of Charges.—Where the record fails to show the presentation of a bill of exceptions to the refusal of charges requested by the defendant within 90 days after judgment and notation of appeal, the court can not review the propriety of the charges refused. *Taylor v. State*, 14 Ala. App. 13, 70 So. 949.

Same—Absence of Oral Charge.—In the absence of a bill of exceptions and the oral charge of the court, the appellate court can not review the requested charges which were refused to defendant. *Biles v. State* (Ala. App.), 78 So. 320; *Williams v. State* (Ala. App.), 77 So. 919; *Miller v. State* (Ala. App.), 72 So. 506.

Where no bill of exceptions has been filed, and oral charge of court is not set out in record, refusal of requested written charges will not be reviewed. *Franklin v. State* (Ala. App.), 76 So. 476.

In the absence of a bill of exceptions, where the written charges given and refused are set out in the transcript as provided by Acts 1915, p. 815, but not the oral charge, the instructions will not be reviewed. *Hester v. State* (Ala. App.), 73 So. 757.

On appeal from conviction, general affirmative charge on different counts in indictment set out in record can not be reviewed in absence of bill of exceptions and oral charge. *Clements v. State* (Ala. App.), 73 So. 765.

Refusal of Written Charges.—On an appeal on the record proper, there being no bill of exceptions, there can be no review of refusal of requested written charges. *Mack v. State* (Ala.), 77 So. 683; *Hazelwood v. State* (Ala. App.), 73 So. 827; *Parsons v. State* (Ala. App.), 73 So. 759; *Pastry v. State*, 196 Ala. 598, 72 So. 36; *Mitchell v. State* (Ala. App.), 72 So. 507.

Where the charge given on the court's own motion is not set out in the transcript, as required by Acts 1915, p. 815, and where there is no bill of exceptions, written requests to charge, refused to defendant, can not be reviewed. *Canto v. State* (Ala. App.), 73 So. 826.

A general affirmative charge requested in writing by defendant can not be reviewed on appeal in absence of bill of exceptions. *Frazier v. State*, 14 Ala. App. 665, 71 So. 981.

On appeal, where transcript contains no bill of exceptions, showing the evidence, and appeal is on record proper, court can not review written requests to charge refused defendant, such requests being for general affirmative charge. *Clements v. State* (Ala. App.), 73 So. 765.

Under Code 1907, § 5364.—*Davis v. State*, 8 Ala. App. 147, 62 So. 1027, certiorari denied in *Ex parte Davis*, 184 Ala. 26, 63 So. 1010. See the title CRIMINAL LAW, § 712 (4), vol. 4, p. 727.

While charges not set out in the bill of exceptions can not be reviewed, since Code 1907, § 5364, makes all charges given a part of the record, the supreme court can look to charges not contained in the bill of exceptions to determine whether they substantially cover charges refused. *Wilson v. State*, 7 Ala. App. 134, 61 So. 471.

§ 712 (4½) New Trial.

In absence of bill of exceptions, overruling of motion for new trial can not be reviewed. *Mowery v. State* (Ala. App.), 75 So. 632.

Under Acts 1915, p. 722.—In the absence of a bill of exceptions, defendant's motion for a new trial can not be reviewed, notwithstanding the authority for such review given by Acts 1915, p. 722. *Hazelwood v. State* (Ala. App.), 73 So. 827; *Waits v. State* (Ala. App.), 73 So. 765; *Mitchell v. State* (Ala. App.), 72 So. 507.

The denial of accused's motion for new trial on grounds necessitating the examination of the evidence can not be reviewed, under Acts 1915, p. 722, authorizing a review of the ruling on such motion, in the absence of a bill of exceptions incorporating the substance of the evidence in the record. *Smith v. State* (Ala. App.), 73 So. 824; *Stass v. State* (Ala. App.), 73 So. 749.

Motion to Set Aside Verdict for Surprise.—On appeal, motion, shown in transcript, to set aside conviction for surprise as to testimony of witnesses in-

troduced for state can not be reviewed, in absence of bill of exceptions. *Hollis v. State* (Ala. App.), 73 So. 758.

§ 713. — Form and Contents.

§ 713 (1) In General.

A bill of exceptions which is only a stenographic report of the trial violates circuit court practice rule 32 (Code 1907, p. 1526), and is properly stricken. *Owens v. State*, 11 Ala. App. 309, 66 So. 852.

§ 713 (2) Setting Forth Errors or Irregularities in General.

It is not enough for review that the record shows a motion was made to quash the indictment; but the bill of exceptions should set out the motion. *Tarpey v. State*, 8 Ala. App. 432, 63 So. 17.

§ 713 (2½) Showing as to Examination and Impeachment of Witnesses.

A bill of exceptions not showing that, at the time questions were permitted to be asked, the examination of the witness had been concluded, or that any one conferred with him after he commenced to testify, held to show no abuse of the trial court's discretion. *Howell v. State*, 10 Ala. App. 1, 64 So. 522.

§ 713 (2½a) Setting Forth Errors or Irregularities in Admission of Evidence.

Accused can not, on appeal complain of the admission of testimony, where the bill of exceptions showed no objections to the question eliciting it. *Webb v. State*, 11 Ala. App. 123, 65 So. 845.

Forged Note.—Trial court's action in admitting note alleged to have been forged will not be reviewed where note is not set out in bill of exceptions. *King v. State* (Ala. App.), 75 So. 692.

§ 713 (2½b) Setting Forth Errors and Irregularities in Exclusion of Evidence.

Where the refusal to exclude the evidence and direct a verdict for accused is assigned as error, the bill of exceptions should set out all the evidence. *Boice v. State*, 10 Ala. App. 100, 65 So. 83.

§ 713 (3½) Setting Forth Errors and Irregularities as to Instructions.

In order to have the refusal of requested instructions reviewed, the bill of exceptions need not affirmatively show their presentation to the court before the jury retired. *Murphy v. State*, 14 Ala. App. 78, 71 So. 967.

A bill of exceptions, which, after setting out a part of the court's oral charge, stated that, "Before the jury retired defendant duly excepted to that portion of the oral charge in quotations and underscored," but in which nothing purporting to be a quotation from the charge was underscored, leaving the subject of the exception unidentified, was unavailing. *Woods v. State*, 10 Ala. App. 96, 64 So. 508.

§ 713 (4) Setting Forth Objections, Rulings, and Exceptions.

Where no ruling on matters which must be shown by bill of exceptions is shown by any recital in the bill of exceptions, the matters are not reviewable. *Sears v. State*, 10 Ala. App. 76, 65 So. 300, certiorari denied in Ex parte Sears, 187 Ala. 672, 65 So. 1034.

Where no exceptions appear in what purports to be the bill of exceptions, no rulings of the lower court are presented for review. *Hughes v. State*, 11 Ala. App. 307, 66 So. 844.

Instrument Containing No Exceptions.—*Blackwell v. State*, 8 Ala. App. 430, 62 So. 1034. See the title CRIMINAL LAW, § 713 (4), vol. 4, p. 528.

Correcting Minute Entries Nunc Pro Tunc.—When the bill of exceptions does not show the reservation of an exception to a ruling to correct nunc pro tunc minute entries, the court's action is not reviewable. *Lewis v. State*, 10 Ala. App. 31, 64 So. 537.

Admitting Petitioner to Bail.—*State v. Carter*, 7 Ala. App. 1, 60 So. 941. See the title CRIMINAL LAW, § 713 (4), vol. 4, p. 529.

Refusal to Strike Out Testimony.—*Smith v. State*, 7 Ala. App. 55, 62 So. 301. See the title CRIMINAL LAW, § 713 (4), vol. 4, p. 528.

Remark of Witness Used by Solicitor.—*Gibson v. State*, 8 Ala. App. 56, 62 So.

895. See the title CRIMINAL LAW, § 713 (4), vol. 4, p. 528.

§ 713 (5) Construction of Bill.

A bill of exceptions is construed most strongly against the appellant. *Davenport v. State* (Ala. App.), 73 So. 209.

§ 714. — Settlement, Signing, and Filing.

§ 714 (½) In General.

Accused who submits his case on appeal on the merits alone thereby abandons a motion to establish a bill of exceptions, and is presumed to have accepted the bill of exceptions in the record. *Curtis v. State*, 9 Ala. App. 36, 63 So. 745.

§ 714 (2) Settlement, Allowance, or Filing after Term.

Where the time allowed for presenting a bill of exceptions for approval and signing expired before the call of the division to which the case belonged, and no cause was shown for failure to prosecute the appeal, the bill will be dismissed on motion. *Avery v. State*, 13 Ala. App. 277, 69 So. 255.

§ 714 (3) Time Prescribed or Allowed.

Date from Which to Compute 90 Days.—The entry of judgment referred to in Code 1907, § 3019, as fixing the time from which to compute the 90 days within which the bill of exceptions is to be presented is the judgment from which an appeal is authorized, which, under § 6244, is the judgment of conviction. *Harper v. State*, 13 Ala. App. 47, 69 So. 302.

The date of judgment of conviction, and not of pronouncement of sentence, governs in fixing the 90 days from rendition of judgment, in which to present the bill of exceptions. *Corbin v. State* (Ala. App.), 72 So. 505.

Failure to Present within 90 Days.—In criminal case, bill of exceptions, not presented to trial judge for signature within 90 days required by law, will be stricken on motion. *Hearil v. State* (Ala. App.), 74 So. 395; *Owens v. State*, 11 Ala. App. 309, 66 So. 852; *Powell v. State* (Ala. App.), 62 So. 897.

Under Code 1907, § 3019, which provides that a bill of exceptions shall be presented within 90 days from the day

on which judgment is rendered, a bill presented 91 days after the judgment will be stricken. *McGay v. State*, 183 Ala. 41, 63 So. 70, following *McOllister v. State*, 183 Ala. 8, 62 So. 767.

Under Code 1907, § 3019, where judgment was rendered and entered October 21, 1914, though sentence was not imposed until October 24th, bill of exceptions not presented to the trial judge until January 22, 1915, must be stricken. *Lewis v. State*, 194 Ala. 1, 69 So. 913.

Where a judgment of conviction was rendered on February 14th and the bill of exceptions was first presented to the judge on June 21st, it was not presented within the 90 days from the date of judgment entry, as required by Code 1907, § 3019, so that accused's motion to establish a bill of exceptions will be denied, though defendant confessed judgment for the fine and costs on February 22d. *Ramey v. State*, 9 Ala. App. 51, 64 So. 168.

§ 714 (4) Compliance with Requirements as to Time.

Presentation on Ninetieth Day.—A motion to dismiss the bill of exceptions on the ground that it was not presented within the time allowed by Code 1907, § 3019, will be overruled, where it appears that presentation was made on the ninetieth day. *Keeble v. State*, 14 Ala. App. 31, 70 So. 971.

Presumption of Presentation on Date of Signing.—The bill of exceptions, not showing when it was presented to the trial court, will be treated as presented on the day it was signed, and so will be stricken; that day, though within the time for signing, not being within the time for presentation. *Busby v. State*, 10 Ala. App. 183, 65 So. 307.

Absence of Judge.—Under Gen. Acts 1915, p. 816, providing that appellant's bill of exceptions may, in the absence of the trial judge from the county, be filed with the clerk within 90 days from the entry of judgment, a bill, so filed after 91 days had expired since such entry, will be stricken. *Scott v. State* (Ala. App.), 77 So. 937.

Proof that the trial judge was out of the state during the last 30 days of the time appellant had to establish his bill

of exceptions, without evidence that the bill was in existence within 90 days from the day on which judgment was entered, held insufficient to confer jurisdiction on the appellate court to establish the bill under Code 1907, §§ 3019, 3022. *Crane v. State*, 10 Ala. App. 82, 65 So. 301.

§ 714 (6) Signature by Trial Judge.

Bill of exceptions without indorsement by trial judge that it was presented to him, or was correct, is insufficient, in view of Code 1907, § 3019, requiring judge's signature to establish verity of bill. *Grace v. State* (Ala. App.), 77 So. 978.

Under Code 1907, § 3019, where what purports to be bill of exceptions was presented within time prescribed by law, and indorsed by trial judge, but was never signed by him at any time, it must be stricken on request of state. *Waddell v. State* (Ala. App.), 74 So. 726.

Signature by State Solicitor on Death of Trial Judge.—*Graves v. State*, 178 Ala. 1, 59 So. 584. See the title CRIMINAL LAW, § 714 (6), vol. 4, p. 532.

Refusal to Sign Because Term Had Expired.—*Fulton v. State*, 8 Ala. App. 257, 62 So. 959. See the title CRIMINAL LAW, § 714 (6), vol. 4, p. 532.

Establishment—Construction of Statute.—Code 1907, § 3021, authorizes the establishment of a bill of exceptions in the court of appeals only when a proper bill has been duly and seasonably presented to the trial judge and he has failed or refused to sign it. *Crane v. State*, 10 Ala. App. 82, 65 So. 301.

Same—Death of Judge without Signing.—Bill of exceptions presented to presiding judge, who died without having signed it as such, established as bill of exceptions on motion. *Brindley v. State*, 193 Ala. 43, 69 So. 536.

§ 714 (7) Service.

Sufficiency of Service by Mail.—*Clegghorn v. State*, 8 Ala. App. 272, 62 So. 329. See the title CRIMINAL LAW, § 714 (7), vol. 4, p. 533.

Sufficiency of Unsworn Certificate of Appellant's Attorney.—*Clegghorn v. State*, 8 Ala. App. 272, 62 So. 329. See the title CRIMINAL LAW, § 714 (7), vol. 4, p. 533.

§ 715. — Scope and Sufficiency.

As to amendment or correction of record, see post, "Amendment or Correction," § 722. As to form and contents, see ante, "Form and Contents," § 713. As to settlement, signing, or filing, see ante, "Settlement, Signing, and Filing," § 714.

On appeal from conviction of crime, where the bill of exceptions to the court's oral charge recited that they were "duly" reserved, and that the court, after the reservation, made changes in its oral charge and continued to charge the jury, and that the exceptions were duly reserved as the charge was being given, such bill sufficiently indicated that the exceptions were taken in proper time before the jury retired and before the charge was given. *Wade v. State*, 14 Ala. App. 130, 72 So. 269.

The bill of exceptions held not to show error, not showing that a question as to witness' testimony on the preliminary hearing was answered, or what the testimony was, or that it was read in evidence, but merely that the state offered it. *Bradley v. State*, 11 Ala. App. 329, 66 So. 820.

Construction of Statement.—A statement in the bill of exceptions to the charge of the court, which did not set out the charge, that the court defined and explained to the jury the law of self-defense, means that the court correctly defined and explained that law. *Reeves v. State*, 13 Ala. App. 1, 68 So. 569.

Burden of Showing Error.—*Johnson v. State*, 8 Ala. App. 14, 62 So. 450. See the title CRIMINAL LAW, § 715, vol. 4, p. 534.

§ 716. — Effect of Failure to Make.

See post, "Affirmance," § 786.

There being no bill of exceptions and no error of reversible nature appearing in the record, judgment of conviction will be affirmed. *Henry v. State* (Ala. App.), 77 So. 969; *Abrams v. State* (Ala. App.), 75 So. 706; *Steele v. State* (Ala. App.), 75 So. 628; *Williams v. State*, 191 Ala. 672, 67 So. 981; *Davis v. State*, 11 Ala. App. 679, 66 So. 913; *Webb v. State*, 11 Ala. App. 306, 66 So. 870; *Clay v. State*, 10 Ala. App. 663, 63 So. 774.

Failure to Present within Required Time.—Where bill of exceptions has been stricken because not presented to trial judge or clerk within the time required by law and no reversible error appears in the record proper, a judgment of conviction will be affirmed. *Scott v. State* (Ala. App.), 77 So. 937.

A record proper showing a regular conviction on an indictment charging the offense for which defendant was convicted, but containing no bills of exceptions, after the expiration of the time for filing such bills, presented no error requiring reversal. *Douglas v. State*, 14 Ala. App. 663, 71 So. 614.

Where the time for presenting and signing a bill of exceptions had expired before the submission of the cause, and no reason was shown for not having the record filed, the attorney general's motion to dismiss the appeal would be granted. *Kenamer v. State*, 14 Ala. App. 665, 71 So. 981.

§ 717. — Striking Out.

Where the record does not show that the bill of exceptions was presented and signed within the time allowed by Code 1907, § 3019, the bill will be stricken on motion. *Cochran v. Anniston* (Ala. App.), 68 So. 544; *Morris v. State*, 13 Ala. App. 676, 69 So. 303; *Collins v. State*, 14 Ala. App. 54, 70 So. 995; *McOllister v. State*, 183 Ala. 8, 62 So. 767; *Conrad v. State*, 9 Ala. App. 666, 62 So. 994; *McCutcheon v. State*, 9 Ala. App. 670, 62 So. 1020.

Where time for filing bill of exceptions has passed, attorney general's motion to dismiss will be granted. *Smith v. State* (Ala. App.), 75 So. 629; *Forbus v. State* (Ala. App.), 75 So. 632.

Presented 91 Days after Judgment.—Under Code 1907, § 3019, a bill of exceptions presented 91 days after the entry of the judgment will be stricken on motion. *Johnson v. State*, 10 Ala. App. 667, 63 So. 13; *Pierce v. State*, 8 Ala. App. 359, 63 So. 33; *Harper v. State*, 13 Ala. App. 47, 69 So. 302.

Presented 92 Days after Judgment.—*Young v. State*, 8 Ala. App. 343, 62 So. 1014. See the title CRIMINAL LAW, § 717, vol. 4, p. 534.

Applicability of Code 1907, § 3020; to Bill Not Presented.—Code 1907, § 3020, declaring that appellate court may strike a bill of exceptions from the record because not signed within the time required by law, has no application when the bill is not presented within the 90 days allowed therefor. *Harper v. State*, 13 Ala. App. 47, 69 So. 302.

§ 719. Transcript or Return.

As to transmission and filing, see post, "Transmission and Filing," § 720.

Where no questions were raised as to the power of the court to try the case at the term or the lawful organization of the grand jury, the failure of the transcript on appeal to show the organization of the court at the trial term and the organization of the grand jury finding the indictment, was immaterial under Supreme Court rules (175 Ala. xxviii, 57 South. vi, 61 South. vii). *Washington v. State*, 188 Ala. 101, 66 So. 34.

Form and Contents.—Under Act Sept. 25, 1915 (Acts 1915, p. 815), as to setting out charges in the transcript, an oral charge should be set out entire in the transcript. *Chappell v. State* (Ala. App.), 73 So. 134.

Under Acts 1915, p. 815, where transcript fails to set out general charge or written charges given at request of defendant, the court will not consider refused charges. *De Bardeleben v. State* (Ala. App.), 75 So. 629.

Original Papers.—Under Supreme Court rule of practice 24 (Code 1907, p. 1511), authorizing transmission of original papers to the supreme court, the trial court may transmit an original indictment to the court of appeals for inspection. *Brown v. State* (Ala. App.), 74 So. 733.

§ 719½. Authentication and Certification.

Sufficiency.—A recital in the certificate of appeal as to the statement for appeal in substantially the words of Supreme Court rule 43 (61 South. viii) shows sufficient compliance with the rule. *Harkey v. State*, 13 Ala. App. 203, 68 So. 699.

Where the transcript contained no certificate of the clerk that it was a com-

plete transcript of all the proceedings, as required by Code 1907, § 2848, nor a certificate of its correctness, the appeal will be dismissed. *Davis v. State*, 13 Ala. App. 309, 69 So. 338.

§ 720. Transmission and Filing.

An appeal will be dismissed on failure to file the record. *Cameron v. State*, 13 Ala. App. 678, 69 So. 400.

Failure to File in Time.—Where certificate of appeal was filed February 20th and transcript had not been filed on November 25th, motion to affirm held to be granted. *Hester v. State*, 14 Ala. App. 661, 70 So. 956; *Spigner v. State*, 7 Ala. App. 659, 60 So. 737. See the title CRIMINAL LAW, § 720, vol. 4, p. 535.

Where judgment of conviction was rendered April 10, 1914, an appeal was taken April 11th, and the certificate filed April 15th, no transcript having been filed, motion at the November term, 1914, to dismiss, will be granted. *Pridgin v. State*, 13 Ala. App. 677, 69 So. 399.

Where the certificate showed that an appeal was taken a few days before it was filed and it was not perfected by the filing of a transcript, the appeal will be dismissed six months thereafter for failure to prosecute. *Mitchell v. State*, 13 Ala. App. 678, 69 So. 399.

Where a judgment of conviction was rendered at the spring term of 1914, from which defendant appealed on June 23, 1914, without filing a transcript, a motion to dismiss in June, 1915, will be granted for failure to prosecute it. *Trautwine v. State*, 13 Ala. App. 677, 69 So. 399; *Pruett v. State*, 13 Ala. App. 679, 69 So. 400.

Same — Compliance with Rules of Court.—*Campbell v. State*, 182 Ala. 18, 62 So. 57. See the title CRIMINAL LAW, § 720, vol. 4, p. 535.

Failure of clerk to file record in the court of appeals till some weeks after it was due held not to require dismissal of accused's appeal, where it was filed long before the next call of the calendar for the division to which the case belonged. *White v. State*, 12 Ala. App. 160, 68 So. 521.

One Day's Delay Due to Illness of Counsel.—A motion to dismiss for de-

lay of one day in filing transcript will be overruled, where it appears that the delay was due to serious illness of counsel for accused. *Keeble v. State*, 14 Ala. App. 31, 70 So. 971.

§ 721. Defects and Objections.

Court Not Organized Pursuant to Law.—*Bowen v. State*, 9 Ala. App. 664, 62 So. 994. See the title CRIMINAL LAW, § 721 (1), vol. 4, p. 535.

Where the record on appeal is defective for failure to show the organization of the court at the trial term and the organization of the grand jury indicting accused, his appeal from a conviction must be dismissed. *Washington v. State*, 188 Ala. 101, 66 So. 34.

§ 722. Amendment or Correction.

§ 722 (½) Power to Amend and Correct Errors.

Where a bill of exceptions allowed and signed by the trial judge is incorrect, the remedy is to reject the bill and proceed by motion in the appellate court to establish a correct one. *Collins v. State*, 14 Ala. App. 54, 70 So. 995.

§ 722 (1) Defects Amendable.

Matters Relating to Jury.—*Redman v. State*, 8 Ala. App. 408, 62 So. 992; *Ward v. State*, 8 Ala. App. 185, 62 So. 993. See the title CRIMINAL LAW, § 722 (1), vol. 4, p. 536.

§ 722 (4) Certiorari to Bring up Record.

Right to Writ.—*Clark v. State*, 8 Ala. App. 105, 62 So. 987. See the title CRIMINAL LAW, § 722 (4), vol. 4, p. 536.

Same—After Submission and Dismissal of Appeal.—*Clark v. State*, 8 Ala. App. 105, 62 So. 987. See the title CRIMINAL LAW, § 722 (4), vol. 4, p. 536.

Same — Defects Known to Defendant before Submission.—Accused is not entitled, as matter of right, on an application for rehearing, to a writ of certiorari to correct defects in the record in a criminal case, where he knew of such defects before submission of the case to the appellate court. *Cochran v. Aniston* (Ala. App.), 68 So. 544.

Compliance by Clerk.—Where certiorari issued commanding the clerk to

send up a duly authenticated copy of the judgment entry, it was not complied with by a certificate reciting a portion of the judgment entry, though that portion was the part to secure which the writ was issued. *Edmonds v. State* (Ala. App.), 75 So. 873.

§ 723. Conclusiveness and Effect.

§ 723 (1) Conclusiveness of Record in General.

When the statements in a bill of exceptions conflict with matters shown by, and properly a part of, the record proper, the latter prevails over the former. *McDaniel v. State*, 10 Ala. App. 79, 64 So. 641.

Verdict.—The recital of the verdict in the judgment is prima facie correct, though varying from the written verdict found in the papers; the regular judgment recitals importing verity, and being conclusive. *McDaniel v. State*, 10 Ala. App. 79, 64 So. 641.

§ 723 (2½) Conclusiveness of Bill of Exceptions, Case or Statement of Facts.

That a bill of exceptions concludes with the statement that all the evidence is set out is not controlling when the bill on its face shows that all the evidence is not set out. *Thornhill v. State*, 14 Ala. App. 647, 72 So. 297.

§ 724. Impeaching or Contradicting.

When a bill of exceptions is presented to the trial judge within the statutory period, as shown by the record, and is signed within such period, as appears by the record, it is a part of the record, which, as certified, imports absolute verity and can not be impeached by an affidavit. *Collins v. State*, 14 Ala. App. 54, 70 So. 995.

§ 725. Questions Presented for Review.

As to effect of striking out bill of exceptions, see ante, "Striking Out," § 717. As to necessity of bill of exceptions, see ante, "Necessity," § 712. As to presumptions as to facts or evidence not shown by record, see post, "Facts or Proceedings Not Shown by Record," § 751.

§ 726. — In General.

It is improper for persons to address

letters to the court on appeal, asking for a reversal of a case on the ground that accused had not had a square deal on his trial; they basing their assertion on mere hearsay. *Curtis v. State*, 9 Ala. App. 36, 63 So. 745.

Limitation by Scope of Record. —

Where the record contains no bill of exceptions, and the order of the judge to the clerk states that no bill was presented within the time required by law, only the record proper is presented for review. *Minden v. State*, 14 Ala. App. 662, 70 So. 196.

If the bill of exceptions was presented more than 90 days after rendition of judgment, but within 90 days from the overruling of a motion for new trial, it would only present for review the action of the court in overruling the motion for new trial, if such action were reviewable. *Ramey v. State*, 9 Ala. App. 51, 64 So. 168.

Effect of Omitting Evidence.—On certiorari, where evidence is not before this court, decision of court of appeals, reversing judgment of conviction for giving of an instruction, will not be disturbed. *Ex parte State* (Ala.), 76 So. 568.

§ 727. — Preliminary Proceedings.

Selections and Impaneling of Jury.—

The overruling of objections to the venire of jurors can not be reviewed where the record does not show that there was any evidence before the trial court of the existence of any ground stated in defendant's motion to quash. *Price v. State*, 10 Ala. App. 67, 65 So. 308.

Where record does not disclose that evidence was offered in support of defendant's motion to quash venire, or in support of his objection to overruling of motion, court of appeals will not review ruling. *McMillan v. State* (Ala. App.), 75 So. 824.

§ 728. — Indictment and Pleas.

Allowance of Amendment. — Where the judgment entry showed that defendant, in prosecution for violation of prohibition law, objected and excepted to allowance of amendment to complaint, but the amendment was not set out in the record, its allowance could not be

reviewed. *Ogden v. State* (Ala. App.), 72 So. 587.

Overruling Motion to Require Election.—The record, showing but one indictment containing only a single count, shows no error in overruling motion to require state to elect "which count * * * it would rely on for conviction." *Mason v. State* (Ala. App.), 78 So. 321.

Striking Parts of Special Pleas.—Where defendant filed special pleas on which issue was joined, but offered no evidence in support thereof, the court of appeals could not determine whether the trial court erred in striking certain parts of such pleas, where neither the record proper nor the bill of exceptions disclosed the part stricken. *Lacy v. State*, 13 Ala. App. 267, 69 So. 244, judgment affirmed in *Ex parte Lacy*, 195 Ala. 668, 70 So. 272.

Plea in Abatement.—Alleged error in failure to dispose of defendant's plea in abatement held not presented by the record containing only a recital that plea was made with no showing that it was insisted upon, and hence the matter was not reviewable. *De Wyre v. State*, 190 Ala. 1, 67 So. 577.

Former Jeopardy.—Where the motion to strike the plea of former jeopardy and the court's ruling thereon do not appear in the bill of exceptions, such ruling is not presented for review. *Savage v. State*, 12 Ala. App. 116, 68 So. 498.

Ruling on Motion to Quash Indictment.—The trial court's ruling on a motion to quash the indictment, not shown by a judgment entry set out in the record, but only by recitals contained in the bill of exceptions, can not be reviewed. *Wise v. State*, 11 Ala. App. 72, 66 So. 128.

Overruling Motion to Quash Affidavit.—Where the judgment entry showed the overruling of defendant's motion to quash an affidavit charging his violation of the prohibition law, but the record nowhere showed the grounds of the motion, no question was presented for review in such particular. *Ogden v. State* (Ala. App.), 72 So. 587.

§ 729. — Venue or Change of Venue.

Under circuit court rule 35 (175 Ala.

xxi), the circuit court would not be put in error for refusing the affirmative charge, where the record did not affirmatively show that the prosecution's failure to prove venue was brought to the court's attention before the argument was concluded, or at any time. *Jones v. State*, 13 Ala. App. 10, 68 So. 690.

§ 729½. — Continuance or Refusal Thereof.

The denial of a continuance for the absence of witnesses can not be reviewed without a showing as to what they would testify. *Brand v. State*, 13 Ala. App. 390, 69 So. 379.

§ 730. — Conduct of Trial in General.

§ 730 (1) In General.

Where the record on appeal did not show that questions to which objections were overruled were answered, there is no error reviewable by an appellate tribunal. *Gravett v. State*, 11 Ala. App. 211, 65 So. 850.

Where the record did not show that the court acted upon the motion of the state's solicitor to exclude competent evidence, there is nothing for review. *James v. State*, 12 Ala. App. 16, 67 So. 773.

§ 730 (2) Argument and Conduct of Counsel.

Error can not be predicated on limitation of arguments where the record fails to show that counsel for accused consumed the entire time allotted. *Newsom v. State* (Ala. App.), 72 So. 579, certiorari denied in *Ex parte Newsom* (Ala.), 73 So. 1001.

§ 731. — Admissibility of Evidence.

As to necessity of bill of exceptions, see ante, "Evidence," § 712 (2).

§ 731 (1) In General.

Error can not be predicated upon the asking of a question which the record fails to show was asked and objected to or excepted to. *Wilson v. State*, 195 Ala. 675, 71 So. 115.

§ 731 (2) Necessity of Setting Forth Evidence Excluded.

Paper.—Ruling of trial court excluding from evidence a paper not set out in the bill of exceptions, reciting that the

paper was offered by accused and an exception reserved to its exclusion, is not reviewable. *Farrior v. State*, 12 Ala. App. 123, 67 So. 633.

Answer to Question Objected to.—A conviction of manslaughter will not be reversed for refusal to permit defendant's witness to answer questions, where it is not shown what the answer would have been. *Randall v. State*, 14 Ala. App. 122, 72 So. 214.

Under Supreme Court rule No. 45 (61 So. ix), where solicitor objected to question to witness on cross-examination, and court sustained objection, there being no showing as to what witness would have answered, court's action was not reversible error. *Malone v. State* (Ala. App.), 76 So. 469.

Under Supreme Court rule 45 (175 Ala. xxi, 61 So. ix), prohibiting reversal, except for error probably injuriously affecting accused, accused may not complain of sustaining of objection to question asked a witness, without showing what the witness would have testified to. *Bone v. State*, 13 Ala. App. 5, 68 So. 702.

Purpose of Testimony and Expected Answer.—Rulings of the court rejecting testimony can not be reviewed when the object or the purpose of the testimony is not set out or the expected answer does not appear. *Lee v. State* (Ala. App.), 75 So. 282.

§ 731 (3) Necessity of Setting Forth Evidence Admitted.

In the absence of a showing as to what would have been the answer, the exclusion of a question to a witness can not be held erroneous. *Autrey v. State*, 190 Ala. 10, 67 So. 237.

That the overruling of an objection to a question may be complained of, it should be shown that it was answered. *McConnell v. State*, 13 Ala. App. 79, 69 So. 333; *Moore v. State*, 10 Ala. App. 179, 64 So. 520.

§ 731 (4) Necessity of Setting Forth All the Evidence.

Alleged error in excluding defendant's testimony to an exculpatory statement made by deceased to him "just after the shooting" could not be sustained, where

the bill of exceptions did not purport to set out all the evidence and did not show that the statement was part of the *res gestæ*. *Welsh v. State*, 9 Ala. App. 4, 63 So. 685.

§ 731 (5) Necessity of Setting Forth Grounds of Admissibility.

On appeal from a conviction of assault with intent to murder, held that error could not be predicated on the admission of evidence of a knife being taken from the assaulted person's pocket and given to another, where the record did not show how soon after the difficulty or how far from the place of difficulty this transaction occurred. *Keeble v. State*, 14 Ala. App. 31, 70 So. 971.

§ 731 (5½) Necessity of Showing Purpose of Evidence.

In manslaughter case, disallowance of a question, "What, if anything, did deceased say?" referring to conversation the day of the killing, could not be considered on appeal; record not showing expected answer. *Tittle v. State* (Ala. App.), 73 So. 142.

§ 732. — Sufficiency of Evidence.

§ 732 (1) In General.

Where the bill of exceptions does not purport to set out all the evidence, the court of appeals can not review the refusal of the affirmative charge. *Storey v. State*, 14 Ala. 127, 72 So. 267.

§ 732 (2) Necessity of Setting Forth All the Evidence.

Where all the evidence is not set out in the record, error can not be predicated upon refusal to give the general affirmative charge for accused, since the appellate court will presume that omitted evidence justified such refusal. *Bridgeforth v. State* (Ala. App.), 77 So. 77.

Refusal of General Charge. — On bill of exceptions on appeal from conviction for violation of prohibition law, where there was evidence of "bundles" of whiskey left by defendant with a third person, court on appeal can not say that trial court erred in refusing general charge for defendant. *Ogden v. State* (Ala. App.), 72 So. 587.

§ 732 (2½) Necessity of Recital or Certificate That All the Evidence Is Included.

In the absence of an express statement to that effect, the reviewing court will not presume that the bill of exceptions contains all the evidence. *Foot v. State*, (Ala. App.), 75 So. 728.

§ 733.—Instructions, and Failure or Refusal to Give Instructions.

As to necessity of bill of exceptions, see ante, "Instructions," § 712 (4).

§ 733 (1) In General.

Absence of Oral Charge.—Where the record contained given and refused charges requested by defendant in writing, but no bill of exceptions or the oral charges of the court, as required by Acts 1915, p. 815, the court of appeals could not review the charges refused to the defendant. *Dorough v. State*, 14 Ala. App. 110, 72 So. 208; *Mitchell v. State*, 14 Ala. App. 104, 71 So. 982.

Where transcript contained no bill of exceptions and did not set out the oral charge, court of appeals can not say whether particular written charge was covered by oral charge, or whether, from evidence particular written charge was given or refused. *Clay v. State*, 14 Ala. App. 664, 71 So. 982.

In the absence of a showing as to the connection in which the court used in its oral charge the expression "you are not bound by a preponderance of the evidence," it can not be said that the statement was improper. *Adams v. State*, 9 Ala. App. 89, 64 So. 371, certiorari denied in *Ex parte Adams*, 187 Ala. 10, 65 So. 514.

A refused affirmative charge in a criminal case not incorporated in the bill of exceptions, nor indorsed "refused" by the trial judge, as required by Code 1907, § 5364, as amended by Acts 1915, p. 815, can not be considered on appeal. *Carroll v. State* (Ala. App.), 78 So. 717.

§ 733 (3) Necessity of Setting Forth Evidence to Review Instructions Refused.

The court will not review the trial court on the refusal of charges requested by the defendant, in the absence of a bill of exceptions setting out the evidence or

some of its tendencies. *Herring v. State* (Ala. App.), 78 So. 417.

Construction of Statutes. — Although Code 1907, § 5364, makes written charges a part of the record, § 3016 by operation of law grants accused an exception to courts ruling in charges, and § 6264 makes it the duty of the court of appeals in criminal cases to review the record for error apparent thereon, in the absence of a bill of exceptions setting forth the evidence, charges refused defendant can not be reviewed; the rule not being changed by Acts 1915, p. 815, amendatory of § 5364, providing, that the charges shall be read to the jury, and providing the manner in which they are to be set out in the transcript on appeal. *Clark v. State*, 14 Ala. App. 633, 72 So. 291.

§ 733 (4) Necessity of Setting Forth Instructions Given or Refused.

No Review of Charge Not Set Out.—*Snead v. State*, 7 Ala. App. 118, 61 So. 473; *Wilson v. State*, 7 Ala. App. 134, 61 So. 471. See the title CRIMINAL LAW, § 733 (4), vol. 4, p. 544.

Where no bill of exceptions has been filed, and oral charge of court is not set out in record, refusal of requested written charges will not be reviewed. *Franklin v. State* (Ala. App.), 76 So. 476.

Refusal of instructions not in the bill of exceptions is not reviewable on appeal. *Brown v. State*, 11 Ala. App. 321, 66 So. 829.

§ 733 (5) Necessity of Showing Request.

Failure to Show Request before Jury Retired. — *Jamison v. State*, 7 Ala. App. 3, 60 So. 944. See the title CRIMINAL LAW, § 733 (5), vol. 4, p. 544.

§ 733½. — Verdict.

Findings of fact will not be reviewed, the record not containing all the evidence. *Dees v. State* (Ala. App.), 75 So. 645.

§ 734. — Grounds for New Trial.

Necessity of Setting Forth Evidence Given on Trial. — Under Gen. Acts 1915, p. 722, where substance of evidence was not reduced to writing and set out in bill of exceptions, held, action of lower court in overruling defendant's motion for new

trial will not be disturbed. *Benton v. State* (Ala. App.), 76 So. 476.

Necessity of Setting Forth Proceedings and Evidence on Motion.—It is essential to the right to review a ruling on a motion for new trial that evidence and ruling should be incorporated in bill of exceptions in view of Acts 1915, p. 722. *King v. State* (Ala. App.), 75 So. 692.

Error in overruling motion for new trial can not be reviewed, unless exception, together with evidence and ruling of the court on the motion, be incorporated in the bill of exceptions, as required by Acts 1915, p. 722. *Ross v. State* (Ala. App.), 78 So. 309.

§ 737. Matters Not Apparent of Record.

As to incorporating in bill of exceptions matters not part of record, see ante, "Effect of Incorporating Matters of Record in Bill of Exceptions," § 710 (10).

Where a fact nowhere appeared except in the brief of counsel, it could not be considered by the appellate court. *Ex parte Adams*, 187 Ala. 10, 65 So. 514, denying certiorari *Adams v. State*, 9 Ala. App. 99, 64 So. 371; *Ex parte Minto*, 187 Ala. 671, 65 So. 516.

An affidavit of defendant's counsel, attached to his brief, stating that the general affirmative charge in defendant's behalf was requested in writing, could not be considered. *Foote v. State* (Ala. App.), 75 So. 728.

(E) ASSIGNMENT OF ERRORS AND BRIEFS.

§ 738. Assignments of Error.

Necessity. — Where, on appeal from a conviction for violation of a city ordinance, appellant has failed to assign error on the record, a judgment will be affirmed. *Robertson v. Tuscaloosa* (Ala. App.), 63 So. 794.

In view of Code 1907, § 6264, held, that no assignment of errors are required in appeals in criminal cases. *McPherson v. State* (Ala.), 73 So. 387.

On appeal from conviction in circuit court for violation of city ordinance, no assignment of error having been made as required by law, motion to affirm will be granted. *Hellner v. Montgomery* (Ala. App.), 77 So. 978.

Appeal from order of court in criminal case on motion to retax costs prosecuted under provision of Code 1907, § 3684, as amended by Act March 4, 1911 (Laws 1911, p. 90), is not within purview of § 6264, and assignment of error on record is essential to present question for review. *Smitherman v. State* (Ala. App.), 78 So. 417.

§ 739. Briefs.

The defendant in a criminal prosecution was within his legal rights in objecting to each question propounded, moving to exclude each answer, and excepting to each of the rulings on such objections and motions, and objecting and excepting to various remarks of the solicitor during the closing argument, and excepting separately to numerous parts of the charge and to the refusal of requested charges, and in failing to file any brief, notwithstanding his numerous exceptions, but in such case the appellate court will not undertake to specifically pass upon each exception noted, but will content itself with a general statement of the law applicable to the case. *Brannon v. State* (Ala. App.), 76 So. 991.

(F) DISMISSAL, HEARING, AND REHEARING.

§ 740. Dismissal.

Where no question of law is reserved, jurisdiction of the appellate court does not attach, and the appeal will be dismissed. *Chandler v. State*, 12 Ala. App. 287, 68 So. 536.

Where the record or the bill of exceptions did not show any question of law reserved for review, and no statement of appeal was filed, as required by rule of practice 43 (175 Ala. xx, 61 So. viii), the jurisdiction of the court of appeals did not attach, and the bill would be dismissed. *Upshaw v. State*, 11 Ala. App. 310, 66 So. 621.

Irregularities arising from failure to comply with the rules of practice not affecting jurisdiction are waived by submission on merits. *Chandler v. State*, 12 Ala. App. 287, 68 So. 536.

Where Defendant Pleaded Guilty.—*Redman v. State*, 8 Ala. App. 408, 62 So. 992. See the title CRIMINAL LAW, § 740, vol. 4, p. 546.

Grounds of Dismissal—Failure to Prosecute. — Where a certificate of appeal was filed in April 1915, and on March 4, 1916, a motion to affirm was overruled, the case was subject to dismissal, for failure to prosecute the appeal, on April 20, 1916. *Stephens v. State*, 14 Ala. App. 666, 72 So. 268.

Same—Failure to Perfect.—Where the certificate of appeal shows a conviction and notice of appeal in November, 1915, but no further steps were taken to perfect an appeal, it was subject to dismissal on motion in May, 1916. *Martin v. State*, 14 Ala. App. 663, 71 So. 981; *Neely v. State*, 14 Ala. App. 664, 71 So. 981.

Where the certificate of appeal filed February 3, 1916, in the court of appeals, shows judgment of conviction entered against defendant November 9, 1915, and that November 20, 1915, defendant gave written notice of appeal, the case being regularly called May 18, 1916, and no further steps having been taken to perfect the appeal, it will be dismissed on motion. *Griffin v. State*, 14 Ala. App. 668, 72 So. 271.

Escape of Accused.—Where the accused escapes jail and becomes a fugitive from justice after he appeals, his appeal will be dismissed. *Belmont v. State* (Ala. App.), 78 So. 306; *Shaw v. State*, 12 Ala. App. 669, 67 So. 770.

An appeal will be dismissed where accused, pending appeal, escapes and is a fugitive from justice, and has failed to duly present bill of exceptions. *Wood v. State*, 13 Ala. App. 104, 69 So. 349.

Defendant's appeal will be dismissed for his escape, with right to a hearing by returning to custody. *Black v. State*, 12 Ala. App. 183, 67 So. 770.

§ 741. Rehearing.

Lapse of Time as Affecting Court's Power to Grant.—Where an application for a rehearing in the court of appeals was filed in time, the court did not lose its power to hear and determine the application and reconsider its judgment by reason of the lapse of more than four months between the application and the time it was ruled on. *Ex parte Adams*, 187 Ala. 10, 65 So. 514, denying certiorari *Adams v. State*, 9 Ala. App. 89, 64 So. 371; *Ex parte Minto*, 187 Ala. 671, 65 So. 516.

Matters Reviewable — No Proper Order Prescribing Venire.—*Powell v. State*, 7 Ala. App. 17, 60 So. 967. See the title CRIMINAL LAW, § 741, vol. 4, p. 547.

Same — Order Overruling Rehearing Application.—Order overruling rehearing application is subject to revision by court of appeals during remainder of term. *Adlington v. State* (Ala. App.), 77 So. 993.

Same—Improperly Signed Bill of Exceptions.—The state, inviting on original hearing rulings on questions presented by bill of exceptions, held not entitled, on application for rehearing, to object to the bill as not properly signed. *Hill v. Prattville*, 13 Ala. App. 643, 69 So. 227.

Same — Record's Failure to Show Indorsement on Indictment. — A motion for rehearing will not be granted for the failure of the record to show the indorsement on the indictment, where the court of appeals had set aside the affirmance and granted certiorari to bring up the original indictment, which showed the indorsement. *Tarrant v. State*, 12 Ala. App. 172, 67 So. 626, certiorari denied in *Ex parte Tarrant*, 191 Ala. 664, 67 So. 1018.

Same — Illegal Sentence. — Where accused did not question the legality of the sentence on appeal, and after affirmance submitted to the illegal sentence, that such sentence was partially executed would not prevent the supreme court, at the term at which the conviction was affirmed, from setting aside such affirmance and reversing the judgment as to the sentence and remanding for proper sentence. *Adams v. State*, 9 Ala. App. 89, 64 So. 371, certiorari denied in *Ex parte Adams*, 187 Ala. 10, 65 So. 514.

Same — Demurrer's Failure to Show Defect. — On appeal from conviction, that the state's brief assumed that failure of indictment to state the time of commission of the offense was raised by appellant's demurrer did not estop the state from raising, on rehearing, the point that the demurrer did not point out such defect. *Trent v. State* (Ala. App.), 73 So. 834, certiorari denied in *Ex parte Trent* (Ala.), 73 So. 1002.

(G) REVIEW.

As to review dependent upon presentation of questions by record, see ante,

"Questions Presented for Review," § 725; As to review in summary proceedings, see ante, "Review," § 144 (8).

§ 742. Scope and Extent in General

§ 742 (1) Matters or Evidence Considered.

Excluded Questions. — Where defendant did not advise the court what answer he expected to questions excluded on state's objection, the appellate court will not consider the ruling. *King v. State* (Ala. App.), 75 So. 602.

Sufficiency of indictment will not be passed on, where the evidence will not sustain a conviction under a good indictment. *Whatley v. State*, 12 Ala. App. 201, 68 So. 491.

§ 742 (2) Questions Considered in General.

Although the court might have refused to examine a plea of misnomer to the indictment because the demurrer did not sufficiently specify its insufficiency, yet, if the plea was manifestly insufficient, the appellate court would not reverse judgment below sustaining the demurrer. *Oliveri v. State*, 13 Ala. App. 348, 69 So. 359.

Improper Argument of Counsel.—On appeal from a conviction, the court, where reversal is required on other grounds, need not consider improper argument of counsel, since that would not arise on another trial. *Wilson v. State*, 195 Ala. 675, 71 So. 115.

Order Admitting Defendant to Bail.—Because of the superior opportunity possessed by the trial court of personal observation of the witnesses, an order admitting a defendant to bail will not be reversed, unless it clearly appears that the lower court has erred. *State v. Franklin*, 11 Ala. App. 230, 65 So. 421.

Same — Conflicting Evidence. — The court on appeal from an order admitting accused to bail will not reverse where the evidence is conflicting, but one phase supports the order. *State v. Chancey*, 14 Ala. App. 119, 72 So. 213.

Same — Review of Evidence. — A probate court's action in admitting one indicted for murder to bail on oral testimony will not be reversed unless contrary to the great weight of the evidence. *State v. Reeves* (Ala. App.), 72 So. 509.

§ 742 (3) Rulings on Motion for New Trial.

As to discretion of lower court, see post, "New Trial," § 762.

The ruling on motion for new trial is not reviewable. *Inglis v. State*, 13 Ala. App. 184, 68 So. 583.

Overruling of a motion for a new trial is not reviewable. *Bradley v. State*, 11 Ala. App. 329, 66 So. 820; *Bean v. State*, 10 Ala. App. 660, 64 So. 471.

Appeal Taken before Amendment of Code. — Where an appeal was taken and bill of exceptions signed before amendment of the Code to authorize appeals from ruling on motion for new trial in criminal cases, the appeal was governed by the pre-existing rule, and the court on appeal could not consider the ruling for new trial. *Sherrod v. State*, 14 Ala. App. 57, 71 So. 76.

Code 1907, § 2846, as amended by Acts 1911, p. 198, did not authorize appeal from judgment overruling motion for new trial, and on appeal and bill of exceptions containing exception only to denial of new trial the judgment will be affirmed, the appeal being perfected before Acts 1915, p. 722, allowing appeals from denial of new trial, became effective. *Trice v. State* (Ala. App.), 72 So. 601.

§ 742 (3½) Rulings as to Summoning, Impanelling, or Selection of Jury.

The failure to observe mandate of Jury Law (Gen. Acts 1909 [Sp. Sess.] pp. 318, 319) § 32, being made to appear upon the record, the error will be reviewed on appeal. *Mayo v. State* (Ala. App.), 73 So. 141.

§ 742 (3½a) Theory and Grounds of Decision in Lower Court.

Where an objection to a question was properly sustained, the court would not be put in error because the ground of objection urged was improper. *Daniel v. State*, 14 Ala. App. 63, 71 So. 79.

§ 743. Parties Entitled to Allege Error.

§ 744. — In General.

Motion to exclude an answer merely because not responsive can only be availed of by the interrogator. *Borok v. Birmingham*, 191 Ala. 75, 67 So. 389.

§ 745. — Estoppel.**§ 745 (2) Instructions.**

Requests for Inconsistent Instructions.—*Livingston v. State*, 7 Ala. App. 43, 61 So. 54, judgment reversed in *Ex parte State*, 181 Ala. 4, 61 So. 53. See the title CRIMINAL LAW, § 745 (2), vol. 4, p. 548.

That the court's refusal to give a general charge for defendant as to the third count of the indictment was inconsistent with the erroneous giving of defendant's requested general charge as to the first count was not error of which he could complain on appeal. *Brannon v. State*, 191 Ala. 29, 67 So. 1007.

Withdrawing Charge at Defendant's Request—Invited Error.—In prosecution for murder, any error in court's withdrawing charge on murder in second degree, requested by defendant and later objected to by him, held error invited by defendant. *Day v. State (Ala.)*, 74 So. 352.

Request for General Charge.—A defendant can not complain on appeal of a general charge in his favor as to one count of the indictment, where such charge has been given on his written request. *Brannon v. State*, 191 Ala. 29, 67 So. 1007.

Where defendant requested the general charge as to one count of an indictment charging vagrancy, which was given, he could not thereafter assign such action of the court as reversible error. *Brannon v. State*, 12 Ala. App. 189, 67 So. 634, certiorari denied in 67 So. 1007.

§ 745 (3) Admission of Evidence.

Accused can not complain of admission of testimony where he himself testifies to same facts. *Carter v. State (Ala. App.)*, 76 So. 468.

Defendant can not complain of the admission of improper evidence where he himself testified to the same facts. *Coplon v. State (Ala. App.)*, 73 So. 225, certiorari denied in 74 So. 1005.

§ 745 (4) Exclusion of Evidence.

In a prosecution for crime, defendant, who rejected court's offer to permit him to make proof of offer of restitution, after proper predicate had been laid,

can not complain of original exclusion of the evidence. *Spinks v. State*, 14 Ala. App. 75, 71 So. 623.

§ 745 (5) Conduct of Trial.

Elimination of Juror on Defendant's Request.—*Bone v. State*, 8 Ala. App. 59, 62 So. 455. See the title CRIMINAL LAW, § 745 (5), vol. 4, p. 548.

§ 746. Amendments.

Where no objection was made to an amended affidavit because not reverified, any defect will be considered cured under Code 1907, § 6723, providing that all amendable defects shall be considered amended upon appeal. *Nelson v. State (Ala. App.)*, 72 So. 510, certiorari denied in *Ex parte Nelson (Ala.)*, 73 So. 1001.

§ 747. Additional Proofs and Trial De Novo.

Refusal of Change of Venue.—*Godau v. State*, 179 Ala. 27, 60 So. 908. See the title CRIMINAL LAW, § 747, vol. 4, p. 549.

§ 748. Presumptions.

As to prejudicial effect of error, see post, "Presumptions as to Effect of Error," § 769.

§ 749. — In General.**§ 749 (1) In General.**

Ruling of Trial Court.—The court will indulge in favor of the ruling of the trial court all legitimate and fair presumptions. *Farrior v. State*, 12 Ala. App. 123, 67 So. 633.

Every reasonable presumption will be indulged in favor of the correctness of the trial court's ruling, and the presumption prevails unless overturned by affirmative showing to the contrary. *Diamond v. State (Ala. App.)*, 72 So. 558, certiorari denied in *Ex parte State (Ala.)*, 73 So. 1002.

Finding of Fact by Court—Construction of Statute.—Acts 1915, p. 939, forbidding, on review of the finding of fact of a judge sitting without a jury, any presumption in favor of the correctness of such findings, applies only where the opportunities of the appellate court are the same as that of the trial court, and the evidence is by deposition. *Ross v.*

State (Ala. App.), 72 So. 759, writ of certiorari denied in 73 So. 1001.

When the trial is by court, and the testimony is given ore tenus, the judgment will not be disturbed unless plainly contrary to the weight of evidence, notwithstanding the act creating the court provides that on appeal such judgment must be reviewed without any presumption in favor of the findings of the trial court. *Mulligan v. State* (Ala. App.), 72 So. 761, writ of certiorari denied in 73 So. 1001.

§ 749 (2) Burden of Showing Error.

The burden is on the convicted defendant to affirmatively show error. *Diamond v. State* (Ala. App.), 72 So. 558, certiorari denied in *Ex parte State* (Ala.), 73 So. 1002; *Ex parte State*, 181 Ala. 4, 61 So. 53, reversing judgment *Livingston v. State*, 7 Ala. App. 43, 61 So. 54.

Quasi Confession or Declaration against Interest.—On appeal, the burden is on the defendant to affirmatively show that his quasi confession or declaration against interest was received in evidence without a showing that it was voluntary. *Allsup v. State* (Ala. App.), 72 So. 599.

Rejection of Evidence.—Party taking a bill of exceptions to rejection of evidence must affirmatively show error to his prejudice, or the case will not be reversed. *Randall v. State*, 14 Ala. App. 122, 72 So. 214.

Laying Proper Predicate for Admission of Evidence.—*Ex parte State*, 181 Ala. 4, 61 So. 53, reversing judgment *Livingston v. State*, 7 Ala. App. 43, 61 So. 54. See the title CRIMINAL LAW, § 749 (2), vol. 4, p. 550.

§ 750. — Matters Shown by Record.

See post, "Facts or Proceedings Not Shown by Record," § 751.

Instructions.—On appeal the court must presume that the original instruction given was as shown by the record. *Harold v. State*, 12 Ala. App. 74, 67 So. 761.

Presumptions against Record.—*Edgar v. State*, 183 Ala. 36, 62 So. 800. See the title CRIMINAL LAW, § 750, vol. 4, p. 550.

§ 751. — Facts or Proceedings Not Shown by Record.

§ 751 (1) Complaint, Warrant, and Preliminary Examination.

The record not showing the contrary, it may be presumed that the complaint on which defendant was tried was but an amendment of the original one, allowed, as is permissible, in the law and equity court, after the case was brought into it by appeal. *Wiley v. State*, 10 Ala. App. 249, 65 So. 204.

§ 751 (2) Organization and Proceedings of Grand Jury.

Signing of Indictment by Special Solicitor.—*Brigman v. State*, 8 Ala. App. 400, 62 So. 980. See the title CRIMINAL LAW, § 751 (2), vol. 4, p. 550.

§ 751 (4) Arraignment and Pleas.

A plea in abatement to an indictment is abandoned, where the record does not show any action of the trial court thereon. *Boyd v. State*, 12 Ala. App. 152, 67 So. 806.

Former Jeopardy.—If from the condition of the record, the bill of exceptions can not be looked to, to explain the entire conduct of the cause, it may be presumed from the judgment entry, showing only joinder on plea of not guilty, that issue was not joined on the plea of former jeopardy. *Toney v. State* (Ala. App.), 72 So. 508.

Violating Municipal Ordinance.—Where record of prosecution for violating municipal ordinance showed no ruling on defendant's demurrer to complaint, it will be presumed that demurrer was not insisted upon. *Robertson v. Montgomery* (Ala.), 77 So. 724.

§ 751 (6) Selection and Impanelling of Jury.

Sufficiency of Oath.—The judgment entry reciting: "Came a jury * * * who on their oath say," it will be presumed they were properly sworn, the record not showing the contrary, or objection of insufficient oath. *Terry v. State*, 13 Ala. App. 115, 69 So. 370.

Grounds of Challenge to Juror.—*Bone v. State*, 8 Ala. App. 59, 62 So. 455. See the title CRIMINAL LAW, § 751 (6), vol. 4, p. 553.

§ 751 (7) Preliminary Proceedings.

Where the bill of exceptions recited that the written demand for a jury was dated but not marked or indorsed "filed" by the clerk, it will be presumed that the demand was not seasonably filed, as required by Acts 1886-87, p. 838, § 13. *Davenport v. State* (Ala. App.), 73 So. 209.

§ 751 (8) Conduct of Trial in General.

Waiver of Severance.—*Graves v. State*, 178 Ala. 1, 59 So. 584. See the title CRIMINAL LAW, § 751 (8), vol. 4, p. 554.

Where record is silent as to severance of trial of defendants jointly indicted, it is presumed the trial court acted properly. *Palmer v. State* (Ala. App.), 73 So. 139, certiorari denied in 73 So. 1001.

That Jury Heard All Evidence.—Unless record shows to contrary, appellate court will presume that jury heard all evidence in case. *Hendley v. State* (Ala.), 76 So. 904.

Counsel's Argument within Evidence.—Where the record does not contain all the evidence, it will be presumed that counsel's argument was within the evidence. *Roden v. State* (Ala. App.), 72 So. 605.

Accused's Testimony Submitted Attached to Other Witnesses.—Where the record recited that accused's testimony at the former trial was submitted to the jury bound together with that of several other witnesses, held not reversible error, since the record does not affirmatively show that the other testimony was taken to the jury room. *Dennison v. State* (Ala. App.), 72 So. 589.

§ 751 (10) Reception of Evidence.

§ 751 (10a) In General.

Other Evidence Rendering Evidence Objected to Admissible.—Where the bill of exceptions sets out only some of the evidence, if evidence objected to is such as may be competent in connection with other evidence, it will be presumed that the other evidence rendered it admissible. *Dickey v. State* (Ala. App.), 72 So. 608, certiorari denied in 73 So. 72; *Roden v. State* (Ala. App.), 72 So. 605.

Answer Responsive to Question.—*Feagin v. State*, 7 Ala. App. 101, 61 So.

464. See the title CRIMINAL LAW, § 751 (10a), vol. 4, pp. 554, 555.

Answer Responsive to Question.—*Allen v. State*, 8 Ala. App. 228, 62 So. 971. See the title CRIMINAL LAW, § 751 (10a), vol. 4, p. 555.

Where no objection was made to questions asked a witness, but only to the answers, it will be presumed that the answers were responsive, and the objections are too late. *Finney v. State*, 10 Ala. App. 39, 65 So. 93.

The introduction of a letter against objection by defendant will on appeal be presumed proper, where neither the letter nor its contents, are included in the transcript. *Bufford v. State*, 14 Ala. App. 69, 71 So. 614.

Laying Predicate.—Where the record did not affirmatively show no proper predicate for the admission of testimony was laid, it will, on appeal, be presumed that the predicate was sufficient. *Doby v. State* (Ala. App.), 74 So. 724.

Bill of exceptions complaining of admission of impeaching evidence held not to show affirmatively that the trial court erred in failing to require a proper predicate to be laid, and it would be presumed that the court did its duty. *Phillips v. State*, 11 Ala. App. 168, 65 So. 673.

Same—Reputation.—In the absence of a showing that a bill of exceptions set out all the evidence, it will be assumed that sufficient foundation was laid for admission of testimony as to reputation. *Thornhill v. State*, 14 Ala. App. 647, 72 So. 297.

Same—Good Character.—It will be presumed, in favor of a ruling allowing a witness to testify to the good character of an assaulted party, that the witness testified to facts showing knowledge thereof, justifying his refusal to grant the motion to exclude the evidence, for which no ground was stated. *McDaniel v. State*, 10 Ala. App. 79, 64 So. 641.

Same—Absent Witness.—Every reasonable presumption is indulged in favor of finding on question of admissibility of evidence as predicate for admission of testimony of absent witness on former trial. *Hardaman v. State* (Ala. App.), 78 So. 324.

Showing for Absent Witness.—Where the bill of exceptions did not show that the whole of the showing for one of the absent witnesses was excluded, it must be presumed on appeal that the admissible portions were received. *Autrey v. State*, 190 Ala. 10, 67 So. 237.

Rape—Delay in Making Complaint.—In a prosecution for rape, in support of the admission of evidence of complaints by the girl ravished, it will be presumed that the delay in making complaint was explained. *Beiser v. State*, 10 Ala. App. 86, 65 So. 312.

Inference from Quantity Liquor Was for Sale.—Upon appeal from a conviction for a violation of the prohibition law, where it appeared that two suit cases filled with bottles of gin and whisky were exhibited to the jury, it will be presumed that the quantity of prohibited liquor was so great as to warrant an inference that accused who had it in his possession on a train, and procured the porter thereon to deliver it to a third person who was engaged to take it to his home, had it for sale, barter, or exchange. *Foshee v. State*, 9 Ala. App. 76, 63 So. 753.

§ 751 (10b) Admissions and Confessions.

Proper Predicate Laid.—On appeal from conviction of crime, unless the record affirmatively shows that the trial court, before permitting defendant's inculpatory statements to be shown, did not ascertain that they were voluntary, the presumption will be indulged that a proper predicate was laid for the admission of the evidence. *Cauley v. State*, 14 Ala. App. 133, 72 So. 271; *Moye v. State*, 12 Ala. App. 127, 67 So. 716; *Fortner v. State*, 12 Ala. App. 179, 67 So. 720; *Wasserleben v. State*, 184 Ala. 2, 63 So. 520.

§ 751 (10c) Competency of Witnesses.

Predicate for Impeaching Evidence.—Ex parte *State*, 181 Ala. 4, 61 So. 53, reversing judgment *Livingston v. State*, 7 Ala. App. 43, 61 So. 54. See the title CRIMINAL LAW, § 751 (10c), vol. 4, p. 556.

§ 751 (11) Sufficiency of Evidence.

Where bill of exceptions does not purport to set out all evidence, it will be presumed that there was evidence to

sustain the court's ruling. *Dennis v. State* (Ala. App.), 75 So. 707.

Inference Whisky Kept for Unlawful Purpose from Quantity.—On record court of appeals held bound to indulge presumption in favor of trial court's rulings that the "bundles" of whisky delivered by defendant contained sufficient quantity to afford inference that liquors were kept for an unlawful purpose. *Ogden v. State* (Ala. App.), 72 So. 587.

Predicate for Omission of Absent Witness' Former Testimony.—The trial court's ruling that the evidence sufficiently showed that a witness for the state could not be found to render admissible his former testimony will not be reversed unless the evidence in connection with the presumption in favor thereof is insufficient. *Harwell v. State*, 12 Ala. App. 265, 68 So. 500.

§ 751 (12) Instructions.

Although the record shows that written charges given at defendant's request can not be found, it can not thereupon be presumed that other written charges refused him were refused for the reason that they were embodied in those already given. *Diamond v. State* (Ala. App.), 72 So. 558, certiorari denied in Ex parte *State* (Ala.), 73 So. 1002.

Propriety of Charge.—Since the whole charge must be construed together, where a mere passage is excepted to and the remainder is omitted, the appellate court must presume that the charge was proper. *Culliver v. State* (Ala. App.), 73 So. 556.

Request for Charges.—*Staton v. State*, 8 Ala. App. 221, 62 So. 387; *Patterson v. State*, 8 Ala. App. 420, 62 So. 1023. See the title CRIMINAL LAW, § 751 (12), vol. 4, p. 557.

All reasonable inferences are to be presumed in favor of the trial court in refusing instructions, where the bill of exceptions does not pretend to set out all the evidence. *Boice v. State*, 10 Ala. App. 100, 65 So. 83.

When the bill of exceptions nowhere shows that refused requests were requested before the jury retired, it will be presumed that the requests, if good, were refused because not requested be-

fore the jury retired. *Morgan v. State*, 8 Ala. App. 172, 63 So. 21.

Failure to State Exceptions Mitigating Offense.—Where the bill of exceptions sets out only an excerpt of the oral charge, it will not be presumed that the court in portions of the charge not set out failed to state exceptions that might mitigate or justify the offense. *Scott v. State* (Ala. App.), 73 So. 212.

Order of Giving Instructions. — *Livingston v. State*, 7 Ala. App. 43, 61 So. 54, judgment reversed in 181 Ala. 4, 61 So. 53. See the title CRIMINAL LAW, § 751 (12), vol. 4, p. 557.

§ 751 (13) Verdict.

It will not be assumed that the verdict was rested on any act of which there was no evidence. *Borok v. Birmingham*, 191 Ala. 75, 67 So. 389.

§ 751 (14½) New Trial and Arrest of Judgment.

Where nothing in the record shows time of making motion in arrest of judgment or the disposition made of such judgment, error will not be presumed; the same not being affirmatively shown. *Moran v. State* (Ala. App.), 75 So. 748.

§ 751 (15) Proceedings for Review.

Exceptions Not Reserved within Proper Time.—On appeal from conviction of crime, where the bill of exceptions does not recite when the exceptions to the court's oral charge were reserved, it will be presumed that the exceptions were not reserved within the proper time and can not be considered; since it must be made to appear that exceptions to such charges were duly reserved before the jury retired, justifying a holding putting the trial court in error. *Wade v. State*, 14 Ala. App. 130, 72 So. 269.

Failure to File Written Request for Appeal.—Failure of the record to be before the court of appeals held presumed to be due to defendant's negligence in failing to file a written request for an appeal, the certificate of appeal failing to show such filing with the trial clerk, so that the appeal would be dismissed. *Anderson v. State*, 13 Ala. App. 677, 69 So. 398.

Defendant's failure to file with the

trial clerk written request for appeal from conviction of crime required by Supreme Court rule 43 (175 Ala. xx, 61 So. viii), held to be presumed to be the cause of the delay until the second call of the division in getting before the court of appeals the certificate of appeal and transcript, and the appeal would be dismissed. *Kelly v. State*, 13 Ala. App. 677, 69 So. 398.

§ 752. Discretion of Lower Court.

As to review of decisions of intermediate courts, see post, "Decisions of Intermediate Courts," § 785. As to review on summary prosecutions, see ante, "Review," § 144 (8).

§ 753. — In General.

Reviewability When Not Exceeding Authority.—*Dunn v. State*, 8 Ala. App. 382, 62 So. 379. See the title CRIMINAL LAW, § 753, vol. 4, p. 558.

§ 754. — Preliminary Proceedings.

Refusal of the trial court to suspend the trial and submit to the jury an inquisition as to defendant's insanity at the time of the trial, as provided by Code 1907, § 7178, held not revisable on appeal. *Rohn v. State*, 186 Ala. 5, 65 So. 42.

§ 755. — Amendments and Rulings as to Indictment or Pleas.

Refusal to Quash Indictment. — The refusal of a trial court to quash an indictment is not ordinarily reversible on appeal, being a matter addressed to the sound discretion of the court. *Clark v. State*, 14 Ala. App. 683, 72 So. 291; *Fealy v. Birmingham* (Ala. App.), 73 So. 296.

The ruling on a motion to quash an indictment is not reviewable, unless an abuse of discretion appears; it being within the discretion of the trial court to put the defendant to a demurrer or plea in abatement to the indictment, a ruling on which may be reviewed. *Smith v. State* (Ala. App.), 73 So. 824; *Canto v. State* (Ala. App.), 73 So. 826.

Where motion to quash the indictment on the ground that an attorney employed to assist the prosecution made improper statements to the grand jury was not made until after defendant had been arraigned and had pleaded the trial court's discretion in overruling the same

will not be reviewed. *Wise v. State*, 11 Ala. App. 72, 66 So. 128.

Compelling Election.—The discretion of the trial court as to compelling election in misdemeanor cases is judicial and reviewable on appeal. *Ex parte State*, 197 Ala. 419, 73 So. 35, denying certiorari *Brooms v. State* (Ala. App.), 72 So. 691.

Refusal to Enforce Solicitor's Agreement to Nolle Pros.—Under Code 1907, § 7159, providing that no nolle pros. can be taken without the trial court's consent, its refusal to enforce the solicitor's agreement to nolle pros. could not be reviewed. *Lacy v. State*, 13 Ala. App. 267, 69 So. 244, judgment affirmed in *Ex parte Lacy*, 195 Ala. 668, 70 So. 272.

Refusal to Allow Pleading "Insanity" after Prescribed Time.—The action of the trial court in refusing to allow additional pleas to be filed after the time prescribed by law is not revisable on appeal, and there is no exception in favor of a plea of "not guilty by reason of insanity," not interposed at the time of arraignment, as required by Code 1907, § 7176. *Rohn v. State*, 186 Ala. 5, 65 So. 42.

§ 757. — Continuance.

The granting or refusing of a continuance in the court's discretion will not be reviewed, unless gross abuse appears. *Brand v. State*, 13 Ala. 390, 69 So. 379; *Davenport v. State* (Ala. App.), 73 So. 209; *Brown v. Tuscaloosa*, 12 Ala. App. 608, 67 So. 780; *Curtis v. State*, 8 Ala. App. 36, 63 So. 745.

§ 758. — Conduct of Trial in General.

Suspending Trial for Absent Witness.—Action of the court in suspending the trial to enable the state to produce witnesses is not reviewable except for gross abuse of discretion. *Stokes v. State*, 13 Ala. App. 294, 69 So. 303.

Motion for Recess.—*Key v. State*, 8 Ala. App. 2, 62 So. 335. See the title CRIMINAL LAW, § 758 (1), vol. 4, p. 560.

§ 759. — Reception of Evidence.

§ 759 (1) In General.

See ante, "Necessity of Previous Objection," § 461 (3).

§ 759 (3) Competency of Witnesses.

The competency of a witness to testify to the sanity or insanity of accused rests largely in the discretion of the trial court; but, where it falls into such error as amounts to a clear abuse of discretion, a reversal will be ordered by the court on appeal. *Woods v. State*, 186 Ala. 29, 65 So. 342.

Competency of Nonexpert—Insanity.—*Jones v. State*, 181 Ala. 63, 61 So. 434. See the title CRIMINAL LAW, § 759 (2), vol. 4, p. 561.

§ 759 (3) Order of Proof.

It is discretionary with the trial court to permit the introduction of the ordinance violated after proof of its breach, and such action is not reviewable. *Roe v. Tuscaloosa*, 12 Ala. App. 614, 67 So. 845.

§ 759 (4) Examination of Witnesses.

Extent of Examination.—The discretion of the court as to extent of examination will not be reviewed unless abused. *Harbin v. State* (Ala. App.), 73 So. 594.

Leading Questions.—That the trial court permitted leading questions is not ground for reversal unless discretion was abused. *Thomas v. State*, 11 Ala. App. 85, 65 So. 863.

Cross-Examination.—In prosecution for larceny, solicitor's cross-examination of defendant's witness by asking, "You are sure you are not lying to the jury about this matter, are you?" to which the witness answered, "No, sir," held not such an abuse of the trial court's discretion as to require reversal. *Evans v. State* (Ala. App.), 73 So. 562, certiorari denied in 73 So. 999.

Same—Scope to Test Accuracy or Show Bias.—The scope of the cross-examination of witnesses as to irrelevant matters to test the accuracy of their testimony or show bias is a matter largely within the enlightened discretion of the trial court and will not be interfered with unless abused. *Allsup v. State* (Ala. App.), 72 So. 599.

The trial court's discretion regarding scope of cross-examination touching the sincerity, bias, etc., of a witness is not reviewable, unless a clear abuse result-

ing in injury to the complaining party is shown. *Smith v. State* (Ala. App.), 72 So. 593.

Recalling Witness after Closing Case.—It is within sound discretion of trial court whether it will allow defendant to examine witness after evidence has closed, and reversal will not be ordered for refusal unless discretion is abused. *Flowers v. State* (Ala. App.), 73 So. 126.

Same—To Prove Venue.—The discretion of the trial court in permitting the state, after closing its case, to recall a witness and re-examine her as to whether the offense was committed within the court's jurisdiction was not reviewable on appeal. *Boice v. State*, 10 Ala. App. 100, 65 So. 83.

Expert Witnesses—Range of Examination.—In examination of expert witnesses, the range of the examination is largely within the discretion of the trial court, which in the absence of prejudice will not be revised. *Wilson v. State*, 195 Ala. 675, 71 So. 115.

§ 759 (5) Separation and Exclusion of Witnesses.

The exercise of the discretion of trial court in permitting a witness, who was put under the rule, to testify, notwithstanding the disobedience of the rule, can not be reviewed. *Ward v. State* (Ala. App.), 72 So. 754; *Moore v. State*, 12 Ala. App. 243, 67 So. 789.

§ 762. — New Trial.

§ 762 (1) In General

The court of appeals will not review the action of the trial court in overruling a motion for a new trial in a criminal case. *Bails v. State*, 13 Ala. App. 273, 69 So. 250; *Merrill v. State*, 11 Ala. App. 224, 65 So. 709; *Pryor v. State*, 186 Ala. 27, 65 So. 331; *Ramey v. State*, 9 Ala. App. 51, 64 So. 168; *Finley v. State*, 7 Ala. App. 161, 62 So. 265.

Prior to Acts 1915, p. 722, a motion for a new trial in a criminal case was a matter to be determined by the trial court, and was entirely within its discretion. *Suttles v. State* (Ala. App.), 74 So. 400.

Where a trial and appeal were had before amendment of Code 1907, § 2846, by Laws 1915, p. 722, authorizing appeals from rulings on motions for new

trial in criminal cases, refusal of motion for new trial will not be reviewed. *Watson v. State* (Ala. App.), 72 So. 569.

§ 762 (3) Newly Discovered Evidence.

Reviewability. — *Aaron v. State*, 181 Ala. 1, 61 So. 812. See the title CRIMINAL LAW, § 762 (3) vol. 4, p. 563.

§ 763. Questions of Fact, Verdicts, and Findings.

See ante, "Discretion of Lower Court," § 752. As to review of decisions of intermediate courts, see post, "Decisions of Intermediate Courts," § 785. As to summary proceedings, see ante, "Review," § 144 (8).

§ 764. — In General.

§ 764 (1) Power or Duty to Review in General.

The rule that the primary tribunal's findings on the facts are not reviewable on written record unless clearly erroneous applies to appeals from the Pike law court, although Loc. Acts 1888-89, p. 634, § 15, Loc. Acts 1890-91, p. 392, § 3, Loc. Acts 1903, p. 335, § 6, establishing that court provide that no presumption in favor of the finding of the court shall obtain. *Robinson v. State* (Ala. App.), 72 So. 592.

Refusal to Enforce Production under Subpoena Duces Tecum. — In a prosecution for assault with intent to murder, the trial court's refusal to grant a motion directing one who had refused to obey a subpoena duces tecum to produce the clothes mentioned therein, where the evidence as to his possession thereof was conflicting, held not reviewable. *Robbins v. State*, 13 Ala. App. 167, 69 So. 287.

§ 764 (2) Conclusiveness of Findings on Preliminary Proceedings in Conduct of Trial in General.

On appeal from a judgment on facts specially found by the court as required by Code 1907, § 5360, the only matter open for the review is whether a proper judgment was rendered on the facts as found. *Wilson v. State*, 10 Ala. App. 158, 64 So. 510.

Under Loc. Acts 1907, pp. 82, 83, conferring the right of appeal generally from any judgment of an inferior court, where the circuit judge was warranted in finding that accused claimed an appeal from an

inferior court, he was not required to further find that the judgment was entered on a plea of guilty so as to cut off the right of appeal. *State v. Thomas*, 9 Ala. App. 1, 63 So. 688.

§ 764 (4) Reception of Evidence.

Where the evidence is conflicting and the court adjudges a confession voluntary and admissible, its finding is entitled to great weight, and will not be disturbed unless palpably contrary to the weight of evidence. *Cook v. State* (Ala. App.), 78 So. 306.

§ 765. — Conclusiveness of Verdict.

§ 765 (1) In General.

Perjury — Corroboration of Single Witness. — Where accused took the stand and there was some evidence corroborating a single witness as to his perjury, the jury's verdict will not be disturbed. *McDaniel v. State*, 13 Ala. App. 318, 69 So. 351, certiorari denied in *Ex parte McDaniel*, 13 Ala. 678, 69 So. 1018, cited in note in *L. R. A.* 1917B, 743.

Where Judges Would Arrive at Different Conclusion. — *Brooks v. State*, 8 Ala. App. 277, 62 So. 569. See the title CRIMINAL LAW, § 765 (1), vol. 4, p. 564.

§ 765 (2) Weight of Evidence in General.

The jury in the trial court are the exclusive judges of the credibility of the evidence. *Reeves v. State*, 186 Ala. 14, 65 So. 160.

Where evidence in support of a conviction is so unsatisfactory as to convince the appellate court that it is unjust, it will be set aside. *Hines v. State* (Ala.), 73 So. 428.

Misdemeanors Tried without Jury.

Under Acts 1915, p. 940, § 3, forbidding any presumption on appeal in favor of the judgment or conclusions of the court in misdemeanor cases tried without jury, the judgment in such case will not be disturbed unless the facts are clearly and palpably insufficient to sustain it. *Daniel v. State*, 14 Ala. App. 97, 71 So. 976.

§ 765 (3) Conflicting Evidence.

Where the evidence is conflicting, and that offered by the state, if believed, is sufficient to support a judgment for conviction, the judgment will not be disturbed

on appeal. *Kelly v. State* (Ala. App.), 78 So. 644.

Where the evidence was conflicting, but there was ample evidence to sustain the conviction, the credibility and the weight of the evidence were questions for the jury. *Brooks v. State* (Ala. App.), 74 So. 85.

§ 766. — Approval of Verdict by Trial Court.

The court has no authority to review the overruling of a motion for new trial in a criminal case. *Curtis v. State*, 9 Ala. App. 36, 63 So. 745.

Where there was evidence tending to prove defendant's guilt, denial of his motion for new trial will not be disturbed. *Williams v. State* (Ala. App.), 75 So. 703.

§ 767. Harmless Error.

As to grounds for reversal in general, see post, "In General," § 790.

§ 769. — Presumption as to Effect of Error.

§ 769 (1) In General.

Burden of Proof. — *Smith v. State*, 183 Ala. 10, 62 So. 864. See the title CRIMINAL LAW, § 709 (1), vol. 4, p. 566.

Burden is on appellant to affirmatively show error. *Rogers v. State* (Ala. App.), 75 So. 364.

Accused must, under Supreme Court Practice, rule 45 (175 Ala. xxi, 61 So. viii), affirmatively show that error complained of probably injuriously affected his substantial rights. *Chandler v. State*, 12 Ala. App. 287, 68 So. 536.

Error Shown — Burden to Show Accused Not Injured. — *Smith v. State*, 183 Ala. 10, 62 So. 864. See the title CRIMINAL LAW, § 769 (1) vol. 4, p. 565.

§ 769 (3) Rulings as to Evidence.

Prejudicial Error. — *Watson v. State*, 8 Ala. App. 414, 62 So. 997. See the title CRIMINAL LAW, § 769 (3), vol. 4, p. 566.

§ 772. — Preliminary Proceedings.

Error in striking the defendant's plea of not guilty is harmless, where the record shows elsewhere that he entered such a plea, and that the question of his guilt was submitted to the jury. *McGay v. State*, 182 Ala. 41, 63 So. 70.

Failure to give the notice of a special term of court as required by Code 1907, § 3253, is not prejudicial error, where a defendant indicted for violating the prohibition law appeared and failed to show injury. *Shiver v. State*, 13 Ala. App. 258, 69 So. 238.

§ 773. — Conduct of Trial in General.

§ 733 (2) Drawing and Summoning Jury.

Error in Sheriff's Return. — *Perry v. State*, 177 Ala. 1, 59 So. 150. See the title CRIMINAL LAW, § 773 (2), vol. 4, p. 568.

Error in Giving Defendant Special Venire. — Where defendant was acquitted of murder in the first degree, and convicted of murder in the second degree, and on reversal it was properly recorded as a capital case until defendant interposed plea of former jeopardy, after which it was not a capital case, and he was not entitled to a special venire, error in giving him the special venire from which to select the jury was harmless under rule of Supreme Court No. 45 (175 Ala. xxi, 61 So. ix). *De Wyre v. State*, 190 Ala. 1, 67 So. 577.

§ 773 (3) Impaneling Jury in General.

Defendant held not prejudiced by the jury not being examined as to opinion against capital punishment or conviction on circumstantial evidence. *Terry v. State*, 13 Ala. App. 115, 69 So. 370.

Failure to Examine Jurors Separately on Voir Dire. — *Bowen v. State*, 8 Ala. App. 103, 62 So. 1022. See the title CRIMINAL LAW, § 773 (3), vol. 4, p. 569.

Challenges. — *Bone v. State*, 8 Ala. App. 59, 62 So. 455, cited in note in 47 L. R. A., N. S., 717; *White v. State*, 8 Ala. App. 43, 62 So. 454, cited in note in 47 L. R. A., N. S., 717. See the title CRIMINAL LAW, § 773 (3), vol. 4, p. 569.

§ 773 (5) Remarks of Judge.

In prosecution for murder, opening remark in charge, to effect that it was the first time in history of court that written charge had been requested, Code 1907, § 5363, giving parties the right to insist on a written charge, held reversible error, being a reflection on defense. *Moulton v. State* (Ala.), 74 So. 454.

§ 773 (6) Conversations between Judge and Attorney.

Where the record did not show that accused was deprived of any rights when his counsel was commanded by the court to take his seat, but on the contrary disclosed that counsel continued to insist on his contention, the action of the court, if improper, was harmless. *Doby v. State* (Ala. App.), 74 So. 724.

§ 774. — Rulings as to Indictment or Pleas.

§ 774 (1) Rulings on Indictment or Information Containing Several Counts.

In a prosecution for violation of prohibition law in keeping prohibited liquors for sale, where court limited the jury to consideration of sole question as to why defendant kept such liquors, other counts in complaint as to amount of such liquors not considered at trial held not prejudicial. *Cunningham v. State* (Ala. App.), 74 So. 747.

Overruling Demurrer. — Error, if any, in overruling a demurrer to certain counts was without injury, where the defendant was convicted upon another sufficient count. *Posey v. State*, 12 Ala. App. 193, 67 So. 737.

Jurisdictional Error. — Where the only count in the indictment which will support the judgment is defective, the doctrine of error without injury is inapplicable; the error being jurisdictional. *Noah v. State* (Ala. App.), 72 So. 611.

§ 774 (2) Motion to Quash or Strike Out.

Eliminating by striking one of the offenses charged in an affidavit in the alternative did not prejudice defendant. *Nelson v. State* (Ala. App.), 72 So. 510, certiorari denied in Ex parte Nelson (Ala.), 73 So. 1001.

Under rule 45 (175 Ala. xxi, 61 So. ix), the mere fact that a plea was erroneously disposed of on motion to strike rather than on demurrer, is insufficient to require reversal if no substantial right of the defendant was probably injuriously affected. *Sherrod v. State*, 14 Ala. App. 57, 71 So. 76.

§ 774 (4) Plea or Demurrer.

Sustaining or Overruling Demurrer. — Error, if any, in overruling a demurrer

to a count of an indictment was rendered harmless by a nol. pros., even though not taken until the jury were impaneled and the trial entered upon. *Norman v. State*, 13 Ala. App. 337, 69 So. 362.

Any error in overruling a demurrer to several counts was error without injury where the court subsequently gave defendant the affirmative charge as to each of those counts. *Hancock v. State*, 14 Ala. App. 91, 71 So. 973.

Where accused was tried and convicted solely on the first count of the affidavit, error in overruling a demurrer to the second count was harmless. *Rash v. State*, 13 Ala. App. 262, 69 So. 239.

Errors in rulings on demurrers to a complaint are harmless, where counts demurred to are afterwards eliminated on a plea of autrefois acquit. *Richardson v. State* (Ala. App.), 78 So. 717.

Rulings on Replications to Demurrable Pleas. — Technical errors, in rulings on the replications to demurrable pleas to an indictment are harmless. *Rogers v. State* (Ala. App.), 72 So. 689, certiorari denied in ex parte *Rogers* (Ala.), 73 So. 1001.

Former Jeopardy. — *Parsons v. State*, 179 Ala. 23, 60 So. 864. See the title CRIMINAL LAW, § 774 (4), vol. 4, p. 570.

Error in sustaining demurrer to plea of former jeopardy is not reversible, where accused had benefit of the matters under another plea. *Stadt v. State*, 13 Ala. App. 275, 69 So. 254.

Where the state was entitled to an affirmative charge on a plea of former jeopardy, error in submitting the plea to the jury held not prejudicial to accused. *Johns v. State*, 13 Ala. App. 263, 69 So. 259.

Special Plea. — *Barr v. State*, 7 Ala. 96, 61 So. 40. See the title CRIMINAL LAW, § 774 (4), vol. 4, pp. 570, 571.

In a prosecution for practicing medicine without a license, error if any, in sustaining demurrers to special pleas that accused in treating persons was practicing religious faith was harmless, the defense being equally available under the plea of not guilty. *Fealy v. Birmingham* (Ala. App.), 73 So. 296.

§ 775. — Rulings as to Evidence in General.

See post, "Prior or Subsequent Admission of Same Evidence," § 777 (3). As to

presumption as to effect of error, see ante, "Rulings as to Evidence," § 769 (3).

§ 775 (½) Prejudice to Rights of Accused in General.

Where the court instructed the jury that a confession of a codefendant was only to be considered as evidence against the one that made it the other defendants could not complain of the sustaining of objections to questions by their counsel to the officer testifying as to the confession, as to how he got confessions. *Boswell v. State*, 9 Ala. App. 23, 64 So. 188.

Subsequent Change Giving Defendant Benefit of Former Objection. — The error in rulings on evidence was not prejudicial to accused, where the rulings were subsequently changed so that accused was given the benefit of everything he sought to obtain through his objections. *Sears v. State*, 10 Ala. App. 76, 63 So. 300, certiorari denied in Ex parte *Sears*, 187 Ala. 672, 65 So. 1034.

Adultery—Rulings on Evidence Not Bearings on Issue. — The only question at issue on prosecution for adultery being whether the intercourse was accomplished by a promise of marriage, rulings on evidence not having a bearing thereon held not prejudicial to defendant. *Watts v. State*, 8 Ala. App. 264, 63 So. 18.

Perjury — Truth or Falsity of Defendant's Former Statements. — In a prosecution for perjury, where only issue was whether statements made on former trial and admitted by defendant were true or false, rulings on evidence affecting this issue were not prejudicial to substantial rights of defendant requiring a reversal. *Kelsoe v. State* (Ala. App.), 73 So. 831.

Vagrancy — Limiting Scope of Inquiry. — Defendant, prosecuted for vagrancy, can not complain of court's action, of its own motion, not injuring him, limiting scope of inquiry. *Collier v. State* (Ala. App.), 78 So. 419.

§ 775 (2) Rulings as to Competency of Witnesses.

Under Acts 1915, p. 942, giving wife an election to testify against her husband, action of court in compelling her against her objection to testify against her husband is prejudicial error as to him. De

Bardeleben v. State (Ala. App.), 77 So. 979.

§ 775 (3) Rulings on Motion to Strike Out Evidence.

Error, if any, in refusing to exclude evidence for want of proof of venue, held harmless where such proof was subsequently introduced. *Britton v. State* (Ala. App.), 74 So. 721.

Court's statement, after a negative answer, "I will let that go out," was not reversible error, because not properly and effectively excluding it from the jury. *Evans v. State* (Ala. App.), 73 So. 562, certiorari denied in 73 So. 999.

Favorable Evidence Partly Elicited by Defendant. — In a prosecution for crime, there is no error in overruling defendant's motion to strike evidence elicited in part by him and in part by the state, and which was favorable to defendant. *Harwell v. State*, 12 Ala. App. 265, 68 So. 500.

§ 776. — Admission of Evidence.

§ 776 (1) In General.

It was prejudicial error to permit a witness for the state, after testifying to impeaching statements alleged to have been made by one of defendant's witnesses, to state that such statements were also made in the presence of a third party, who was at home sick and could not be present at the trial. *Phillips v. State*, 11 Ala. App. 15, 65 So. 444.

The admission of evidence that a witness for the state was induced to give different testimony at a former trial by a person not connected with the defendant was not prejudicial to him. *Hairrell v. State* (Ala. App.), 75 So. 702.

Tracks. — The error, if any, in admitting the testimony of a witness that he found tracks near the body of decedent, and that they would be made by a No 8 shoe, was not, prejudicial to accused where it was not shown what size shoe was worn by him, or that the tracks led in the direction of his home. *Finney v. State*, 10 Ala. App. 39, 65 So. 93.

In prosecution for murder based on circumstantial evidence, permitting witnesses to testify that tracks where victim's body was found fitted shoes secured by sheriff from home of defendant's father was reversible error where there was no evidence

that defendant could have worn them. *Newell v. State* (Ala. App.), 75 So. 625.

Ability of Dog to Track Persons. — Exception to the admission of evidence of the ability of a dog to track persons presents no question for review, where evidence that the dog trailed the defendant was not admitted. *Cunningham v. State*, 14 Ala. App. 1, 69 So. 982.

Matters Not Part of Res Gestæ. — Admission of evidence, as to matters not part of res gestæ, not unfavorable to defendant, if error, was harmless. *Ingram v. State*, 13 Ala. App. 147, 69 So. 976.

Gaming -- Conduct of Parties Engaged with Defendant. — In prosecution under Code 1907, § 6983, for gaming, admission of evidence that parties engaged with defendant had liquor, and that they fought and one was injured, held reversible error. *Rogers v. State*, 12 Ala. App. 196, 67 So. 781.

Homicide — Bad Character. — Where in a homicide case, self-defense was claimed, admission in evidence that defendant's general character for peace and quiet was bad is prejudicial error. *Forman v. State*, 190 Ala. 22, 67 So. 583.

Murder — Where Accused Obtained Liquor. — Error in permitting the state to prove where accused, while in a store lying in wait for decedent, obtained liquor was not prejudicial. *Brown v. State*, 11 Ala. App. 321, 66 So. 829.

Same — Negative Answer to Improper Question. — Where a witness replied that she did not know whether accused was intoxicated at the time of the killing, her answers were not prejudicial. *Keith v. State* (Ala. App.), 72 So. 602.

Direction of School from Place of Killing. — Although question concerning the direction of school from place of killing was objectionable, its admission was not prejudicial, where it was immaterial in what direction it was. *Butler v. State* (Ala. App.), 77 So. 72.

Some One Said Police Were Coming. — *Minto v. State*, 8 Ala. App. 306, 62 So. 376. See the title CRIMINAL LAW, § 776 (1), vol. 4, p. 572.

Where Accused, Jointly Indicted with Third Person, Obtained Severance. — *Campbell v. State*, 182 Ala. 19, 62 So. 57. See the title CRIMINAL LAW, § 776 (1), vol. 4, p. 573.

Certain Book Was in Burglarized Store.—*Allen v. State*, 8 Ala. App. 228, 62 So. 971. See the title CRIMINAL LAW, § 776 (1), vol. 4, p. 572.

Improper Answer of Character Witness.—Under rule 45 of the new supreme court rules (175 Ala. xxi, 61 So. ix), improper answer of character witness in prosecution for homicide that defendant got drunk held not ground for reversal as not prejudicial under the evidence. *Lewis v. State*, 13 Ala. App. 31, 68 So. 792.

Age.—*Smith v. State*, 182 Ala. 38, 62 So. 184, cited in note in Ann. Cas. 1918A, 268. See the title CRIMINAL LAW, § 776 (1), vol. 4, p. 573.

Evidence Germane to Admitted Fact.—*Gilmer v. State*, 181 Ala. 23, 61 So. 377. See the title CRIMINAL LAW, § 776 (1), vol. 4, p. 576.

Parol Evidence Impeaching Order of Court Excusing Foreman.—*Wilder v. State*, 7 Ala. App. 128, 61 So. 600, decided in conformity to answer to certified question in 179 Ala. 45, 60 So. 923. See the title CRIMINAL LAW, § 776 (1), vol. 4, p. 574.

Overruling Objection to Improper Question.—*Minto v. State*, 8 Ala. App. 306, 62 So. 376. See the title CRIMINAL LAW, § 776 (1), vol. 4, p. 572.

Subsequent Admission of Testimony to Matter Already Admitted.—Where on a certain matter there was testimony without conflict, admitted without objection, subsequent admission of testimony of another to substantially the same facts was harmless. *Knott v. State*, 10 Ala. App. 77, 65 So. 83.

An entire document being in evidence without objection, any error in subsequently admitting part of it over objection is harmless. *Tarpey v. State*, 8 Ala. App. 432, 63 So. 17.

Difference in Size of 32 and 38 Caliber Bullets.—Error, if any, in permitting a state's witness to testify that there was a difference in size between a 32 and 38 caliber pistol ball was harmless; it being a matter of common knowledge and observation. *Thomas v. State*, 11 Ala. App. 85, 65 So. 863.

Non Expert on Caliber of Bullets.—*Smith v. State*, 182 Ala. 38, 62 So. 184. See the title CRIMINAL LAW, § 776 (1), vol. 4, p. 572.

Opinion on Range of Shotgun Fire.—Where accused admitted that he shot deceased from behind a rail fence while deceased was traveling down the road, the erroneous admission of opinion evidence as to the range of shotgun fire was harmless. *Monts v. State*, 186 Ala. 1, 64 So. 953.

Illegal Sale of Liquor — Purpose in Placing Money.—One charged with illegal sale of liquor was not prejudiced by the overruling of an objection to a question asked the prosecuting witness as to his purpose in placing the money as he did, where the witness stated that he laid the money down and did not know whether accused received it or not. *Cooper v. Gadsden*, 10 Ala. App. 609, 65 So. 715.

Introduction of Bottles.—Evidence that defendant had bottles of whiskey about his person having been admitted without objection, introduction in evidence of the bottles was harmless. *Hall v. State*, 11 Ala. App. 95, 65 So. 427.

Sheriff's Return on Search Warrant Showing List of Liquor Seized.—*Kinsaul v. State*, 9 Ala. App. 405, 62 So. 990. See the title CRIMINAL LAW, § 776 (1), vol. 4, p. 573.

That Accused Was Concerned in Running Blind Tiger.—*Smith v. State*, 183 Ala. 10, 62 So. 864. See the title CRIMINAL LAW, § 776 (1), vol. 4, p. 773.

§ 776 (2) Curing Error by Facts Established Otherwise.

The admission of incompetent evidence, if of undisputed facts, is harmless. *Coplon v. State* (Ala. App.), 73 So. 225, certiorari denied in 74 So. 1005.

In General.—*Chestnut v. State*, 7 Ala. App. 72, 61 So. 609. See the title CRIMINAL LAW, § 776 (2), vol. 4, p. 574.

Testimony of witness that he owned four mules, without identifying them as mules described in mortgage or indictment, held not such corroboration of confession as would cure error in admitting the confession without independent proof of the corpus delicti. *Sherard v. State* (Ala. App.), 75 So. 721.

Supporting or Corroborating Testimony.—*King v. State*, 8 Ala. App. 239, 62 So. 374. See the title CRIMINAL LAW, § 776 (2), vol. 4, p. 574.

Error in admitting plaintiff's statement that she had loved defendant held harmless, where the conclusion might have been inferred from evidence previously admitted without objection. *Holland v. State*, 11 Ala. App. 134, 66 So. 126, certiorari denied in *Ex parte Holland*, 191 Ala. 662, 66 So. 1008.

Facts or Statements Already Admitted. — Where evidence of a fact has gone into the case without objection, it is not prejudicial error to permit the same fact to be shown over objection. *Walling v. State* (Ala. App.), 73 So. 216, certiorari denied in *Ex parte Walling* (Ala.), 73 So. 1003.

Where one witness testified as to statements of third person during quasi confession by one of several present defendants, without objection, or motion to require it to be limited to defendant making the confession, there was no prejudice in overruling objection to same testimony by another witness. *Hendley v. State*, (Ala.), 76 So. 904.

Where it was shown by competent evidence that an associate of defendant was a gambler, evidence that he had that reputation held, not reversible error. *Brannon v. State* (Ala. App.), 76 So. 991.

Fact Subsequently Admitted by Defendant. — Error in admitting evidence on prosecution for violating prohibition law that defendant was half drunk when witness met him was rendered harmless by defendant testifying he was full drunk. *Pressnall v. State* (Ala. App.), 75 So. 278.

Question Calling for Conclusion. — Permitting witness who testified to conversation to answer question as to whether parties to conversation knew he was there, though calling for a conclusion, held not prejudicial, where the facts showed that they did not know and his answer was to the same effect. *Phillips v. State*, 11 Ala. App. 168, 65 So. 673.

Embezzlement — Error Not Cured by Other Evidence. — Although the evidence of embezzlement of a check was complete without illegal proof of one who read from a bank statement, of the correctness of which he had no knowledge, that the check alleged to have been embezzled had been charged against the complaining witness, yet, when taken together, with proof that the check had been deposited by defen-

dant to his own account, and that defendant was employed by complainant, and authorized to draw checks, it was prejudicial as tending to show guilty intent. *Young v. State*, 9 Ala. App. 55, 64 So. 171.

§ 776 (3) Curing Error by Facts Admitted by Defendant.

Accused can not complain of the improper admission of testimony where he himself testified to the same facts. *Swain v. State*, 8 Ala. App. 26, 62 So. 446; *Powell v. State*, 7 Ala. App. 17, 60 So. 967. See the title CRIMINAL LAW, § 776 (3), vol. 4, p. 575.

The admission of evidence was not prejudicial to accused, where the same fact was testified to by numerous other witnesses without objection and admitted by defendant. *Lightner v. State*, 195 Ala. 687, 71 So. 469.

Where it was not disputed that defendant shot deceased with a pistol, admission of testimony that deceased was shot with a pistol is not prejudicial. *James v. State*, 14 Ala. App. 652, 72 So. 299.

Error, if any, in admitting evidence of defendant's admission as to an accomplice was without prejudice, where she voluntarily testified to all of such matters. *Moye v. State*, 12 Ala. App. 127, 67 So. 716.

Reception of evidence of a statement by deceased after receiving a fatal wound from defendant's knife, "Boys, see how bad he has cut me," was not prejudicial, where the cutting was not denied. *Harris v. State*, 13 Ala. App. 89, 69 So. 344.

Cost of Watches. — Error in admitting evidence as to what watches, alleged to have been taken by defendant, cost was harmless, where witness subsequently testified that that was their value. *Ware v. State*, 12 Ala. App. 101, 67 So. 763.

Opinion as to Defendant's Weight. — Error, if any, sustaining an objection to a question as to how much witness would "say" defendant weighed held without prejudice, where defendant was permitted, without contradiction, to testify as to his weight. *Tarver v. State*, 9 Ala. App. 17, 64 So. 161.

Defendant's Confessions as to Who Committed Assault. — In prosecution for assault with weapon, admission of de-

fendant's counsel that defendant did shooting rendered harmless any error in evidence as to confessions and admissions of defendant as to who committed the assault. *Tarwater v. State* (Ala. App.), 75 So. 816.

Witness' Qualification to Identify Defendant's Handwriting. — In a larceny trial a witness identifying defendant's handwriting is properly qualified by later testimony of defendant that the witness "is familiar with my handwriting; we have had a number of letters pass between us." *Bufford v. State*, 14 Ala. App. 69, 71 So. 614.

Stenographer's Transcript of Defendant's Former Testimony. — In a prosecution for perjury, where defendant admitted alleged statements at former trial and sought to establish their truth, any error in admission of official stenographer's certified transcript of evidence of defendant at former trial held harmless. *Kelsoe v. State* (Ala. App.), 73 So. 831.

Checks Representing Money Obtained without Identification. — In prosecution for obtaining money by false pretenses, error in admitting checks representing money obtained without identification or proof of indorsement by accused or receipt of money by him was cured by his admission that he received the money. *Foster v. State* (Ala. App.), 78 So. 721.

Failure to Cure Error. — Error in admitting testimony is not cured by the fact that defendant, to counteract the effect of the testimony, testified in detail as to the objectionable matter, especially where his account of the transaction is different from that of the state's witnesses. *Wise v. State*, 11 Ala. App. 72, 66 So. 128.

§ 776 (4) Curing Error by Evidence Being Made Proper Subsequently.

Conspiracy. — Any error in admitting the declaration of a state's witness that he expected defendant to meet him is harmless, where a conspiracy between the two for violating the liquor law was subsequently proved. *Bridgeforth v. State* (Ala. App.), 74 So. 402, certiorari denied by Supreme Court in 74 So. 1005.

Corpus Delicti. — In prosecution for violation of the prohibition law, the er-

roneous admission of material evidence before proof of the corpus delicti held not prejudicial, where the corpus delicti is subsequently established. *Foshee v. State*, 9 Ala. App. 76, 63 So. 753.

Ordinance on Which Prosecution Based. — Any error in refusing to exclude testimony as to the commission of the offense before the ordinance on which the prosecution was based was introduced was cured by its subsequent introduction. *Roe v. Tuscaloosa*, 12 Ala. App. 614, 67 So. 845.

Establishment of Predicate. — Error in admitting testimony, the foundation for which has not been laid, is cured by subsequent introduction of the proper predicate. *Harbin v. State* (Ala. App.), 72 So. 594.

Memorandum. — The admission of a memorandum of delivery to defendant held not prejudicial to defendant, where another witness testified to such delivery a fact recollected by him apart from such entry. *Herring v. State*, 11 Ala. App. 202, 65 So. 707.

§ 776 (5) Curing Error by Withdrawal, Striking Out, or Instructions to Jury.

Error, if any, in admitting testimony is cured by the court's announcement after the testimony was in that it was excluded and could not be considered. *Brown v. State* (Ala. App.), 75 So. 174; *Johnson v. State* (Ala. App.), 72 So. 766; *Benjamin v. State*, 12 Ala. App. 148, 67 So. 792; *Wise v. State*, 11 Ala. App. 72, 66 So. 128; *Smith v. State*, 183 Ala. 10, 62 So. 664.

Error, if any, in admitting testimony tending to contradict a witness held cured by its subsequent exclusion. *Mizell v. State*, 184 Ala. 16, 63 So. 1000.

Error Cured by Withdrawal. — *Sanders v. State*, 181 Ala. 35, 61 So. 336. See the title CRIMINAL LAW, § 776 (5), vol. 4, p. 576.

Accused's Bad Reputation. — Where witnesses testified to the bad reputation of accused without limiting it prior to time of the crime charged, but the court so limited the testimony, accused was not prejudiced. *Rector v. State*, 11 Ala. App. 333, 66 So. 857.

Handwriting. — The error in admitting certain testimony as to handwriting was

cured, where subsequently it was plainly and unequivocally excluded from the consideration of the jury. *Newsum v. State*, 10 Ala. App. 124, 65 So. 87.

Matters Occurring after Seduction Was Complete.—Where the court improperly received evidence as to matters occurring after the seduction was complete, the error was cured by striking it out and by its instructions and admonitions to disregard such evidence. *Brand v. State*, 13 Ala. App. 390, 69 So. 379.

Failure to Cure Error by Charge.—Error in admitting the testimony of a number of witnesses over accused's objections held not cured by a charge that the court sustained accused's objection and excluded the evidence objected to. *Hicks v. State*, 11 Ala. App. 290, 66 So. 873.

Same—Confession of Accomplice.—Where court erroneously admitted evidence of confession by alleged accomplice, instruction to disregard erroneous evidence and statements made to counsel held not sufficiently clear and specific to cure error. *Willis v. State* (Ala. App.), 73 So. 766.

§ 776 (6) Errors Favorable to Accused.

The accused can not on appeal complain of a question which elicited matter decidedly beneficial to him. *Turner v. State* (Ala. App.), 72 So. 574.

Defendant's Letter to Witness.—In a prosecution for murder, the admission in evidence of a letter of defendant to witness for the state which tended to show a state of ill will between defendant and the witness who was greatly concerned in and active for the conviction of the defendant, was not prejudicial to defendant. *Spicer v. State* (Ala.), 73 So. 396.

§ 776 (7) Opinion Evidence.

Any error in the admission of the prosecuting witness' conclusion was harmless, where in her subsequent testimony she detailed the facts constituting the transaction in question. *Herring v. State*, 14 Ala. App. 93, 71 So. 974.

§ 776 (8) Evidence of Other Offenses.

While, on a trial for vagrancy, it was error to permit a witness to testify that he had sworn against defendant in an-

other case, its admission was without injury. *Brannon v. State* (Ala. App.), 76 So. 991.

§ 776 (9) Acts, Admissions, Declarations, and Confessions of Accused.

Admission of acts of a defendant in seeking to get witnesses to testify in his favor, where his statements to them were not capable of being construed as an effort to suppress the truth was not reversible error. *Dempsey v. State* (Ala. App.), 72 So. 773.

Heard Defendant Call Victim "William."—In prosecution for murder, where there was no dispute as to identity of victim, permitting witnesses to state that they had heard accused call him "William" was without prejudice to defendant. *Hornsby v. State* (Ala. App.), 75 So. 637.

§ 777. — Exclusion of Evidence.

§ 777 (1) In General.

Where a witness for the prosecution stated on cross-examination that he was a private detective employed to secure evidence of illegal sales of liquor, the sustaining of an objection to further cross-examination as to whether his purpose was to ascertain whether accused would sell liquor and to report him to the authorities and have him arrested was not prejudicial. *Grimes v. Florence*, 10 Ala. App. 651, 65 So. 846.

Question Not Indicating What Answer Expected.—It is not prejudicial error to sustain an objection to a question a responsive answer to which may be either favorable or unfavorable to the party asking it when it does not appear, either by the question itself or in any other way, what was the answer expected. *Beiser v. State*, 10 Ala. App. 86, 65 So. 312.

Testimony Tending to Prejudice Defendant's Case.—Tendency of excluded evidence on cross-examination of state's witness, that indictment was pending against him for the same sale charged against defendant, and that he had been convicted thereof in justice court, was to show bias in favor of rather than against defendant. *Wiggins v. State* (Ala. App.), 78 So. 413.

The exclusion of evidence that accused had heard of improper relations between deceased and accused's wife and had talked with deceased thereon, held not prejudicial to accused. *Chappell v. State* (Ala. App.), 73 So. 134.

Undisputed Fact or Statement.—Where a statement by accused to which he had testified was undisputed he was not prejudiced because the court refused to allow him to prove it by other witnesses. *Hickman v. State*, 12 Ala. App. 143, 67 So. 775.

In a murder trial, where it was admitted and the evidence was uncontroverted that a state's witness made a statement on the preliminary trial which accused sought to prove, accused could not complain of its exclusion. *Walling v. State* (Ala. App.), 73 So. 216, certiorari denied in *Ex parte Walling* (Ala.), 73 So. 1003.

Sustaining Objection to Question—

Answer Not Excluded.—Where objection was made to the question whether witness could have heard a pistol shot if there had been one, after the question was answered affirmatively, and the objection was then sustained, but the answer was not excluded, the ruling, if error, was without injury. *Watson v. State* (Ala. App.), 72 So. 569.

Sustaining objections to questions which were fully answered, and the answers not excluded, was harmless. *Storey v. State*, 14 Ala. App. 127, 72 So. 267; *McConnell v. State*, 13 Ala. App. 79, 69 So. 333.

Custody of Written Statement Already Admitted.—Where a written statement of a state's witness was allowed in evidence, the court's denial of questions as to its custody after it was made, and previous to the trial, was not injurious as the only purpose of such questions was to lay a predicate for its admission. *Allsup v. State* (Ala. App.), 72 So. 599.

Uxoricide—Witness' Subsequent Testimony.—In a prosecution for uxoricide, defendant was not prejudiced by the court's refusal to permit a witness to testify who occupied a room with decedent on the specified occasion, where the witness subsequently testified that "no one did." *Ragland v. State*, 187 Ala. 5, 65 So. 776.

Effect of Whisky on Accused.—Exclusion of testimony as to what effect whisky had on accused held not prejudicial, where accused testified that he knew nothing about the crime charged against him. *Williams v. State*, 13 Ala. App. 133, 69 So. 376.

Third Person's Possession of Seized Liquor.—*Brigman v. State*, 8 Ala. App. 400, 62 So. 980. See the title CRIMINAL LAW, § 777 (1), vol. 4, p. 578.

§ 777 (2) Curing Error by Other Evidence of Same Fact.

Exclusion of testimony upon a point established by other uncontradicted evidence is not prejudicial error. *Johnson v. State* (Ala. App.), 72 So. 561, judgment reversed in *Ex parte State* (Ala.), 74 So. 366.

Error in excluding testimony of a witness to facts established by other uncontradicted evidence, including that of the prosecuting witness, is not prejudicial. *Scott v. State* (Ala. App.), 73 So. 212.

Error in refusing to permit a witness for defendant to testify as to certain facts was harmless, where several witnesses for defendant were allowed without objection to state the same facts. *Phillips v. State*, 11 Ala. App. 15, 65 So. 444.

Allowing Defendant's Testimony to Facts Excluded.—The exclusion of testimony of witnesses for accused was not rendered harmless by permitting accused to testify to the facts which witnesses were called to prove. *Spicer v. State*, 188 Ala. 9, 65 So. 972.

Interest of State's Witness.—Exclusion of testimony showing interest of state's witness, if error, is cured where subsequently the matter of interest was fully brought out. *Turner v. State* (Ala. App.), 72 So. 574.

Reference to Another's Memorandum to Refresh Recollection.—Injury from court's denial of right to refer to written statement of another witness to refresh recollection was averted, where the statement was offered by defendant and admitted as evidence of what such other witness had stated. *Allsup v. State* (Ala. App.), 72 So. 599.

Witness Could Not See Affray from Position.—Defendant is not prejudiced

by exclusion of testimony that state's witness could not have seen the affray as to which he testified from his position, where witness for defendant was permitted to say that he went to that position and could not see the place of the affray. *Watson v. State* (Ala. App.), 72 So. 569.

Whether Accused Talked and Acted Like Rational Man.—*Harris v. State*, 8 Ala. App. 33, 62 So. 477. See the title CRIMINAL LAW, § 777 (2), vol. 4, p. 578.

§ 777 (3) Prior or Subsequent Admission of Same Evidence.

Erroneous rulings on admission of evidence were not error, where accused afterwards elicited testimony which he first sought to obtain. *Norris v. State* (Ala. App.), 75 So. 718; *Campbell v. State*, 13 Ala. App. 70, 69 So. 322; *Francis v. State*, 188 Ala. 39, 65 So. 969; *Brooks v. State*, 8 Ala. App. 277, 62 So. 569.

Character of Witness as to Truth.—Action of court in sustaining solicitor's objection to question eliciting testimony as to character of witness for truth and veracity was harmless error, as immediately after the testimony was given without objection. *Rogers v. State* (Ala. App.), 75 So. 264.

Flight.—Where defendant in a prosecution for forgery was afterwards permitted to explain flight, error in previously sustaining objection to questions relating thereto was harmless. *King v. State* (Ala. App.), 75 So. 692.

Entries in Account Book.—Objection to introduction of entries in account book, showing defendant's sales of intoxicating liquors, was rendered harmless by defendant subsequently asking that the whole book be introduced. *Quinn v. State* (Ala. App.), 74 So. 743.

Probate Judge's Certificate for Defendant's Admission to Asylum.—*Cogbill v. State*, 8 Ala. App. 223, 62 So. 406. See the title CRIMINAL LAW, § 777 (3), vol. 4, p. 579.

Opinion as to Sanity.—Error, if any, in refusing to allow witness to give opinion as to defendant's sanity in answer to question of defendant's counsel held cured by subsequent allowance of such

opinion. *Moye v. State*, 12 Ala. App. 127, 67 So. 716.

Deceased's Borrowing Pistol from Witness.—Error, if any, in excluding testimony that deceased borrowed a pistol from witness, held cured by subsequent admission on proper predicate. *Lee v. State* (Ala. App.), 75 So. 282.

Conduct of Prosecuting Witness.—*Ward v. State*, 8 Ala. App. 185, 62 So. 993. See the title CRIMINAL LAW, § 777 (3), vol. 4, p. 579.

Statements, and Conduct of Deceased.—Error, if any, in exclusion of testimony of witness for defendant that witness and deceased, after leaving a station, heard some shooting, and that deceased said it was defendant and shot twice, was cured by its subsequent admission. *Allsup v. State* (Ala. App.), 72 So. 599.

§ 777 (4) Prior or Subsequent Examination of Same Witness.

Exclusion of evidence for accused is not prejudicial, where the same matter is subsequently admitted in his testimony without objection. *Tittle v. State* (Ala. App.), 73 So. 142; *Butler v. State* (Ala. App.), 77 So. 72; *Mathis v. State* (Ala. App.), 73 So. 122; *Terry v. State*, 13 Ala. App. 115, 69 So. 370; *Sexton v. State*, 13 Ala. App. 84, 69 So. 341; *Brown v. State*, 11 Ala. App. 321, 66 So. 829.

In a homicide case, where the question, "Did D. strike the first lick?" was improperly ruled out, but the witness later testified that the deceased struck the first blow and that the defendant "struck back," the error was harmless. *Daniel v. State*, 14 Ala. App. 63, 71 So. 79.

Conduct of Deceased.—The sustaining of an objection to a question as to deceased's conduct at the time of the killing was not error, where immediately afterwards the witness was allowed to go into full particulars as to the matter. *Carmichael v. State*, 197 Ala. 185, 72 So. 405.

Where the question, "Do you know what Mr. D. was doing?" was improperly ruled out, but the witness later testified fully as to the conduct of the parties immediately before and during the affray, the error was harmless. *Daniel v. State*, 14 Ala. App. 63, 71 So. 79.

§ 778. — Examination of Witnesses.

§ 778 (1) Rulings on Questions in General.

Where a murder trial witness exhibited his friendship for accused, it was reversible error to exclude testimony that he had been equally friendly with deceased. *Patton v. State*, 197 Ala. 180, 72 So. 401.

Where counsel to impeach a witness asked question, “* * * Ask if you would say that a man against whom you had heard these things reported was a man of good character; you know as a matter of fact that this man didn’t steal that mule, don’t you?” and record shows that on recross-examination he did not say that as a matter of fact witness did not steal mule, clearly showing that he only intended his answer as a response to the first part of the question, no injury is shown. *Rogers v. State* (Ala. App.), 75 So. 264.

Exclusion of impeaching evidence is not ground for reversal, where the impeachment is accomplished by the witness’ own testimony. *Posey v. State* 12 Ala. App. 193, 67 So. 737.

What Memoranda of Other Person Indicated.—Error in permitting a witness to testify with reference to what memoranda made by other persons indicated held cured by the other persons testifying. *Stokes v. State*, 13 Ala. App. 294, 69 So. 303.

Seduction—Answer Too Broad as to Time.—If the statement of the prosecuting witness in seduction, “He asked me to marry him,” was too broad as to time, it was rendered harmless by her immediately subsequent statement, giving the exact time and place thereof. *Watts v. State*, 8 Ala. App. 264, 63 So. 18.

§ 778 (2) Error in Question Cured by Answer.

Though the condition of defendant at any time during the night following the offense was not material, and his objection to question eliciting such facts should have been sustained, such question held without prejudice, in view of the other testimony. *Keith v. State* (Ala. App.), 72 So. 602.

Answer Favorable to Accused.—Defendant can not complain of questions, though they are improper, if the answers thereto are all favorable to him. *Keith v. State* (Ala. App.), 72 So. 602.

Answer Disclosing Knowledge.—*Hammock v. State*, 8 Ala. App. 367, 62 So. 322. See the title CRIMINAL LAW, § 778 (2), vol. 4, p. 580.

Answer Negating Knowledge.—Witness, answering, he did not know a certain thing, which defendant wanted, he was not injured by the sustaining of objection to the question. *Lambert v. State*, 13 Ala. App. 289, 69 So. 261.

Error, if any, in permitting the son-in-law of accused to say whether he had married accused’s daughter over the objection of accused and his wife was without prejudice, where the witness answered in the negative. *Edmonds v. State* (Ala. App.), 75 So. 873.

It is not prejudicial to ask the arresting officer, who testified to accused’s flight, whether accused knew witness came to arrest him, where the answer was that he did not know. *James v. State*, 14 Ala. App. 652, 72 So. 299.

Error, if any, in permitting the witness to be asked whether he had had any conversation with defendant since being summoned as a witness was not prejudicial to defendant, where the witness answered in the negative. *Maxwell v. State*, 12 Ala. App. 212, 67 So. 772.

Same—Character of Defendant.—Error by solicitor, in asking witness as to character of defendant charged with murder, without having laid proper predicate, was harmless, where witness stated he could not say defendant’s character was bad. *Hardaman v. State* (Ala. App.), 78 So. 324.

Same—Who Reported Case to Grand Jury.—Permitting a witness to be asked relative to his knowledge as to who reported the case to the grand jury held harmless, where he returned a negative answer. *Moore v. State*, 12 Ala. App. 243, 67 So. 789.

Answer Not Objected to.—*Swain v. State*, 8 Ala. App. 26, 62 So. 446. See the title CRIMINAL LAW, § 778 (2), vol. 4, p. 580.

Answer to Question Invoking Conclusion Stating Facts.—The objection to a question as calling for a conclusion of the witness in a criminal case held removed by his answer containing a statement of fact. *Brown v. State*, 11 Ala. App. 321, 66 So. 829.

§ 778 (3) Error in Question Not Answered.

Where question to witness was not answered, overruling of defendant's objection thereto was harmless. *Malone v. State* (Ala. App.), 76 So. 469.

Where an improper question, asked character witness, was not answered, overruling an objection thereto, was without injury. *Cole v. State* (Ala. App.), 75 So. 261.

§ 778 (5) Cross-Examination.

All the evidence tending to show state's witness participated in the sale charged against defendant, excluding questions, on his cross-examination, whether an indictment was not pending against him therefor, and whether he had not been convicted thereof in justice court, was harmless. *Wiggins v. State* (Ala. App.), 78 So. 413.

In a prosecution for assault with intent to murder, where defendants stopped prosecuting witness on the highway and shot him, exclusion of a question to prosecuting witness on cross-examination as to whether his answer to defendant's question at the time of shooting, "What about you and Pa this morning?" was true or false, if error, was harmless. *Knotts v. State* (Ala. App.), 78 So. 640.

Summoning Witnesses.—There was no error in sustaining an objection to a question asked by defendant's counsel on cross-examination of a state's witness as to whether she had an individual summoned, where the fact that the individual was summoned does not appear in the record. *Brooks v. State* (Ala. App.), 74 So. 85.

Where a state's witness had admitted that she had given the names of the other state's witnesses and had them summoned, it was not prejudicial error to exclude a cross-question seeking to elicit a repetition of that testimony with re-

spect to a particular witness. *Brooks v. State* (Ala. App.), 74 So. 85.

Refusal of cross-examination to discredit a state's witness, by showing he had kept 50 cents out of money another had given him, with which to buy whisky, held not reversible abuse of discretion. *Askew v. State*, 11 Ala. App. 293, 66 So. 852.

Answer Negative.—Where accused answered in the negative questions on his cross-examination, the overruling of objections to such questions held harmless. *Smith v. State*, 13 Ala. App. 399, 69 So. 402.

Same—Conduct of Accused. — Where defendant, on cross-examination, eliciting testimony as to his conduct before the crime, answered in denial of such conduct, any error in the allowance of the question was harmless. *Rivers v. State*, 13 Ala. App. 362, 69 So. 387.

Answer Favorable.—Where the answer of a witness on cross-examination by the state was favorable to the defendant, the error, if any, was harmless. *Rogers v. State* (Ala. App.), 72 So. 689, certiorari denied in *Ex parte Rogers* (Ala.), 73 So. 1001.

Witness' Contribution to Prosecuting Fund—Substantial Answer. — Although defendant, on his cross-examination of a state's witness, was entitled to an answer to his questions as to how much and in what way witness had contributed to a fund for prosecution of pending charge, where he got a substantial answer, there was no reversible error. *Dickey v. State*, 197 Ala. 610, 73 So. 72, denying certiorari 72 So. 608.

Witness' Testimony at Preliminary Hearing. — Permitting a question on cross-examination of defendant's witness, if he did not give certain testimony at the preliminary hearing, is harmless, if nothing in it tends to contradict his testimony. *Bradley v. State*, 11 Ala. App. 329, 66 So. 820.

Re-Examination — Exclusion of Character Witness' Irrelevant Testimony. — Exclusion of irrelevant and incompetent testimony on re-examination of character witness, followed by explicit instruction to disregard it, held to remove any un-

favorable impression made as far as practicable. *Hill v. State*, 194 Ala. 11, 69 So. 941.

Error Held Prejudicial.—Where a witness for the state was allowed to state that defendant had made what he regarded as a threat under certain circumstances, the refusal to allow defendant on cross-examination to have the witness testify just what the defendant said about deceased held prejudicial error. *Mizell v. State*, 184 Ala. 16, 63 So. 1000.

§ 778 (6) Error Cured by Rulings and Instructions of Court.

An offer to recall witness held not to cure error in excluding testimony by such witness, showing bias on the part of a witness for the state. *Johnson v. State*, 13 Ala. App. 140, 69 So. 396.

§ 779. — Arguments and Conduct of Counsel.

As to irregularity cured by action of trial court, see ante, "Action of Court," § 486.

In murder case, refusal to exclude statement by state's counsel in argument, defense being insanity, that if defendant is sent to the asylum another doctor might give a different opinion and have him turned loose on the neighborhood, was not reversible error. *Russell v. State* (Ala.), 78 So. 916.

Alluding to Historical Fact.—Solicitor's argument merely alluding to an historical fact to illustrate his point held not prejudicial. *Harvey v. State* (Ala. App.), 73 So. 200.

Error Held Prejudicial—Comments on Evidence.—In a prosecution for murder, a statement by counsel for the state in his argument that a witness had intimated that defendant had admitted going to the place of the homicide with the express purpose of murdering deceased was prejudicial. *Gibson v. State*, 193 Ala. 12, 69 So. 533.

Same—Reference to Negro "as a Negro."—In a prosecution for violating the prohibition law, the statement of the solicitor that "you must deal with a negro in the light of the fact that he is a negro, and applying your experience and common sense," was prejudicial error. *Sim-*

mons v. State, 14 Ala. App. 103, 71 So. 979.

§ 780. — Instructions.

As to errors cured by withdrawal or giving other instructions, see ante, "Error in Instructions Cured by Withdrawal or Giving Other Instructions," § 566.

§ 780 (1) In General.

Misleading but Not Prejudicial.—Reversal, will not be granted for a merely misleading charge, unless it clearly prejudiced the accused. *Murphy v. State*, 14 Ala. App. 78, 71 So. 967.

Argumentative but Not Prejudicial.—In prosecution for homicide, a charge that a reasonable doubt was not an imaginary or fanciful doubt, but an actual one growing out of the evidence, which would cause a reasonably prudent man to pause and hesitate in the graver transactions of life, while argumentative, is not prejudicial. *Perry v. State*, 177 Ala. 1, 59 So. 150.

Error Held Reversible.—Giving of erroneous instruction that the jury could convict defendant of assault with intent to murder if they had a reasonable doubt that he assaulted with intent to murder held to require reversal. *Brasseale v. State* (Ala. App.), 75 So. 697.

§ 780 (2) Instruction as to Evidence.

Under Code 1907, § 5362, providing that court may state to jury law of case, and may also state evidence where it is disputed, but shall not charge upon effect of testimony unless required to do so, it is reversible error to charge upon the effect of conflicting evidence in the oral charge. *Cole v. State* (Ala. App.), 75 So. 261.

§ 780 (4) Inapplicable to Issue or Evidence.

Abstract Proposition of Law.—The mere statement of an abstract proposition of law to the jury in a larceny case is not ground for reversible error. *Britton v. State* (Ala. App.), 74 So. 721.

Court's Inadvertent Use of Word "Felon."—*Johnson v. State*, 7 Ala. App. 88, 60 So. 973. See the title CRIMINAL LAW, § 780 (4), vol. 4, p. 584.

§ 780 (5) Errors Favorable to Defendant.

Error in instructions, because too favorable to accused, is not reversible. *Poe v. State*, 193 Ala. 685, 69 So. 553.

§ 780 (6) Effect of Verdict or Determination.

Convicted of Manslaughter—Objection to Charges on Higher Offenses.—*Parker v. State*, 7 Ala. App. 9, 60 So. 995. See the title CRIMINAL LAW, § 780 (6), vol. 4, p. 584.

Form of Verdict.—*Kirkwood v. State*, 8 Ala. App. 108, 62 So. 1011, certiorari denied in 184 Ala. 9, 63 So. 990. See the title CRIMINAL LAW, § 780 (6), vol. 4, p. 585.

Assault and Battery with Knife.—*Wilson v. State*, 7 Ala. App. 66, 60 So. 983. See the title CRIMINAL LAW, § 780 (6), vol. 4, p. 585.

§ 780 (7) Instructions as to Punishment.

Error as to Amount of Fine Imposable.—An instruction that the jury could assess a fine of not less than \$100 "or any greater sum within its judgment" was harmless, where the verdict assessed the lowest authorized fine. *Stone v. State*, 11 Ala. App. 141, 65 So. 693.

Error as to Length of Term.—*Harris v. State*, 8 Ala. App. 33, 62 So. 477. See the title CRIMINAL LAW, § 780 (7), vol. 4, p. 585.

Error as to Minimum Fine.—*Bartlett v. State*, 7 Ala. App. 85, 60 So. 958. See the title CRIMINAL LAW, § 780 (7), vol. 4, p. 585.

§ 780 (8) Oral Instructions.

Prejudicial error can not be predicated on the court's oral explanation of an abstract charge which was requested by defendant. *Scott v. State* (Ala. App.), 73 So. 212.

§ 781. — Failure or Refusal to Give Instructions.**§ 781 (1) In General.**

Doubt and Uncertainty. — *Given v. State*, 8 Ala. App. 122, 62 So. 1020. See the title CRIMINAL LAW, § 781 (1), vol. 4, p. 585.

Guilt Reasonably Reconciled with Theory of Innocence.—It was not re-

versible error to refuse a request to charge that, if all the evidence tending to show defendant's guilt could be reasonably reconciled with the theory of innocence, the jury should acquit. *Ducett v. State*, 186 Ala. 34, 65 So. 351.

Reasonable Doubt. — Refusal of a charge that, if the jury have a reasonable doubt of accused's guilt growing out of the evidence or any part of it, they must acquit accused, was prejudicial error. *Spelce v. State*, 10 Ala. App. 196, 65 So. 199.

Moral Certainty.—Refusal of an instruction to find accused not guilty, unless, after a full consideration of all the evidence, his guilt was proven to a moral certainty, was reversible error. *Yorty v. State*, 11 Ala. App. 160, 65 So. 914.

§ 781 (3) Effect of Verdict or Determination.

Where the jury returned verdict of guilty under second count only, defendant was not prejudiced by a refusal of affirmative charge as to first count. *Summers v. State*, 14 Ala. App. 16, 70 So. 951.

Conviction of Lesser Offense.—*Burton v. State*, 8 Ala. App. 295, 62 So. 394. See the title CRIMINAL LAW, § 781 (3), vol. 4, p. 586.

§ 782. — Verdict or Findings.

As to the one of two jointly indicted who alone was tried, it was harmless error that the name of the other was also inserted in the verdict. *Agee v. State*, 190 Ala. 19, 67 So. 411.

Correction by Jury.—*Davis v. State*, 8 Ala. App. 147, 62 So. 1027, certiorari denied in *Ex parte Davis*, 184 Ala. 26, 63 So. 1010. See the title CRIMINAL LAW, § 782, vol. 4, p. 586.

§ 783. — Sentence and Judgment.

As to the one of two jointly indicted, who alone was tried, it was harmless error that the name of the other was also inserted in the judgment of conviction. *Agee v. State*, 190 Ala. 19, 67 So. 411.

Where the record recited that upon arraignment defendant pleaded not guilty, that the judgment entry recited that he pleaded not guilty, and not guilty by reason of insanity, was unimportant, where the judgment entry

showed that he had the benefit of both pleas. *Marks v. State*, 14 Ala. App. 664, 71 So. 983.

§ 784. Error Waived in Appellate Court.

Errors assigned, but not noticed in appellate's brief, are treated as waived. *Fealy v. Birmingham* (Ala. App.), 73 So. 296.

Grounds of defendant's motion to quash the venire not argued on appeal will not be reviewed. *Maxwell v. State*, 11 Ala. App. 53, 65 So. 732.

Admission and Rejection of Evidence.—Rulings of the trial court on the admission and rejection of evidence, not noticed in the brief, need not be considered on appeal. *Robbins v. State*, 13 Ala. App. 167, 69 So. 297.

Consideration of Other Questions in Record.—On appeal of a criminal case after finding on questions insisted upon by counsel in his argument of the case, it is the duty of the court to give careful consideration to all other questions presented by the record. *Dawson v. State*, 196 Ala. 593, 71 So. 722.

§ 785. Decisions of Intermediate Courts.

It is error of law, reviewable by the supreme court, for the court of appeals to hold that after lawful arrest without warrant, and defendant's giving bond to the recorder's court, such arrest was not a bar to prosecution under warrant for the same offense in the city court. *Sherrod v. State*, 197 Ala. 286, 72 So. 540, reversing judgment 71 So. 76.

Misapprehension of Facts.—On certiorari to the court of appeals the supreme court will not investigate the record to learn whether that court has misapprehended the facts. *Toney v. State*, 197 Ala. 703, 73 So. 13.

Questions of Jurisdiction — Conclusion of Fact.—Ex parte *State*, 181 Ala. 4, 61 So. 53, reversing judgment *Livingston v. State*, 7 Ala. App. 43, 61 So. 54. See the title CRIMINAL LAW, § 785, vol. 4, p. 587.

Finding of Facts—Questions of Law.—The supreme court will not, on certiorari, review findings of fact made by the court of appeals; but it will review questions of law decided by such court, when substantial justice and the

rights of litigants depend thereon. Ex parte *Pollard*, 193 Ala. 320, 69 So. 425.

Same—Record Not Disclosing Exception to Evidence.—Under the rule that the supreme court on certiorari to the court of appeals will not revise findings of fact, held that the findings of the court of appeals that the record did not disclose an exception to the trial court's overruling of objections as to part of the evidence of a certain witness would not be revised. *Kirkwood v. State*, 184 Ala. 9, 63 So. 990, denying certiorari 8 Ala. App. 108, 62 So. 1011.

Same—Conviction Sustained by Evidence.—A finding of the court of appeals that a conviction was sustained by evidence could not be reviewed by the supreme court on application for certiorari. *Bannon v. State*, 191 Ala. 29, 67 So. 1007.

Same—Nonexistence of Basic Fact of Charge.—The ruling of the court of appeals that the refusal of a charge was proper because it was abstract so far as it hypothesized certain facts was a finding of the nonexistence of the fact upon which the charge was based, which finding the supreme court will not review. *Kirkwood v. State*, 184 Ala. 9, 63 So. 990, denying certiorari 8 Ala. App. 108, 62 So. 1011.

Same—Delay in Filing Bill of Exceptions.—Ex parte *Williams*, 182 Ala. 34, 62 So. 63. See the title CRIMINAL LAW, § 785, vol. 4, p. 587.

785½. Subsequent Appeals.

Where the court of appeals reversed as to the sentence and remanded, so that a proper sentence could be imposed, appellant could not, on certiorari to the supreme court, raise the question of the constitutionality of the imposition of another sentence. Ex parte *Adams*, 187 Ala. 10, 65 So. 514, denying certiorari *Adams v. State*, 9 Ala. App. 89, 64 So. 371; Ex parte *Minto*, 187 Ala. 671, 65 So. 516.

(H) DETERMINATION AND DISPOSITION OF CAUSE.

As to dismissal, see ante, "Dismissal," § 740.

§ 786. Affirmance.

The Rule.—On appeal in criminal case,

where proceedings shown by transcript, which contains no bill of exceptions, are regular, and there is no error appearing in record proper, judgment of conviction will be affirmed. *Chance v. State* (Ala. App.), 73 So. 759; *Bush v. State*, 14 Ala. App. 666, 72 So. 212; *Cain v. State*, 10 Ala. App. 663, 85 So. 300; *Jackson v. State*, 10 Ala. App. 667, 65 So. 307; *McCarley v. State*, 10 Ala. App. 670, 64 So. 651; *Riley v. State*, 7 Ala. App. 657, 60 So. 431; *Smith v. State*, 7 Ala. App. 659, 60 So. 970; *Robertson v. State*, 7 Ala. App. 658, 60 So. 459; *Lewis v. State* (Ala. App.), 62 So. 386; *Shelby v. State* (Ala. App.), 62 So. 271; *Bilbro v. State*, 9 Ala. App. 664, 62 So. 327.

Appeal upon the Record.—On an appeal from a conviction upon the record proper, where no bill of exceptions was duly presented, and the court reviewing the record, as required by Code 1907, § 6264, found that the proceedings and judgment entry were regular, and no error appeared, the judgment will be affirmed. *Sturdivant v. State*, 14 Ala. App. 664, 71 So. 978; *Douthard v. State*, 14 Ala. App. 665, 71 So. 979.

Where the time for presenting and having signed a bill of exceptions had expired and the transcript contained no bill of exceptions, and the proceedings shown by the record proper were regular and showed no reversible error, held, a conviction will be affirmed. *Gibson v. State*, 14 Ala. 663, 71 So. 614.

Where the transcript contained a certificate of the trial judge that the time for tendering a bill of exceptions had expired, and that no bill had been tendered within the time allowed by law, and the record proper showed that the proceedings were regular and contained no reversible error, held a conviction will be affirmed. *Woods v. State*, 14 Ala. App. 663, 71 So. 614.

Where the record proper showed an indictment in due and regular form, a verdict of guilty and a judgment in conformity therewith, and an examination of the record, exclusive of defendant's refused instructions not properly presented, showed nothing authorizing a reversal, the judgment would be affirmed. *Dorough v. State*, 14 Ala. App. 110, 72 So. 208.

A record showing an indictment in regular form, charging an assault with intent to murder, regular proceedings, a conviction of assault with a weapon, and the fixing of an authorized punishment, but in which the transcript contains no bill of exceptions, as to which the time for presentation and signature had expired, showed no error, and the conviction would be affirmed. *Davis v. State*, 10 Ala. App. 665, 64 So. 528.

§ 789. Reversal.

As to reversal of judgment being bar to subsequent prosecution, see ante, "In General," § 103.

§ 790. — In General.

§ 790 (1) Grounds in General.

Conviction of Two Jointly Indicted—Only One Tried.—The judgment of conviction of two jointly indicted, when only one of them was tried, will be affirmed as to him and reversed as to the other. *Agee v. State*, 190 Ala. 19, 67 So. 411.

Sentence Only Erroneous.—Where upon conviction only the sentence is erroneous, it only will be set aside, and the cause remanded for proper sentence. *Mulligan v. State* (Ala. App.), 72 So. 761, writ of certiorari denied in 73 So. 1001.

In a criminal prosecution, where no error affecting the trial up to the conviction appears, but the sentence is erroneous, the judgment of conviction will be affirmed, and the sentence reversed, and the case remanded for proper sentence. *Stout v. State* (Ala. App.), 72 So. 762, writ of certiorari denied in 73 So. 1002.

Trial Errors Not Probably Injurious.—Where the undisputed evidence for the state in a prosecution for embezzlement was legally sufficient to exclude every doubt of defendant's guilt, the court of appeals would not reverse a conviction for trial errors, since rule 45 (175 Ala. xxi) forbids reversal for error not probably injurious to defendant's substantial rights. *Lacy v. State*, 13 Ala. App. 267, 69 So. 244, judgment affirmed in *Ex parte Lacy*, 195 Ala. 668, 70 So. 272.

§ 790 (2) Statutory Provisions.

In view of Code 1907, §§ 7154, 7148, the attachment to the indictment by means of metal fasteners of a copy of

the instrument alleged to have been forged, held not to constitute reversible error under § 7133. *Dudley v. State*, 10 Ala. App. 130, 64 So. 534, certiorari denied in *Ex parte Dudley*, 188 Ala. 77, 66 So. 91.

Summoning and Impaneling Jurors.—*Powell v. State*, 7 Ala. App. 17, 60 So. 967. See the title CRIMINAL LAW, § 790 (2), vol. 4, p. 589.

§ 790 (3) Technical, Formal, or Trivial Defects or Errors.

Summoning and Impaneling Jurors.—*Costello v. State*, 176 Ala. 1, 58 So. 202. See the title CRIMINAL LAW, § 790 (3), vol. 4, p. 589.

Judgment Erroneously Fixing Place of Imprisonment.—The part of a verdict which fixes the place of imprisonment being surplusage so much of the judgment as conforms to it and orders confinement in the penitentiary will be reversed, and the cause remanded to the trial court for sentence to the county jail, authorized by Code 1907, § 7620, where the term of imprisonment is for one year only. *London v. State* (Ala. App.), 61 So. 611.

Failure of the judgment to set out the costs or days required to work them out being the only error, it will be reversed only to this extent. That the trial court may, conformable to Code 1907, § 7635, enter up proper judgment in this respect. *Kirkland v. State*, 12 Ala. App. 204, 68 So. 518.

No Opportunity to Oppose Sentence.—Where a judgment of conviction is erroneous, because not reciting that defendant was asked if he had anything to say why sentence should not be passed upon him, the judgment will be reversed for resentence on the verdict. *Bryant v. State*, 13 Ala. App. 206, 68 So. 704.

Irregularity in Sentence.—There being mere irregularity in sentence, it will be vacated, and the cause remanded for sentence. *Du Bose v. State* (Ala. App.), 73 So. 121.

Under Supreme Court Rule 45.—Under Supreme Court rule 45 (61 South. ix), errors which have not probably injuriously affected defendant's substantial rights are not reversible errors. *Brannon v. State* (Ala. App.), 76 So.

991; *Minor v. State* (Ala. App.), 74 So. 98; *Norris v. State* (Ala. App.), 75 So. 718.

Same—Bias.—Under Supreme Court rule 45 (175 Ala. xxi, 61 So. ix), held, that the sustaining of an objection to a question asked to show bias of a state's witness was not reversible error. *Robbins v. State*, 13 Ala. App. 167, 69 So. 297.

Same—Overruling Demurrer to Bad Count.—Where accused was convicted of but one offense under indictment containing one good count, error in overruling of demurrer to the bad count held not to injuriously affect accused's rights within Supreme Court rule 45 (175 Ala. xxi, 61 So. ix). *Harrison v. State*, 13 Ala. App. 354, 69 So. 383.

Same—Plea of Not Guilty before Amendment.—In a prosecution for illegally transporting liquor in violation of Laws 1909 (Sp. Sess.) p. 63, plea of not guilty, interposed before an amendment of the original complaint, was no ground for reversal under rule 45 of the supreme court (61 So. ix). *Bush v. State*, 12 Ala. App. 260, 67 So. 847.

Same—Admission of Incompetent Evidence.—In trial for illegal sale of liquor, admission of evidence of prior keeping of liquor held reversible error, under Supreme Court rule 45 (61 So. ix). *Gibson v. State*, 14 Ala. App. 111, 72 So. 210.

Same—Witness' Ipse Dixit as to Truth of Testimony.—Mere ipse dixit of witness that his testimony already given was true, is not such an invasion of the province of the jury to determine the credibility of witnesses, as will support error; but if technically objectionable, the error would be innocuous under rule of practice 45 (61 So. ix). *Andress v. State* (Ala. App.), 72 So. 753.

Same — Friendly Relations between Witness and Deceased.—In a prosecution for murder, error in excluding evidence of the friendly relations between witness and deceased held harmless, under court rule 45 (175 Ala. xxi, 61 So. ix). *Bullington v. State*, 13 Ala. App. 61, 69 So. 319.

Same—When Defendant Was Arrested.—Admitting evidence of when defendant was arrested, though no flight was

shown, held, under Supreme Court rule 45 (175 Ala. xxi, 61 So. ix) not ground for reversal; probable injury not appearing. *Terry v. State*, 13 Ala. App. 115, 69 So. 370.

Same—Reasonable Doubt.—Where the court charged generally on reasonable doubt, giving defendant the benefit of his requested instruction thereon, which was refused, the error, if any, was harmless under Supreme Court rule 45 (175 Ala. xxi). *Jones v. State* (Ala. App.), 74 So. 843, certiorari denied in 75 So. 1003.

§ 792. — Directing Judgment in Lower Court.

Where there is no other error affecting the judgment than that of adjudging defendant guilty of an offense of which he was not found guilty by the verdict, it may be corrected by reversing only that part of the judgment following the acceptance and entry of the verdict, and remanding, with directions to render a judgment of guilt, and impose a sentence in conformity with the verdict. *Lewis v. State*, 10 Ala. App. 31, 64 So. 537, cited in note in Ann. Cas. 1916D, 369.

Quashing Defective Affidavit for Warrant.—The court of appeals will not, on petition for writ of error, quash a defective affidavit for warrant, but will reverse and remand, with direction to quash the affidavit unless properly amended. *Ex parte Mooneyham* (Ala. App.), 73 So. 990.

Where there was error in the sentence imposed, but not in the judgment of conviction, the case should be remanded for resentence only, the object of remand being to place the case again before the trial judge for corrected action at the point of his erroneous departure. *Ex parte Robinson*, 183 Ala. 30, 63 So. 177, cited in note in 51 L. R. A., N. S., 386, denying certiorari *Robinson v. State*, 6 Ala. App. 13, 60 So. 558, overruling *Zaner v. State*, 90 Ala. 651, 8 So. 698, disapproving *Ex parte Brown*, 102 Ala. 179, 15 So. 602; *Ex parte Goucher*, 103 Ala. 305, 15 So. 601.

§ 793. — Ordering New Trial.

Under Acts 1909, p. 90, § 29½, and Code 1907, § 7151, a judgment adjudging defendant guilty of selling intoxicating liquors, where the complaint charged

keeping for sale, is void, requiring remand for new trial. *Thomas v. State* (Ala. App.), 72 So. 769.

§ 795. Mandate and Proceedings in Lower Court.

Where, on appeal, the sentence was annulled and cause remanded for resentence, the trial court at the following term could impose the proper sentence. *Wright v. State*, 12 Ala. App. 253, 67 So. 798.

XVII. PUNISHMENT AND PREVENTION OF CRIME.

As to assessment of punishment by jury, see ante, "Assessment of Punishment," § 606. As to instructions as to punishment, see ante, "Punishment," § 542; "Assessment of Punishment," § 606. As to question for jury as to extent of punishment, see ante, "Extent of Punishment," § 501. As to specifications of punishment in judgment record, see ante, "Definiteness and Certainty as to Punishment or Specification Thereof," § 655 (4).

§ 802. Extent of Punishment in General.

§ 802 (1) Operation and Effect of Statutes Prescribing Punishment.

Under Code 1907, § 7634, prescribing term of punishment on default in payment of fine and costs in misdemeanor cases, where jury found defendant guilty of vagrancy, and assessed fine of \$15, court should not have imposed sentence of imprisonment, on default in payment, exceeding 10 days. *Thompson v. State* (Ala. App.), 77 So. 967.

A sentence to the penitentiary for six months at hard labor was void, where the statute only permits a sentence at hard labor for the county. *Ex parte Gunter*, 193 Ala. 486, 69 So. 442.

§ 802 (2) Power of Courts to Impose Particular Kinds of Punishment.

Under Code 1907, § 7620, providing when court may sentence to hard labor, and § 7635, providing when additional hard labor may be imposed for costs, where term of imprisonment imposed did not exceed two years, sentence to hard labor for county was proper, though additional sentence to hard labor was imposed for

payment of costs. *Smith v. State*, 14 Ala. App. 103, 71 So. 979.

§ 802½. Cumulative Sentences.

Under Code 1907, §§ 6519, 6602, 6603, where a person was convicted of two offenses and continuous sentences passed, one to the penitentiary and the other to jail, and after serving the term in the penitentiary he was discharged, he could not be compelled to serve the jail sentence after expiration of period covered by it. *Ex parte King* (Ala. App.), 75 So. 710.

§ 805. Term of Imprisonment.

Computation of Term. — Under Acts 1911, p. 626, time for which petitioner was at large after his improper release on bail by the sheriff, upon appeal from conviction of felony, held not to be deducted from his term. *Ex parte Crews*, 12 Ala. App. 300, 67 So. 804.

Under Code 1907, § 6249, as amended by Acts 1911, p. 113, and under Acts 1911, p. 626, where petitioner was sentenced for felony, appealed, and was released on bail, pending appeal, without any formal suspension of sentence, he was not entitled to have the time he was out on bail credited on his term of imprisonment. *Ex parte Crews*, 12 Ala. App. 300, 67 So. 804.

§ 806. Place of Imprisonment.

Where defendant has been convicted of a number of misdemeanors punishments for which aggregate more than two years at hard labor for the county, he should be sentenced, not under Code 1907, § 6583, but to the penitentiary under Code 1907, § 7620. *Phelps v. State* (Ala. App.), 75 So. 877.

Gaming—Six Month in Penitentiary.

Under Code 1907, § 7620, providing that, where the sentence to hard labor is for 12 months or less, a party must be sentenced to imprisonment in the county jail or to hard labor for the county, a sentence, for keeping a gaming table, of 6 months in the penitentiary was unauthorized. *Minto v. State*, 9 Ala. App. 95, 64 So. 369, on reconsideration, reversing in part 8 Ala. App. 306, 62 So. 376, cited in notes in 51 L. R. A., N. S., 386; Ann. Cas. 1916D, 369, certiorari denied in *Ex parte Minto*, 187 Ala. 671, 65 So. 516.

One Year Sentence—Necessity of Imprisonment in County Jail. — *London v. State* (Ala. App.), 61 So. 611. See the title CRIMINAL LAW, § 806, vol. 4, p. 595.

Same — Statutory Provisions. — *Descrippio v. State*, 8 Ala. App. 85, 62 So. 1004. See the title CRIMINAL LAW, § 806, vol. 4, p. 595.

Crops.

§ 2½. Contracts.

§ 3. Effect of Sale or Conveyance of Land.

§ 4. — In General.

Cross References.

See the title CROPS, vol. 4, p. 597, and references there given.

In addition, see ante, AGRICULTURE; ATTACHMENT; CHATTEL MORTGAGES; post, LANDLORD AND TENANT; MORTGAGES.

§ 2½. Contracts.

Where a cropping contract between defendant and plaintiff's sons was modified so as to include other land and provide for the labor of plaintiff's family and his horse, the sons to have half of the crop and plaintiff and defendant each one-quarter, plaintiff was entitled to one-quarter of the value of the crop taken by defendant less plaintiff's indebtedness for advances. *Skelton v. Baker*, 189 Ala. 512, 66 So. 695.

Where a cropper left without gathering the crop because of the fault of the landowner, the latter was not entitled to credit for gathering the crop in the division, but otherwise if the cropper left without fault of the landowner. *Skelton v. Baker*, 189 Ala. 512, 66 So. 695.

Burden to Show Waiver of Lien to Part of Crop.—Where plaintiff claimed that defendant had waived his lien to one-quarter of the crop raised on his premises by a modification of a cropping contract, the burden was on plaintiff to show such waiver by obvious and plain proof. *Skelton v. Baker*, 189 Ala. 512, 66 So. 695.

§ 3. Effect of Sale or Conveyance of Land.

§ 4. — In General.

Crops Severed in Course of Husbandry.—Crops severed in the course of husbandry are chattels which do not pass with the realty. *McRight v. Farmed*, 14 Ala. App. 445, 70 So. 297.

Cross Examination.

See post, WITNESSES.

Crossings.

See post, RAILROADS; STREET RAILROADS.

CURTESY.

- § 2. Requisites.
- § 4. — Title or Seisin of Wife.
- § 5. — Birth of Issue.
- § 7. Estates Subject to Curtesy.
- § 9. Bar, Release, or Forfeiture.

Cross References.

See the title CURTESY, vol. 4, p. 599, and references there given.
In addition, see post, DOWER.

§ 2. Requisites.

§ 4. — Title or Seisin of Wife.

Prior to Code 1852, § 1990 (Code 1907, § 3765), creating a husband's life estate in the nature of curtesy in his deceased wife's separate estate, the husband's interest in such estate was by the curtesy to which the wife's seisin in fact or law during coverture was a necessary incident. *Jenkins v. Woodward Iron Co.*, 194 Ala. 371, 69 So. 646.

Code 1852 § 1990 (Code 1907, § 3765), and Code 1852, § 1982, abolished the husband's common-law estate by the curtesy, establishing a statutory estate in the nature of curtesy in the wife's separate estate, without the common-law conditions of seisin and issue, which separate estate includes a remainder. *Jenkins v. Woodward Iron Co.*, 194 Ala. 371, 69 So. 646.

Possession under Color of Title.—A married woman in possession of land under color of title held to have such ownership thereof as gave her husband a life estate under Rev. Code 1867, § 2379. *Vidmer v. Lloyd*, 184 Ala. 153, 63 So. 943.

Same—Abandonment of Possession.—

Married women in possession under color of title, who abandoned such possession without intention of returning, held to have no title such as gave her husband a life estate. *Vidmer v. Lloyd*, 184 Ala. 153, 63 So. 943.

§ 5. — Birth of Issue.

Necessity under Statute.—See ante, "Title or Seisin of Wife," § 4.

§ 7. Estates Subject to Curtesy.

See ante, "Title or Seisin of Wife," § 4.

Life Estate.—Where land was conveyed to a woman for life with remainder to her heirs, her husband was not entitled to a life estate by curtesy. *Smith v. Bachus*, 195 Ala. 8, 70 So. 261.

§ 9. Bar, Release, or Forfeiture.

Mortgage by Husband and Wife.—

Statutory life estate of husband, in nature of estate by curtesy, vested in mortgagee by mortgage executed by husband and wife jointly. *Shannon v. Ogletree* (Ala.), 76 So. 865.

CUSTOMS AND USAGES.

- § 2. Requisites and Validity.
- § 5. — Generality.
- § 7. — Reasonableness.
- § 8. — Legality.
- § 9. Application and Operation.
- § 12. — Knowledge of Parties.
 - § 12 (1) In General.
 - § 12 (2) Presumption of Knowledge.
- § 13. — Exclusion by Terms of Contract.

- § 14. — Explanation of Contract.
- § 15. — Adding to Terms of Contract.
- § 16. — Varying or Setting Aside Terms of Contract.
- § 18. Evidence as to Existence of Custom.
 - § 18 (1) Admissibility.
 - § 18 (2) Weight and Sufficiency.
- § 20. Questions for Jury.

Cross References.

See the title CUSTOMS AND USAGES, vol. 4, p. 603, and references there given. In addition, see ante, CONTRACTS; post, EVIDENCE; PRINCIPAL AND AGENT; SALES.

§ 2. Requisites and Validity.

§ 5. — Generality.

See post, "Reasonableness," § 7.

Where the existence of a grade of cotton specified in a contract of sale of cotton was known to the trade generally, the nonexistence of such a grade in the local cotton trade was immaterial for the use of the term by the parties was prima facie evidence that there was such a grade, and that they understood its application. *Baker v. Lehman, etc., Co.*, 186 Ala. 493, 65 So. 321.

§ 7. — Reasonableness.

Must be Reasonable, Legal and General. — *Loval v. Wolf*, 179 Ala. 505, 60 So. 298. See the title CUSTOM AND USAGES, § 7, vol. 4, p. 606.

§ 8. — Legality.

See ante, "Reasonableness," § 7.

§ 9. Application and Operation.

§ 12. — Knowledge of Parties.

§ 12 (1) In General.

Necessity of Knowledge. — *United States Health, etc., Ins. Co. v. Hill*, 9 Ala. App. 222, 62 So. 954. See the title CUSTOMS AND USAGES, § 12 (1), vol. 4, p. 608.

No local usage can become part of a contract unless it was known to the parties at the time of contracting. *Middleton v. Western Union Tel. Co.*, 197 Ala. 243, 72 So. 548.

A custom among real estate men in a city is not binding on a nonresident principal, in the absence of proof of knowledge of the custom. *Edwards v. Kilgore*, 192 Ala. 343, 68 So. 888.

§ 12 (2) Presumption of Knowledge.

A prevailing usage of trade, however general, can not be presumed to have been in the contemplation of contracting parties so as to control or vary the ordinary legal implications of their agreement, unless it is actually known to them or has prevailed so long that their knowledge of it may be reasonably presumed. *Cole Motor Car Co. v. Tebault*, 196 Ala. 382, 72 So. 21.

§ 13. — Exclusion by Terms of Contract.

A usage can not, by implication, nullify the express terms of a contract. *Middleton v. Western Union Tel. Co.*, 197 Ala. 243, 72 So. 548.

§ 14. — Explanation of Contract.

When the usage of a locality in which an instrument is executed has given certain words therein a peculiar signification, the parties to the instrument will be presumed to have used the words in their peculiar local sense. *Smith Lumber Co. v. Jernigan*, 185 Ala. 125, 64 So. 300.

In action on charter party against one claiming to have signed only as agent, involving the construction of the charter party, evidence of a universal, general custom in respect of the general acceptance in the trade of a particular intent imported by similar equivocal provisions of charter contracts was admissible. *Lutz v. Van Heynigen Brokerage Co. (Ala.)*, 75 So. 284.

Varying Terms of Contract. — *Borden & Co. v. Vinegar Bend Lumber Co.*, 7 Ala. App. 335, 62 So. 245; *Loval v. Wolf*, 179 Ala. 505, 60 So. 298. See the title CUS-

TOMS AND USAGES, § 14 (1), vol. 4, p. 609.

§ 15. — Adding to Terms of Contract.

Payment for Cotton upon Surrender of Receipts. — *Loyal v. Wolf*, 179 Ala. 505, 60 So. 298. See the title CUSTOMS AND USAGES, § 15, vol. 4, p. 612.

§ 16. — Varying or Setting Aside Terms of Contract.

Where no uncertainty existed in contract, except as to which of two theories parties had adopted, evidence of a custom contradicting express stipulations was inadmissible. *People's Bank, etc., Co. v. Walthall* (Ala.), 75 So. 570.

Contracts for mining of coal held not subject to contradiction by proof of custom making contracts for the removal of coal, terminable at will. *Pratt Consol. Coal Co. v. Short*, 191 Ala. 378, 68 So. 63.

Passing Title to Cotton by Delivery of Receipts. — *Loyal v. Wolf*, 179 Ala. 505, 60 So. 298. See the title CUSTOMS AND USAGES, § 16 (2), vol. 4, p. 614.

§ 18. Evidence as to Existence of Custom.

§ 18 (1) Admissibility.

Where seller of logs did not deliver

them alongside ship because buyer did not inspect them, evidence of buyer's custom to inspect held admissible to show a general custom. *Curjel & Co. v. Hallett Mfg. Co.* (Ala.), 73 So. 938.

In determining the proper division of fees between attorneys and associate counsel employed by them, evidence of a custom among members of the city's bar to divide fees equally, held admissible. *Smith v. Waldrop* (Ala.), 77 So. 331.

§ 18 (2) Weight and Sufficiency.

See post, "Questions for Jury," § 20.

§ 20. Questions for Jury.

Evidence Insufficient to Go to Jury. —

In an action of assumpsit to recover commissions for automobiles sold under a contract of agency, itemized statement submitted to plaintiff by defendant containing no suggestion of a custom, there being no evidence that the usage relied on by defendant was existent prior to date of contract, and plaintiff having testified to a diametrically opposite custom, the evidence was insufficient to warrant submission to jury of the existence of a custom or usage relied on by defendant. *Cole Motor Car Co. v. Tebault*, 196 Ala. 382, 72 So. 21.

CUSTOMS DUTIES.

See the title CUSTOMS DUTIES, vol. 4, p. 617, and references there given.

DAMAGES.

I. Nature and Grounds in General.

- § 4. General and Special Damage.
- § 5. Certainty as to Amount or Extent of Damage.

II. Nominal Damages.

- § 7. Nominal or Substantial Damages.
- § 9. — Extent of Damage Not Shown.

III. Grounds and Subjects of Compensatory Damages.

(A) Direct or Remote, Contingent, or Prospective Consequences or Losses.

- § 16. Natural and Probable Consequences of Breaches of Contract.
- § 17. — In General.
- § 23. Elements of Compensation in General.
- § 24. Physical Suffering and Inconvenience.
- § 25. — In General.
- § 26. — Aggravation of Previous Injury, Disease, or Disability.
- § 28. Pecuniary Losses.
- § 30. — Loss of Earnings or Services.
- § 31. — Impairment of Earning Capacity.
- § 33. — Loss of Profits.
- § 34. Expenses Incurred.
- § 35. — In General.
- § 36. — Medical Treatment and Care of Person Injured.
- § 40. Mental Suffering.
- § 42. — As Distinct Cause of Action or Element of Damage
- § 45. — Fright or Apprehension of Personal Injury.
- § 47. — Breach of Contract.

(B) Aggravation, Mitigation, and Reduction of Loss.

- § 49. Matter of Mitigation.
- § 50. Benefits Incident to Injury.
- § 51. Duty of Person Injured to Prevent or Reduce Damage.
 - § 51 (2) Personal Injuries.
 - § 51 (3) Injuries to Property.
 - § 51 (4) Breach of Contract.
- § 53. Reduction of Loss by Insurance.

(C) Interest, Costs, and Expenses of Litigation.

- § 57. Attorneys' Fees, Costs, and Expenses of Litigation.
- § 58½. — Litigation with Third Persons.

IV. Liquidated Damages and Penalties.

- § 60. Construction of Stipulations.
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V. Exemplary Damages.

- § 74. Grounds for Exemplary Damages.
- § 77. Amount of Exemplary Damages.

VI. Measure of Damages.**(A) Injuries to the Person.**

- § 79. Discretion as to Amount of Damages.
- § 80. Physical Suffering and Inconvenience in General.
- § 85. Mental Suffering.

(B) Injuries to Property.

- § 88. Injuries to Real Property.
- § 90½. — Permanent and Continuing Injuries.
- § 90½a. — Buildings or Other Improvements.
- § 91. — Growing Crops, Grass, Shrubby, or Trees.
- § 92. Injuries to Personal Property.

(C) Breach of Contract.

- § 93. Mode of Estimating Damages in General.
- § 95. Failure to Perform in General.
- § 96. Delay in Performance.
- § 98. Prevention or Obstruction of Performance.

VII. Inadequate and Excessive Damages.

- § 101. Injuries to the Person.
- § 102. — In General.
- § 104. — Permanent Injuries.
- § 106. — Impairment of Earning Capacity.
- § 108½. Breach of Contract.

VIII. Pleading, Evidence, and Assessment.**(A) Pleading.**

- § 110. General or Special Damage.
- § 111. Personal Injuries and Physical Suffering.
- § 111½. Loss of Earnings or Services.
- § 112. Loss of or Damage to Property.
- § 114. Grounds for Exemplary Damages.
- § 116. Defenses in General.
- § 117. Issues, Proof, and Variance.
- § 118. — In General.
- § 119. — Personal Injuries and Physical Suffering.
- § 120. — Pecuniary Losses.
- § 121. — Expenses Incurred.

(B) Evidence.

- § 123. Presumptions and Burden of Proof.
- § 124. Admissibility.
- § 124½. — In General.
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- § 132. — Impairment of Earning Capacity.
- § 133. — Loss of or Damage to Property.

- § 135. — Loss of Profits.
- § 136. — Expenses Incurred.
- § 139. — Aggravation, Mitigation, and Reduction of Loss.
- § 140. Weight and Sufficiency.
- § 142½. — Impairment of Earning Capacity.
- § 144. — Breach of Contract in General.
- (C) Proceedings for Assessment.
 - § 146. Inquest on Default or Interlocutory Judgment.
 - § 148. — Writ of Inquiry.
 - § 150. — Assessment by Court without Jury.
 - § 151½. — Reference for Assessment.
 - § 154. Physical Examination of Person Injured.
 - § 154½. Reception of Evidence as to Damages.
 - § 155. Questions for Jury.
 - § 156. Instructions.
 - § 157. — In General.
 - § 158. — Nominal or Substantial Damages.
 - § 159. — Mode of Estimating Compensatory Damages in General.
 - § 160. — Mitigation or Reduction of Damages.
 - § 161. — Exemplary Damages.
 - § 162. — Measure of Damages for Injuries to the Person.
 - § 162 (1) In General.
 - § 162 (2) Physical Suffering and Inconvenience Resulting from Injuries.
 - § 162 (2½) Permanent Injuries.
 - § 162 (2½a) Future Pain and Suffering.
 - § 162 (3) Loss of Earnings and Impairment of Earning Capacity.
 - § 162 (5) Mental Suffering.
 - § 163. — Measure of Damages for Injuries to Property.
 - § 164. — Measure of Damages for Breach of Contract.

Cross References.

See the title DAMAGES, vol. 4, p. 618, and references there given.

In addition, see ante, CARRIERS; post, DEATH; EVIDENCE; HIGHWAYS; MASTER AND SERVANT.

I. NATURE AND GROUNDS IN GENERAL.

§ 4. General and Special Damage.

General Damages. — King Land Co. v. Bowen, 7 Ala. App. 462, 61 So. 22. See the title DAMAGES, § 4, vol. 4, p. 624.

Special Damages. — King Land Co. v. Bowen, 7 Ala. App. 462, 61 So. 22. See the title DAMAGES, § 4, vol. 4, p. 624.

§ 5. Certainty as to Amount or Extent of Damage.

The mere fact that the establishment of

damages claimed is difficult of proof and ascertainment is no reason for holding that they are not recoverable. Limbaugh v. Boaz (Ala. App.), 78 So. 421.

II. NOMINAL DAMAGES.

§ 7. Nominal or Substantial Damages.

§ 9. — Extent of Damage Not Shown.

In the absence of proof of actual damages, only nominal damages can be recovered for breach of a contract. Stephenson v. Jebeles, etc., Confectionery Co., 10 Ala. App. 431, 65 So. 314.

Breach of Duty Shown in Action of Tort. — In an action of tort, where a breach of duty is shown, and the amount of the resulting injury is not shown, nominal damages are properly allowed. *Welch v. Evans Bros. Const. Co.*, 189 Ala. 548, 66 So. 317.

Permanent Injuries. — In the entire absence of data to determine amount of damages to railroad employee resulting from permanent injuries for which road is liable, such employee is entitled to nominal damages. *Alabama, etc., R. Co. v. Taylor*, 196 Ala. 37, 71 So. 676.

Same—Damages Susceptible of Exact Measure.—Where damages for permanent personal injuries are susceptible of exact measurement, the plaintiff must furnish data from which the amount may be fixed and if he does not, only nominal damages can be recovered. *Alabama, etc., R. Co. v. Flinn (Ala.)*, 74 So. 246.

The loss of an eye entitles the injured party to recover some damages if the defendant is liable at all, although not capable of exact ascertainment. *Alabama, etc., R. Co. v. Flinn (Ala.)*, 74 So. 246.

Decreased Earning Capacity. — In a motorman's action for personal injury, where there was evidence of permanent injury and impaired future earning capacity, but no data from which compensatory damage for decreased earning capacity could be fixed, except the evidence of a wage earned at the time of the injury and between the injury and the trial, the defendant was entitled to an affirmative instruction against the award of more than nominal damages for decreased earning capacity. *Birmingham R., etc., Co. v. Colbert*, 190 Ala. 229, 67 So. 513.

Where there was no evidence affording a basis for estimating compensatory damages on account of decreased earning capacity in the future, the jury could only award nominal damages on that item. *Sloss-Sheffield Steel, etc., Co. v. Dunn*, 9 Ala. App. 524, 63 So. 812.

Where the future earning capacity of an injured servant can not be determined with reasonable accuracy from the evidence in his action against his employer, he can recover only nominal damages for decreased earning capacity. *Alabama*

Fuel, etc., Co. v. Ward, 194 Ala. 242, 69 So. 621.

In a passenger's action for personal injury, where the complaint averred that plaintiff had been and would be less able to earn a livelihood, but where there was no positive evidence that she had any business or work at or before her injury or was prevented thereby from engaging in any business or work, but evidence that she was seriously and permanently injured, she might recover nominal damages. *Birmingham R., etc., Co. v. Friedman*, 187 Ala. 562, 65 So. 939.

III. GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES.

(A) DIRECT OR REMOTE, CONTINGENT, OR PROSPECTIVE CONSEQUENCES OR LOSSES.

§ 16. Natural and Probable Consequences of Breaches of Contract.

§ 17. — In General.

Where plaintiff alleges contract existing between him and defendant, and breach by defendant, plaintiff is entitled, in absence of special circumstances, to damages such as would generally result from the breach, according to the usual course of things. *Turner & Co. v. Munson S. S. Line (Ala. App.)*, 77 So. 61.

§ 23. Elements of Compensation in General.

Where a railroad is liable for its servant's permanent injuries, damnifying consequences resulting from such injuries are of elements of recoverable damages. *Alabama, etc., R. Co. v. Taylor*, 196 Ala. 37, 71 So. 676.

Where personal injury is shown to be permanent, pain and suffering, past and future, impaired health, diminished earning capacity, disfigurement, expenses of nursing and care, and other damages proximately resulting may be considered, not all of which are capable of exact measurement. *Alabama, etc., R. Co. v. Flinn (Ala.)*, 74 So. 246.

§ 24. Physical Suffering and Inconvenience.

§ 25. — In General.

An injured employee may, under Fed-

eral Employers' Liability Act, recover for suffering. *Southern R. Co. v. Peters*, 194 Ala. 94, 69 So. 611.

§ 26. — Aggravation of Previous Injury, Disease, or Disability.

Where exposure to weather or cold results in further physical debility to a person already sick or feeble, damages for causing such exposure may be recovered in a proper case. *Seaboard, etc., R. Co. v. Standifer*, 190 Ala. 260, 67 So. 391.

§ 28. Pecuniary Losses.

§ 30. — Loss of Earnings or Services.

"Loss of time" and "decreased or diminished earning capacity," as elements of damage in actions for personal injuries, are not synonymous; "loss of time," in such cases, signifying the loss of those earnings which accrue from employing time in labor or business, importing a materially distinct conception from "decreased or diminished earning capacity," which distinction, unless observed, might sanction a double recovery (citing words and Phrases, Second Series, Loss of Time). *Birmingham R., etc., Co. v. Colbert*, 190 Ala. 229, 67 So. 513.

An employee recovering under Federal Employers' Liability Act for personal injury may recover for loss of time. *Southern R. Co. v. Peters*, 194 Ala. 94, 69 So. 611.

§ 31. — Impairment of Earning Capacity.

An employee recovering under federal Employers' Liability Act for personal injury may recover for diminished earning power. *Southern R. Co. v. Peters*, 194 Ala. 94, 69 So. 611.

§ 33. — Loss of Profits.

Where recovery of profits is denied, it is not because they are profits, but because there is no criterion by which to estimate the amount with the proper certainty. *Deslandes v. Scales*, 187 Ala. 25, 65 So. 393.

In an action for damages to plaintiff's goods from the act of a contractor in leaving uncovered a hole in the roof of the building, through which it rained, plaintiff was not entitled to recover loss

of profits. *Welch v. Evans Bros. Const. Co.*, 189 Ala. 548, 66 So. 517.

Breach of Contract.—Where defendant, who agreed to lend plaintiff a sum of money to reconstruct his sawmill and dam, breached his contract after the dam had been torn down, plaintiff is entitled to recover for the loss of the use of his mill resulting from the tearing down of the dam, and for that purpose can show the reasonable monthly rental value of the mill when dismantling began. *Bixby-Theisen Co. v. Evans*, 186 Ala. 507, 65 So. 81, cited in note in L. R. A. 1916F, 507.

§ 34. Expenses Incurred.

§ 35. — In General.

An employee recovering under federal Employers' Liability Act for personal injuries may recover for expenses. *Southern R. Co. v. Peters*, 194 Ala. 94, 69 So. 611.

§ 36. — Medical Treatment and Care of Person Injured.

Where plaintiff's wife suffered a relapse of a nervous disease by reason of defendant's failure to furnish Pullman accommodations contracted for, all reasonable expenses incurred by plaintiff in having his wife treated may be recovered as damages. *Pullman Co. v. Meyer*, 195 Ala. 397, 70 So. 763.

Plaintiff, in an action for injury to his children from explosives, might recover the value of his services in nursing and caring for them. *Bryan v. Stewart*, 194 Ala. 353, 70 So. 123.

§ 40. Mental Suffering.

§ 42. — As Distinct Cause of Action or Element of Damage.

Carriage of Corpse of His Child. — *Birmingham Transfer, etc., Co. v. Still*, 7 Ala. App. 556, 61 So. 611. See the title DAMAGES, § 42, vol. 4, p. 639.

§ 45. — Fright or Apprehension of Personal Injury.

Where an injury proximately resulted from fright wrongfully caused by defendant, recovery will not be denied on the ground of expediency or public policy, because of the danger of opening the door to fictitious litigation easily simulated. *Alabama Fuel, etc., Co. v. Baladoni* (Ala. App.), 73 So. 205.

Damages are recoverable for physical injuries directly caused by fright which was the proximate consequence of defendant's negligence. *Alabama Fuel, etc., Co. v. Baladoni* (Ala. App.), 73 So. 205.

Mere Apprehension of Future Injury.—

While defendant, in an action for injuries, is responsible for the damages naturally and proximately resulting to the injured person, including nervousness, damages can not be recovered for mere apprehension of a future injury by plaintiff, not associated with, or resulting from, some physical infirmity caused by the injury and continuing with and because of that injury or infirmity. *McCray v. Sharpe*, 188 Ala. 375, 66 So. 441.

Fall, and Approach of Automobile.—

Bachelder v. Morgan, 179 Ala. 339, 60 So. 815, cited in notes in L. R. A. 1915D, 831, 833. See the title DAMAGES, § 45, vol. 4, p. 639.

§ 47. — Breach of Contract.

Contract to Furnish Pullman Car Accommodations.—Where defendant breached its contract to furnish Pullman accommodations, and the circumstances were such that defendant must have known a breach would probably subject plaintiff to distress, damages for mental anguish may be recovered; the action being *ex contractu*. *Pullman Co. v. Meyer*, 195 Ala. 397, 70 So. 763.

Contract to Embalm Child's Body.—

Where defendant breached his agreement to properly embalm the body of the plaintiff's child, plaintiff is entitled to recover damages for mental pain and anguish suffered because of the decomposition of the body before burial. *Loy v. Reid*, 11 Ala. App. 231, 65 So. 855, cited in note in L. R. A. 1915B, 523.

(B) AGGRAVATION, MITIGATION AND REDUCTION OF LOSS.

§ 49. Matter of Mitigation.

Continuance of Payment of Wages.—

Travis v. Louisville, etc., R. Co., 183 Ala. 415, 62 So. 851, cited in note in Ann. Cas. 1915C, 894. See the title DAMAGES, § 49, vol. 4, p. 641.

§ 50. Benefits Incident to Injury.

Donation by Employer to Employee Injured by Third Person.—*Bachelder*

v. Morgan, 179 Ala. 339, 60 So. 815. See the title DAMAGES, § 50, vol. 4, p. 641.

§ 51. Duty of Person Injured to Prevent or Reduce Damage.

§ 51 (2) Personal Injuries.

In an action by passenger for damages for being directed to take the wrong train, in consequence of which she was compelled to remain all night in a town not her home, she could not recover for the inconvenience or damages suffered from remaining all night in the depot, where she declined offers of railroad's agents to take her to a hotel or send her home in an automobile, since such damages were self-inflicted. *Southern R. Co. v. Pruett* (Ala.), 77 So. 49.

§ 51 (3) Injuries to Property.

Use of Carcass.—Plaintiff should, where possible, minimize damages suffered through the killing of an animal by railroad by exercising reasonable diligence to utilize animal's carcass and hide, and if he fails to do so amount of damages recoverable will be proportionately reduced, but this rule is not restricted to the market value of the salvage, although this may be properly considered. *Central, etc., R. Co. v. Williams* (Ala.), 75 So. 401.

Restoration to Former Rental Value.

—*Sloss-Sheffield Steel, etc., Co. v. Mitchell*, 181 Ala. 576, 61 So. 934, 938. See the title DAMAGES, § 51 (3), vol. 4, p. 642.

§ 51 (4) Breach of Contract.

General Rule.—*Borden & Co. v. Vinegar Bend Lumber Co.*, 7 Ala. App. 335, 62 So. 245. See the title DAMAGES, § 51 (4), vol. 4, p. 643.

Contract to Deliver Lumber.—The measure of damages for breach of contract to deliver lumber where the seller offers to deliver, but only on payment made before contract time, is the interest upon such payment from the time of payment under such offer to the contract time of payment, the buyer being bound to minimize damages for the breach of contract, even if he has to deal with the seller. *Borden & Co. v. Vinegar Bend Lumber Co.*, 7 Ala. App. 335, 62 So. 245.

Contract to Employ Plaintiff.—In an

action for breach of contract for rental of land on shares, although the relation between the parties was that of tenants in common, and not that of a contract of hire within Code 1907, § 4743, which would have given plaintiff a lien on crops produced, since the contract provided that plaintiff do the work personally, it will be treated as a breach of contract for personal services, and the proper measure of damages is the value of one-half of the crops that would have been gathered by him, less one-half the cost of fertilizer and such sum plaintiff received from other employment, or could have made had he, in the exercise of reasonable effort, been able to obtain at the same place employment of the same general nature. *Farrow Mercantile Co. v. Riggins*, 14 Ala. App. 529, 71 So. 963.

Payment of Fare to Prevent Ejection of Passenger.—Where an initial carrier sold plaintiff an interstate ticket over a prohibited route, and it was refused by a connecting carrier, it was plaintiff's duty to pay fare for such portion of the route, he being able to do so, to reduce his damages, and he could not recover for delay and added expense resulting from his ejection. *Seaboard, etc., R. Co. v. Patrick*, 10 Ala. App. 341, 65 So. 437.

Preparation for Emergency Created by Carrier.—A passenger owes a carrier no duty to be prepared for an emergency forced upon him by the carrier's wrongful refusal to carry him to his destination; nor is the carrier relieved of responsibility for the full measure of his suffering because of his want of funds to meet a wrong he need not have anticipated. *Birmingham R., etc., Co. v. Hatton*, 187 Ala. 573, 65 So. 934.

§ 53. Reduction of Loss by Insurance.

Personal Accident Insurance. — The admission on cross-examination of defendant, whose chauffeur was alleged to have negligently run down plaintiff, of testimony tending to show that counsel appearing for defendant represented an indemnity insurance company was error, as defendant's liability would not be affected by the fact that he was indemnified nor did it affect his credibility. *Watson v. Adams*, 187 Ala. 490, 65 So. 528.

Automobile Insured.—A person through whose negligence plaintiff's automobile was damaged by a runaway horse was not entitled to have the damages reduced on account of the fact that plaintiff had insurance on the automobile against accident, and evidence of such insurance was not admissible. *Hill v. Condon*, 14 Ala. App. 332, 70 So. 208.

In an action for damages from a collision of automobiles on the ground of a negligent or wantonly negligent operation by defendant's servant, evidence that defendant had a policy indemnifying him against loss by the accident held properly excluded on the court's own motion. *Blalack v. Blackshear*, 11 Ala. App. 545, 66 So. 863.

(C) INTEREST, COSTS, AND EXPENSES OF LITIGATION.

§ 57. Attorneys' Fees, Costs, and Expenses of Litigation.

§ 58½. — Litigation with Third Persons.

In an action for wrongfully altering the minute record of circuit court, damages sustained by plaintiff administrator in defending for judge of court mandamus suit, in which contention judge was not sustained, and in expenses of trip to attend prosecution of petition for mandamus on appeal, were too remote. *Wilder v. Bush (Ala.)*, 75 So. 143.

IV. LIQUIDATED DAMAGES AND PENALTIES.

§ 60. Construction of Stipulations.

§ 63. — Form and Language of Instrument.

Liquidated Damages.—A provision in a building contract that for each day's delay in completion beyond a day fixed the contractor should be liable in the sum of \$10 is not a penalty, but is a provision for liquidated damages. *George v. Roberts*, 186 Ala. 521, 65 So. 345, cited in note in Ann. Cas. 1917D, 749.

Penalty.—Under a contract for the sale of a dry kiln apparatus, a provision that failure of the purchaser to return dry kiln apparatus if unsatisfactory within ten days after stipulated tests will subject him to payment of the price as

liquidated damages, held to impose a penalty. *Walshe Mfg. Co. v. Smith Lumber Co.*, 196 Ala. 371, 72 So. 73.

V. EXEMPLARY DAMAGES.

§ 74. Grounds for Exemplary Damages.

Circumstances of Aggravation.—It is not necessary to the awarding of exemplary damages that plaintiff show wantonness or willfulness; it being sufficient if commission of tort is attended with circumstances of aggravation. *Birmingham Waterworks Co. v. Brooks* (Ala. App.), 76 So. 515.

Conscious of Probable Consequences of His Negligence.—In order to obtain punitive damages, it is not necessary to show malice, but it is sufficient to show such entire want of care as to raise the presumption that person at fault is conscious of probable consequences of his carelessness. *Birmingham Waterworks Co. v. Davis* (Ala. App.), 77 So. 927.

Gross and Wanton Negligence.—A miner injured by his employer's gross and wanton negligence in maintaining defective mine roof could recover punitive damages, in addition to his compensatory damages. *Clinton Min. Co. v. Bradford* (Ala.), 76 So. 74.

§ 77. Amount of Exemplary Damages.

Though amount of punitive damages is within sound discretion of jury, such discretion is not unbridled or arbitrary. *Southern Exp. Co. v. Malone* (Ala. App.), 78 So. 408.

VI. MEASURE OF DAMAGES.

(A) INJURIES TO THE PERSON.

§ 79. Discretion as to Amount of Damages.

Sound Judgment of Jury.—The law has no fixed monetary standard for the assessment of damages for personal injuries, but the damages must be fixed by the jury in the exercise of sound judgment. *Sheffield Co. v. Harris*, 183 Ala. 357, 61 So. 88.

§ 80. Physical Suffering and Inconvenience in General.

Discretion of Jury.—*Birmingham R., etc., Co. v. Coleman*, 181 Ala. 478, 61 So. 890. See the title DAMAGES, § 80, vol. 4, p. 653.

§ 85. Mental Suffering.

Discretion of Jury.—*Birmingham R., etc., Co. v. Coleman*, 181 Ala. 475, 61 So. 890. See the title DAMAGES, § 85, vol. 4, p. 654.

(B) INJURIES TO PROPERTY.

§ 88. Injuries to Real Property.

§ 90½. — Permanent and Continuing Injuries.

Where permanent injury is done to land by the casual or recurrent overflow of water, the measure of damages is the difference between the value of the premises with and without such injury at the time thereof. *International Agr. Corp. v. Abercrombie*, 192 Ala. 50, 68 So. 873.

§ 90¾a. — Buildings or Other Improvements.

Where buildings are destroyed, they are regarded as capable of a separate valuation, and the measure of damages is their value at the time of the injury, and, where the property has no market value or the market value is inadequate, the measure of damages is its reasonable value for the uses to which the owner was then putting it or might have put it; and evidence as to the reasonable cost of the burned buildings, or of similar new buildings, is relevant in support of opinion evidence as to the actual value, in connection with evidence showing the depreciation from use and age. *Southern R. Co. v. Slade*, 192 Ala. 568, 68 So. 867, cited in note in L. R. A. 1917A, 370.

§ 91. — Growing Crops, Grass, Shrubbery, or Trees.

Growing Crops.—In an action for damages to growing crops caused by sulphurous fumes from defendant's fertilizer plant, the measure of damages is the difference in the yield and price of crops with and without the fumes complained of. *International Agr. Corp. v. Abercrombie*, 184 Ala. 244, 63 So. 549, 49 L. R. A., N. S., 415.

Trees.—Measure of damages for destruction of growing trees is diminished value of premises. *Southern R. Co. v. Slade*, 190 Ala. 568, 68 So. 867.

§ 92. Injuries to Personal Property.

Automobile.—In an action for damages to an automobile, where there was no

evidence as to the value of the loss of its use; the measure of damages was the difference in its value just before and just after the injury. *Birmingham R., etc., Co. v. Sprague*, 196 Ala. 148, 72 So. 96.

Stock of Merchandise.—In an action for damages to plaintiff's goods from the act of a contractor in leaving uncovered a hole in the roof of the building, through which it rained, the measure of plaintiff's damages, if entitled to recover, was the difference in the value of the goods before and after the injury. *Welch v. Evans Bros. Const. Co.*, 189 Ala. 548, 66 So. 517.

Household Goods.—Where no market value is shown for secondhand household goods, actual value of such goods to owner, excluding fanciful or sentimental value, furnishes rule for measure of damages. *Buerger v. Mabry* (Ala. App.), 73 So. 135.

(C) BREACH OF CONTRACT.

§ 93. Mode of Estimating Damages in General.

The measure of damages for a breach of contract in those damages which are the natural consequences of the breach, and which may be reasonably deemed to have been in the contemplation of the parties, but damages which can not be supposed to have been contemplated by the parties, or loss of profits in a business where the data are uncertain, can not be recovered. *Illinois Cent. R. Co. v. Brothers*, 12 Ala. App. 351, 67 So. 628.

§ 95. Failure to Perform in General.

Contract to Transfer Fire Insurance Policy.—On counterclaim for breach of contract to transfer a fire insurance policy on property sold to defendant, defendant's damage was what could have been realized on the policy if it had been properly transferred, which was the value of the property destroyed not to exceed the amount provided for in the policy, notwithstanding fact that company might not have consented to the transfer. *Hackett v. Cash*, 196 Ala. 403, 72 So. 52.

On counterclaim for breach of contract to convey a fire policy, damages would not be scaled upon the pro rata clause in the policy in the proportion

the policy bore to another policy in which defendant can not participate. *Hackett v. Cash*, 196 Ala. 403, 72 So. 52.

§ 96. Delay in Performance.

Delay in Completion of Building.—*Huntsville Elks Club v. Garrity-Hahn Bldg. Co.*, 176 Ala. 128, 57 So. 750. See the title DAMAGES, § 96, vol. 4, p. 658.

§ 98. Prevention or Obstruction of Performance.

Where by defendants' breach of collateral engagements, plaintiff was prevented from performing his contract to transport lumber, he may recover the difference between the agreed price and the reasonable cost of performance. *Doran & Co. v. Gilreath*, 196 Ala. 377, 72 So. 94.

VII. INADEQUATE AND EXCESSIVE DAMAGES.

§ 101. Injuries to the Person.

§ 102. — In General.

Verdict Held Not Inadequate.—*Liles v. Montgomery Tract. Co.*, 7 Ala. App. 537, 61 So. 480, cited in notes in L. R. A. 1915F, 493; Ann. Cas. 1916B, 385, 388, 391, 414. See the title DAMAGES, § 102, vol. 4, p. 661.

§ 104. — Permanent Injuries.

A verdict of \$1,250 awarded a brakeman struck by an engine and knocked unconscious, and bruised on the forehead and back, having one rib broken and one arm bruised and a tooth broken, and confined to the hospital for three weeks, suffering a great deal of pain, and lost time, and having permanent scars on his face, was not excessive. *Louisville, etc., R. Co. v. Byrd* (Ala.), 73 So. 514.

Loss of Arm.—Where a girl three years old received injuries which necessitated the amputation of her left arm below the elbow, a verdict for \$3,500 damages will not be set aside as excessive. *Clover Creamery Co. v. Diehl*, 183 Ala. 429, 63 So. 196, cited in note in L. R. A. 1915F, 55.

Loss of Leg.—*Louisville, etc., R. Co. v. Williams*, 183 Ala. 138, 62 So. 679, cited in notes in L. R. A. 1915F, 35, 146, 217, 310. See the title DAMAGES, § 104, vol. 4, p. 663.

Shoulder Injured.—*Bachelder v. Morgan*, 179 Ala. 339, 60 So. 815, cited in notes in L. R. A. 1915F, 62, 438. See the title DAMAGES, § 104, vol. 4, p. 602.

§ 106. — Impairment of Earning Capacity.

Where plaintiff, a man of considerable business affairs, lost an eye, his hearing was impaired, and his earning capacity, which before his injury was from \$5,000 to \$30,000 yearly, was materially lessened, a verdict for \$2,000 was not so inadequate as to indicate that the jury was influenced by improper motives. *Miller v. Southern Bell Tel., etc., Co.*, 195 Ala. 408, 70 So. 730.

§ 106½. Breach of Contract.

Contract for Medical Services.—In action by an employee's wife against employing corporation and the "company doctor" for failure to render to her medical services under contract with her husband, verdict for plaintiff for \$300 was not excessive, where the jury was authorized to find that she suffered, from an abscess, great physical pain and mental anguish for three or four days, which could probably have been prevented by the defendant doctor. *Sloss-Sheffield Steel, etc., Co. v. Taylor* (Ala. App.), 77 So. 79.

VIII. PLEADING, EVIDENCE, AND ASSESSMENT.

(A) PLEADING.

§ 110. General or Special Damage.

Special Damages.—*Goldstein v. Self*, 9 Ala. App. 100, 62 So. 369; *King Land Co. v. Bowen*, 7 Ala. App. 462, 61 So. 22. See the title DAMAGES, § 110, vol. 4, p. 664.

A specification of damage is required only as to special damages which are those of an extraordinary nature. *Birmingham Realty Co. v. Thomason*, 8 Ala. App. 535, 63 So. 65.

§ 111. Personal Injuries and Physical Suffering.

Permanency of Injuries. — Complaint need not in terms allege that injury was permanent, but it is enough to allege that plaintiff received certain personal injury, which he believes to be of perma-

nent nature. *Birmingham R., etc., Co. v. Hunt* (Ala.), 76 So. 918.

Illustration.—*Birmingham R., etc., Co. v. Goldstein*, 181 Ala. 517, 61 So. 281. See the title DAMAGES, § 111, vol. 4, p. 665.

§ 111½. Loss of Earnings or Services.

Loss of time and decreased or diminished earning capacity resulting from personal injury are special damages, not recoverable unless specially claimed; and allegation that plaintiff was rendered for a long time unable to work and earn money was allegation only of lost time. *Birmingham R., etc., Co. v. Colbert*, 190 Ala. 229, 67 So. 513.

§ 112. Loss of or Damage to Property.

Loss of Manure or Fertilizer by Overflow.—*King Land Co. v. Bowen*, 7 Ala. App. 462, 61 So. 22. See the title DAMAGES, § 112, vol. 4, p. 665.

§ 114. Grounds for Exemplary Damages.

Necessity of Specially Pleading. — *Nashville, etc., Railway v. Blackmon*, 7 Ala. App. 530, 61 So. 468. See the title DAMAGES, § 114, vol. 4, p. 665.

§ 116. Defenses in General.

The question of the recoverability of claimed elements of damages should be raised by objection to the admission of evidence or to the instructions or by motion to strike rather than by a plea. *Western Union Tel. Co. v. Favish*, 196 Ala. 4, 71 So. 183.

§ 117. Issues, Proof, and Variance.

§ 118. — In General.

Mitigation of Damages.—Matter in mitigation of damages is admissible under the general issue. *People's Shoe Co. v. Skally*, 196 Ala. 349, 71 So. 719.

Variance.—In an action for damages for breach of an agreement to embalm the body of plaintiff's minor child, the failure of plaintiff to prove all the damages alleged does not constitute a variance. *Loy v. Reid*, 11 Ala. App. 231, 65 So. 855.

§ 119. — Personal Injuries and Physical Suffering.

Fright.—Where the issue raised by the pleadings was whether plaintiff was frightened as a result of a collision with

a buggy occupied by him at the time, evidence that he was so frightened was properly admitted. *Ballenger v. Shumate*, 10 Ala. App. 329, 65 So. 416.

Permanent Injury.—In a servant's action for injuries, where the complaint alleged a permanent, continuing injury, it was proper to permit a medical witness to testify as to the physical condition of plaintiff a few weeks before trial, although the accident happened 18 months before. *Pensacola, etc., Co. v. Brooks*, 14 Ala. App. 364, 70 So. 968.

§ 120. — Pecuniary Losses.

Count for Both General and Special Damage.—Where a count claims damage for the commission of an injury by blasting and concludes with allegations of special damage, the defendant is not entitled to the general charge in its favor, where the evidence does not sustain the special damages alleged; since such damages as the law implies would have accrued from the wrong complained of may be recovered under the general claim. *Birmingham Realty Co. v. Thomason*, 8 Ala. App. 535, 63 So. 65.

Breach of Contract.—*Southern Bituminous Co. v. Hughston*, 177 Ala. 559, 58 So. 450. See the title DAMAGES, § 120, vol. 4, p. 668.

§ 121. — Expenses Incurred.

Evidence that plaintiff incurred expense of employment of counsel to protect him against unlawful arrest and malicious prosecution was properly excluded, where such expense was not specially claimed as damage in complaint for false imprisonment and malicious prosecution. *Williams v. Hayes* (Ala. App.), 77 So. 915.

(B) EVIDENCE.

§ 123. Presumptions and Burden of Proof.

Presumptions.—The law implies some diminished earning capacity from permanent injury. *Birmingham R., etc., Co. v. Colbert*, 190 Ala. 229, 67 So. 513.

Since the loss of time may not result in any damage whatsoever, the law does not imply even a nominal damage. *Birmingham R., etc., Co. v. Colbert*, 190 Ala. 229, 67 So. 513.

In an action for personal injuries, where it appeared that plaintiff's medical expenses had been paid, a judgment, awarding compensation for expenses to which plaintiff, a woman, had been put for the healing of her injuries, can not be reversed on the theory that some one else upon whom plaintiff was dependent may have paid the bill, for there is no presumption of a woman's dependency. *Birmingham, etc., Co. v. Ayer*, 192 Ala. 593, 69 So. 56.

Burden of Proof.—On counterclaim for breach of contract to transfer a fire policy, burden was upon plaintiff to establish his defense that policy could not have been enforced if he had complied with his contract to properly transfer it by showing why and wherein it could not be enforced. *Hackett v. Cash*, 196 Ala. 403, 72 So. 52.

Same — Mitigation of Damages.—Where the conduct of one injured in his efforts to extricate himself from loss does not appear to have been improvident nor in bad faith, the burden of proof is upon the one causing the wrong or loss to show that the loss might have been mitigated by a different course of conduct, which a reasonably prudent man ought to have taken. *Western Union Tel. Co. v. Jackson Lumber Co.*, 187 Ala. 629, 65 So. 962.

§ 124. — Admissibility.

§ 124½. — In General.

Appropriate objection to evidence is one of the recognized means of questioning the recoverability of elements of damages, and the mere fact of a claim therefor in the complaint does not conclude defendant as in the other matters of substance averred. *Deslandes v. Scales*, 187 Ala. 25, 65 So. 393.

It was not material on the question of an employee's damages for personal injuries whether he was working by the day or otherwise, so that evidence thereof was not admissible. *Illinois Cent. R. Co. v. Lowery*, 184 Ala. 443, 63 So. 952, 49 L. R. A., N. S., 1149.

§ 125. — Personal Injuries and Physical Suffering.

Physical Suffering.—Plaintiff may testify of physical pain suffered from and

as the result of his injury. *Birmingham R., etc., Co. v. Hunt* (Ala.), 76 So. 918.

In a husband's action for his damages from injuries to his wife, the testimony of a physician who attended the wife that she suffered pain was properly admitted. *Birmingham R., etc., Co. v. Roach*, 188 Ala. 306, 66 So. 82.

Condition of Other Eye.—In an action for injuries to plaintiff's left eye, evidence as to the condition of his right eye subsequent to the injury was admissible, since, if his right eye was diseased or defective, the consequences to follow from the complete loss of his left eye would be more grave and damnifying, while, if the diseased or defective condition of the right eye was aggravated by the injury to and loss of the left eye, this was a proper fact for the jury's consideration in ascertaining the damages. *Louisville, etc., R. Co. v. Carter*, 195 Ala. 382, 70 So. 655.

§ 127. — Health and Physical Condition of Person Injured.

In a passenger's action for personal injuries, the physician who attended plaintiff could describe the objective and subjective symptoms found when examining plaintiff. *Empire Coal Co. v. Gravlee*, 2 Ala. App. 657, 64 So. 207.

In a husband's action for his damages from injury to his wife, testimony of a witness that she never knew the wife to "complain of a headache" or "to be in bed a day," following testimony of the same witness that she was intimately acquainted with the wife, and that her health appeared to be excellent, and that she was very active, was properly admitted. *Birmingham R., etc., Co. v. Roach*, 188 Ala. 306, 66 So. 82.

Miscarriages.—Plaintiff having introduced proof of a miscarriage a few months after the assault and battery sued for, with expert opinion that the miscarriage probably was caused thereby, defendant could show other prior miscarriages by plaintiff at about the same period of gestation. *Singer Sewing Mach. Co. v. Methvin*, 184 Ala. 554, 63 So. 997.

§ 130. — Pecuniary Condition of Person Injured.

Evidence as to plaintiff's ability to pay

for treatment by physicians held immaterial on the issue of the extent of his injury, or of the character and duration of the pain he claimed to have suffered in consequence thereof. *Birmingham R., etc., Co. v. Friedman*, 187 Ala. 562, 65 So. 939.

§ 131. — Loss of Earnings or Services.

Loss of Time.—In an action against a street railway for personal injuries, plaintiff having stated he was a sawmill man, his testimony, as to his earnings per month, that he had made in the sawmill business as high as \$100 a month, was not irrelevant on his damages by loss of time, or improper as stating the profits of his sawmill business, since the natural import of the testimony included only plaintiff's personal earnings as wages or salary. *Alabama City, etc., R. Co. v. Lee* (Ala.), 76 So. 908.

In an action against a street railway for personal injuries, plaintiff's testimony, as to his earnings per month, that in the sawmill business he had made as high as \$100 a month, if intended to state that plaintiff's sawmill business yielded him that sum in profits was objectionable as irrelevant to his damage by loss of time. *Alabama City, etc., R. Co. v. Lee* (Ala.), 76 So. 908.

Loss of Wife's Services.—In a husband's action for damages suffered by him from an injury to his wife, evidence of the services performed by the wife for her husband before her injury, and that she was unable to perform such services thereafter, was properly admitted. *Birmingham R., etc., Co. v. Roach*, 188 Ala. 306, 66 So. 82.

In an action by a husband for his damages from injuries to his wife, plaintiff's testimony as to his wife's manifestations of pain and the duration of her condition was admissible on the question of the loss suffered by him from her injury. *Birmingham R., etc., Co. v. Roach*, 188 Ala. 306, 66 So. 82.

§ 132. — Impairment of Earning Capacity.

In action for injuries under the federal Employers' Liability Act, plaintiff's testimony that for many years he had been employed by defendant in the service he was performing at the time

of his injury, that his injury had disabled him to further perform such service, and that he was at the time of the trial unable to perform any service requiring the constant use of his injured foot, was material to be considered in ascertaining the effect of plaintiff's injury upon his ability to earn a livelihood in the employment for which he was fitted by long experience and some degree of disability in other lines, and was not objectionable as conclusions. *Southern R. Co. v. Fisher* (Ala.), 74 So. 580.

Experience in Various Kind of Work.—*Birmingham R., etc., Co. v. Simpson*, 177 Ala. 475, 59 So. 213. See the title DAMAGES, § 132, vol. 4, p. 673.

§ 133. — Loss of or Damage to Property.

Value of Vehicle before and after Collision.—In an action for damage to a buggy in a collision on a street evidence of the difference between the value of the buggy before and after the collision was admissible on the question of damages. *Ballenger v. Shumate*, 10 Ala. App. 329, 65 So. 416, cited in note in *Ann. Cas.* 1915D, 795.

Market Value of Injured Animal.—Evidence held not to clearly show that property had a market value at the place where it was injured, so that proof of the market value at the nearest market was admissible. *Louisville, etc., R. Co. v. Dickson* (Ala. App.), 73 So. 750, certiorari denied in 74 So. 1005.

Market Value Elsewhere.—Where there is no market value of property in question at the place where such value would generally be determined, the market value at other places, with cost of transportation, or other facts that will enable the jury to deduce the value at the place in question, may be shown. *Louisville, etc., R. Co. v. Dickson* (Ala. App.), 73 So. 750, certiorari denied in 74 So. 1005.

Where it appears there is a market value of property at the place where such value is usually fixed, market value elsewhere is inadmissible. *Louisville, etc., R. Co. v. Dickson* (Ala. App.), 73 So. 750, certiorari denied in 74 So. 1005.

Amount of Prospective Crops.—In an action for damages to growing crops by

fumes from a fertilizer factory, evidence as to how much the land would have yielded if it had not been injured held admissible as to the amount of damage at the time of injury. *International Agr. Corp. v. Burton*, 194 Ala. 108, 69 So. 417.

§ 135. — Loss of Profits.

In an action against a street railway for personal injuries, plaintiff having stated he was a sawmill man, his testimony, as to his earnings per month, that he had made in the sawmill business as high as \$100 a month, was not improper as stating the profits of his sawmill business, since the natural import of the testimony included only plaintiff's personal earnings as wages or salary. *Alabama City, etc., R. Co. v. Lee* (Ala.), 76 So. 908.

§ 136. — Expenses Incurred.

Medical Treatment.—In a husband's action for damages from personal injuries to his wife, evidence as to his expenses in treating her was admissible; but he should have stated the facts, and could not give a mere estimate of such expenses. *Perrine v. Southern Bitulithic Co.*, 190 Ala. 96, 66 So. 705.

In an action for damages for injury to his child, where plaintiff had testified that the value of his services in nursing and attending to the injured children was \$1.50 a day, testimony of plaintiff in answer to a question that he had made three trips in the course of nursing and treating the child, involving an expense of \$6, was admissible. *Bryan v. Stewart*, 194 Ala. 353, 70 So. 123.

No Hospital Charges.—In a servant's action for personal injuries, evidence for defendant that plaintiff was not charged for staying in the hospital half a day held inadmissible. *Sloss-Sheffield Steel, etc., Co. v. Dunn*, 9 Ala. App. 524, 63 So. 812.

§ 139. — Aggravation, Mitigation, and Reduction of Loss.

Mitigation.—In an action by an engineer of a railroad company against another railroad company for personal injury, evidence as to the amount paid the engineer by his own company is admissible in mitigation of damages. *Louisville,*

etc., *R. Co. v. Burke*, 11 Ala. App. 496, 66 So. 885.

Ability to Reduce.—In an action for breach of contract of rental of land on shares, where the crop season at the time of the breach had not advanced too far to permit plaintiff, in the exercise of reasonable effort and expense, to rent similar lands and replace the stock and tools that the defendants had agreed to furnish, evidence of his financial condition at time of the breach was admissible on the question whether by reasonable efforts he could have minimized the damages. *Farrow Mercantile Co. v. Rigins*, 14 Ala. App. 529, 71 So. 963.

§ 140. Weight and Sufficiency.

§ 142½. — Impairment of Earning Capacity.

In a servant's action for injuries, evidence held insufficient to make possible a determination of plaintiff's future earning capacity with reasonable accuracy. *Alabama Fuel, etc., Co. v. Ward*, 194 Ala. 242, 69 So. 621.

§ 144. — Breach of Contract in General.

Contract to Transfer Insurance Policy.—In an action upon secured notes, where defendant's plea in recoupment set up a contract by plaintiff to transfer a policy of fire insurance, by proving the breach, the destruction of property, and introducing policy, he met the burden and made out a prima facie case as to damages. *Hackett v. Cash*, 196 Ala. 403, 72 So. 52.

(C) PROCEEDINGS FOR ASSESSMENT.

§ 146. Inquest on Default or Interlocutory Judgment.

§ 148. — Writ of Inquiry.

Definition.—*McGowin v. Dickson*, 182 Ala. 161, 62 So. 685. See the title DAMAGES, § 148, vol. 4, p. 679.

§ 150. — Assessment by Court without Jury.

Under Code 1907, § 3971, providing that in all actions on open or stated account if judgment is taken by default, and plaintiff files an itemized and verified statement of the account, or where

there are depositions on file that prima facie prove the correctness of the account, no writ of inquiry shall be necessary, but the court may ascertain the amount due, and render judgment accordingly without a jury, where plaintiff demanded trial by jury as provided by acts 1915, p. 824, on defendant's default the court erred in not directing a writ of inquiry to a jury to ascertain the amount of the account where there was no documentary evidence as to the amount. *Ex parte Florida Nursery, etc., Co. (Ala.)*, 77 So. 391.

If the record proper does not show a substantial compliance with Code 1907, § 3971, justifying final judgment in case of default only in certain cases without a writ of inquiry to the jury to ascertain the amount, the judgment must be reversed on appeal. *Ex parte Florida Nursery, etc., Co. (Ala.)*, 77 So. 391.

§ 151½. — Reference for Assessment.

A register, appointed in an action between cotenants for an accounting for timber cut and sold, to ascertain the value of plaintiff's interest therein, held not warranted in estimating damages solely by a comparison of the amount cut and taken with the amount admitted by defendant to have been cut and taken from land in the vicinity. *Gulf Red Cedar Co. v. Crenshaw*, 188 Ala. 606, 65 So. 1010.

§ 154. Physical Examination of Person Injured.

Where, in an action for personal injuries, defendant did not move for a physical examination of plaintiff's person by physicians prior to the trial, and plaintiff's evidence as to his injuries disclosed nothing more than had been alleged in the complaint, a motion for such examination made at the trial was not seasonably made, and its denial will not be disturbed. *Mobile, etc., R. Co. v. Burch*, 12 Ala. App. 421, 68 So. 509, cited in note in *Ann. Cas.* 1917D, 352.

§ 154½. Reception of Evidence as to Damages.

In a personal injury action, where plaintiff's right of recovery was foreclosed by a default judgment, in a trial merely upon an inquiry as to the amount

of damages, the fact that defendant had a rule in force requiring employees to report any injury was irrelevant; although it would be otherwise where the inquiry is upon the question of negligence or contributory negligence. *Tennessee Coal, etc., R. Co. v. King* (Ala.), 76 So. 982.

§ 155. Questions for Jury.

Conflicting Evidence.—Where the evidence as to actual damages was conflicting, the question as to the amount is for the determination of the jury. *Southern R. Co. v. Hayes* (Ala.), 73 So. 945.

Cause of Sickness.—*Central, etc., R. Co. v. Conville*, 8 Ala. App. 520, 62 So. 973. See the title DAMAGES, § 155, vol. 4, p. 681.

Amount of Damages for Personal Injuries.—The amount of damages to be awarded to plaintiff for inconvenience, physical discomfort, or illness arising from the carrier's breach of contract to carry is peculiarly for the jury, and the jury's award will not be disturbed unless so excessive or so grossly inadequate as to indicate passion, prejudice or corruption. *Central, etc., R. Co. v. Sanders*, 9 Ala. App. 632, 64 So. 190.

Pain and suffering, mutilation, disfigurement, or loss of an organ as elements of damages for permanent personal injuries are not capable of exact measurement, and consequently are left to the jury's discretion. *Alabama, etc., R. Co. v. Flinn* (Ala.), 74 So. 246.

Permanency of Injuries.—Whether the plaintiff was permanently injured—i. e., had suffered an injury that, according to every reasonable probability, would continue throughout the remainder of his life—was for the jury under evidence tending to show that plaintiff was less perfect nine months after the injury; that he complained of pain; that two of his ribs had been broken, etc. *Alabama, etc., R. Co. v. Taylor*, 196 Ala. 37, 71 So. 676.

Measure of Loss of Profits.—On evidence in an action for damages for breach of a contract to extract ore from defendant's property and deliver it at a stipulated price per ton, held, that the measure of plaintiff's lost profits was for

the jury. *Sloss-Sheffield Steel, etc., Co. v. Payne*, 186 Ala. 341, 64 So. 617.

Loss of Time.—In an action for personal injuries, where it appeared that until plaintiff recovered or partially recovered from the injuries his business was conducted by his brother, but there was no evidence that his business suffered during his temporary absence, that is cost him anything to maintain its usual level of earnings, and no evidence of the value on a wage basis of the services he might have rendered had he not been injured, it was error to submit the question of damages for loss of time. *Birmingham R., etc., Co. v. Simpson*, 190 Ala. 138, 67 So. 385.

Punitive Damages.—Awarding of punitive damages where the law permits is exclusively for the jury. *Hilley v. Central, etc., R. Co.*, 11 Ala. App. 605, 66 So. 883.

While the recovery and amount of punitive damages rests in discretion of jury, the rule is otherwise as to actual damages in which case the jury is to be governed by evidence. *Southern R. Co. v. Hayes* (Ala.), 73 So. 945.

In action for trespass against board of commissioners of roads and revenue of county, question whether exemplary damages should have been awarded held for jury. *Jackson v. Bohlin* (Ala. App.), 75 So. 697.

Amount of Exemplary Damages.—*Birmingham R., etc., Co. v. Coleman*, 181 Ala. 478, 61 So. 890. See the title DAMAGES, § 155, vol. 4, p. 682.

§ 156. Instructions.

§ 157. — In General.

Definition of "Show." — The word "show," in instructing a jury as to the damages which the evidence tends to show, is equivalent to the words "reasonably satisfy." *Birmingham R., etc., Co. v. Cohill*, 196 Ala. 278, 72 So. 126.

In an action for damages to growing crops by fumes from a fertilizer factory, instructions that if plaintiff furnished the land, the mules, and one-half of the fertilizer, and the croppers furnished the labor and one-half of the fertilizer, the crops to be divided between them equally, plaintiff could not be awarded damages for the one-half interest be-

longing to the croppers, were erroneously refused, since plaintiff was entitled to recover only for her own interest in the crops grown. *International Agr. Corp. v. Burton*, 194 Ala. 108, 69 So. 417.

Required to Sustain All Damages Alleged.—*Birmingham, etc., R. Co. v. Adkins*, 8 Ala. App. 555, 62 So. 367. See the title DAMAGES, § 157, vol. 4, p. 682; *Ex parte Birmingham R., etc., Co.*, 184 Ala. 580, 64 So. 70.

§ 158. — Nominal or Substantial Damages.

Where, in tort for the destruction of property, the jury could award punitive damages, refusal to limit a recovery to nominal damages for want of evidence of value of the property was proper. *Bowdoin v. Bradley*, 11 Ala. App. 530, 66 So. 823.

Discretion of Jury.—*Birmingham R., etc., Co. v. Coleman*, 181 Ala. 478, 61 So. 890, cited in note in *Ann. Cas.* 1916B, 388. See the title DAMAGES, § 158, vol. 4, p. 683.

§ 159. — Mode of Estimating Compensatory Damages in General.

Mere failure of instruction that reasonable compensation was within the discretion of the jury to require the jury to exercise a sound discretion is not error. *Hood, etc., Furniture Co. v. Royal (Ala.)*, 76 So. 965.

§ 160. — Mitigation or Reduction of Damages.

Overflow of Surface Waters.—*King Land Co. v. Bowen*, 7 Ala. App. 462, 61 So. 22. See the title DAMAGES, § 160, vol. 4, p. 684.

§ 161. — Exemplary Damages.

Where, in an action for injuries to a child struck by a street car causing the loss of both feet, there was no dispute as to the fact and extent of the injuries, and the complaint charged simple negligence and wantonness, an instruction that plaintiff, if entitled to recover, was entitled to compensatory damages, and that the jury might add exemplary damages as might be deemed reasonable from the testimony as a punishment to the street railway company for the injury, and that in making the estimate the

jury should consider the injuries in the light of their experience and award such compensation as in their sound discretion considering the circumstances they deemed fair, properly limited the damages. *Sheffield Co. v. Harris*, 183 Ala. 357, 61 So. 88.

In an action for damages for causing a runaway by reckless driving of an automobile, where no claim was made for punitive damages, it was not error to refuse defendant's requested charge refusing punitive damages. *Roach v. Wright*, 195 Ala. 333, 70 So. 271.

§ 162. — Measure of Damages for Injuries to the Person.

§ 162 (1) In General.

Physical and Mental Suffering and Impairment of Earning Capacity.—*Adams v. Crimm*, 177 Ala. 279, 58 So. 442. See the title DAMAGES, § 162 (1), vol. 4, p. 685.

Measure of Damages for Mental or Physical Suffering Left to Discretion of Jury.—In an employee's action for injury, an oral charge that the law furnished no measure of damages in such cases, and leaving the amount to the jury's discretion, was not erroneous as to damages for mental or physical pain. *Alabama, etc., R. Co. v. Flinn (Ala.)*, 74 So. 246.

All Elements Not Susceptible of Exact Measurement.—Oral charge in an employee's personal injury suit, leaving the jury to award reasonable compensation for personal injuries, where all elements were not susceptible of exact measurement, held not erroneous. *Alabama, etc., R. Co. v. Flinn (Ala.)*, 74 So. 246.

Right to Recover Punitive Damages Not Indicated.—The giving of that portion of the court's oral charge in question that the amount of damages would be such a sum as, guided by the evidence and the facts, the jury deem a reasonable compensation for the injury, including pain and suffering, is not reversible error; there being nothing in instruction to indicate right to recovery of punitive damages. *Benoit Coal Min. Co. v. Faught (Ala.)*, 77 So. 695.

Too wide a latitude in the assessment of damages, in a personal injury case, in

which there is no question of punitive damages, but recovery is sought for loss of time, decreased earning capacity, and mental and physical pain, is given the jury by an instruction, merely, that the law leaves the amount of recovery, not exceeding the amount sued for, to their sound discretion, to be wisely and impartially exercised, from the testimony in the case. *Alabama, etc., R. Co. v. Methvin*, 9 Ala. App. 519, 64 So. 175.

Loss of Eye.—In an action for damages from the loss of an eye, the court charged that, if the jury were reasonably satisfied from the evidence that plaintiff was permanently injured then he was entitled to recover "such a sum as the evidence reasonably satisfies you his earning capacity has been decreased, as placed at interest at 8 per annum will by taking a part of the principal and all of the interest each year, at the end of his life expectancy as shown by the American Experience Tables of Mortality that have been introduced in evidence, leave nothing." Held, that this was error, as the rule that the court was attempting to state is applicable only to cases of death, and the measure of damages for a permanent injury not resulting in death is compensation for the disabling effect of the injury, past and prospective, including damages for loss of time and the incapacity to do as profitable labor as before the injury, as well as the mental and physical suffering. *Louisville, etc., R. Co. v. Carter*, 195 Ala. 382, 70 So. 655.

§ 162 (3) Physical Suffering and Inconvenience Resulting from Injuries.

See ante, "In General," § 162 (1).

§ 162 (3½) Permanent Injuries.

Where plaintiff was before the jury as a witness, and there was evidence tending to show a decrease in his capacity to work and in his earning capacity, indicated in the reduction of wages received by him after his injuries, though the mortality tables were not offered in evidence, the instruction that, if the jury were reasonably satisfied from the evidence that plaintiff was permanently injured, as alleged, as a proximate consequence of the negligence complained of, they might award him such sum

as would reasonably compensate him for such permanent injuries, so advising the jury on the hypothesis that there was evidence warranting compensatory damages for permanent injuries, was proper. *Alabama, etc., R. Co. v. Taylor*, 196 Ala. 37, 71 So. 676.

Loss of Both Feet—Exemplary Damages.—Where, in an action for injuries to a child struck by a street car causing the loss of both feet, there was no dispute as to the fact and extent of the injuries, and the complaint charged simple negligence and wantonness, an instruction that plaintiff, if entitled to recover, was entitled to compensatory damages, and that the jury might add exemplary damages as might be deemed reasonable from the testimony as a punishment to the street railway company for the injury, and that in making the estimate the jury should consider the injuries in the light of their experience and award such compensation as in their sound discretion considering the circumstances they deemed fair, properly limited the damages. *Sheffield Co. v. Harris*, 183 Ala. 357, 61 So. 88.

§ 162 (3½a) Future Pain and Suffering.

Instructions held erroneous in an employee's personal injury case, which sought to prevent recovery of damages for loss of any kind in the future, where the evidence showed pain and suffering and loss of an eye; such damages not being susceptible of exact measurement. *Alabama, etc., R. Co. v. Flinn (Ala.)*, 74 So. 246.

§ 162 (3) Loss of Earnings and Impairment of Earning Capacity.

Where, in an action against a street railroad by a passenger for personal injuries, plaintiff adduced evidence tending to show her earning capacity previous to the injury, and her confinement thereafter, together with the period of attendance of a physician, while defendant adduced evidence tending to show plaintiff was not seriously injured, the court was justified in charging the jury as to the rules of law governing plaintiff's right to recover for loss of time; since the weight and sufficiency of evidence is for the jury. *Birmingham R.*

etc., *Co. v. Frazier*, 14 Ala. App. 269, 69 So. 969.

An instruction that plaintiff's average earnings were so much, and that he lost so much time, is not erroneous as authorizing damages both for loss of time and average earnings. *Monarch Livery Co. v. Luck*, 184 Ala. 518, 63 So. 656.

Instruction that plaintiff could not recover for lost time held properly refused, where damages for lost time were claimed in the complaint, and there was evidence of lost time and the value thereof. *Birmingham R., etc., Co. v. Nalls*, 188 Ala. 352, 66 So. 5, cited in note in *L. R. A.* 1915F, 486.

§ 162 (5) Mental Suffering.

See ante, "In General," § 162 (1).

§ 163. — Measure of Damages for Injuries to Property.

In an action for damages to growing crops by fumes from a fertilizer factory, instructions to find for defendant as to crops grown on a certain portion of the land, on the theory that plaintiff could not recover for damages to the crops of

tenants in common other than herself, were properly refused, where the evidence showed that plaintiff individually cultivated some land in such tract. *International Agr. Corp. v. Burton*, 194 Ala. 108, 69 So. 417.

§ 164. — Measure of Damages for Breach of Contract.

Contractors Personally Performing Contract Work.—In an action for breach of a contract under which plaintiffs were to be paid \$1 per thousand feet for cutting all the timber on certain tracts of land, it appeared that plaintiffs did not employ the work done, but were personally doing the work, that their labor netted them \$2 a day, and that defendant broke the contract by refusing to permit plaintiffs to continue to perform the work and thus use their own labor. Held, that an instruction that, if it would have cost plaintiffs the contract price or more to cut the balance of the timber, their damages would be nominal only, was properly refused. *Hitt Lumber Co. v. McCormack*, 13 Ala. App. 453, 68 So. 696.

Danger.

See post, HOMICIDE; WEAPONS.

As to acts in emergency, see post, NEGLIGENCE.

Dangerous Animals.

See ante, ANIMALS.

DEAD BODIES.

§ 3. Civil Liabilities for Illegal Acts.

Cross References.

See the title DEAD BODIES, vol. 4, p. 690, and references there given.

As to damages for breach of agreement to embalm body, see ante, DAMAGES.

§ 3. Civil Liabilities for Illegal Acts.

Rights of Relatives.—It is well settled law in this state that there is at least a quasi legal right in, to, or concerning dead bodies, which the courts will recognize and protect by proper action.

Deavors v. Southern Exp. Co. (Ala.), 76 So. 288.

Negligent Transfer of Child's Body.—*Birmingham Transfer, etc., Co. v. Still* 7 Ala. App. 556, 61 So. 611. See the title DEAD BODIES, § 3, vol. 4, p. 690.

Deadly Weapons.

See post, HOMICIDE; WEAPONS.

Dealers.

See ante, BROKERS; post, FACTORS; HAWKERS AND PEDDLERS.

DEATH.

II. Actions for Causing Death.

(A) Right of Action and Defenses.

- § 3. Nature and Form of Remedy.
- § 4. What Law Governs.
- § 6. Survival of Right of Action of Person Injured.
- § 8. Grounds of Action.
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- § 38. — Expectancy of Life of Deceased and His Health and Physical Condition.
- § 39. — Earning Capacity of Deceased.
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- § 45. Weight and Sufficiency of Evidence.
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 - § 48. Compensation for Loss or Injury Resulting from Death in General.
 - § 57. Exemplary Damages.
 - § 58. Measure and Amount Awarded.
 - § 59. — In General.
 - § 60. — Inadequate Damages.
 - § 61. — Excessive Damages.
- (E) Trial, Judgment, and Review.
 - § 63. Trial.
 - § 64. — Questions for Jury.
 - § 65. — Instructions.
 - § 65 (1) In General.
 - § 65 (3) Expectancy of Life of Deceased and Beneficiaries.
 - § 65 (6) Measure and Amount Awarded.

Cross References.

See the title DEATH, vol. 4, p. 691, and references there given.

In addition, see ante, ABATEMENT AND REVIVAL; APPEAL AND ERROR; DEAD BODIES; post, EVIDENCE; LIMITATION OF ACTIONS; MASTER AND SERVANT; MUNICIPAL CORPORATIONS; RAILROADS; REMOVAL OF CAUSES; WITNESSES.

As to action under homicide statute founded on and governed by common law, see ante, COMMON LAW. As to employment of minor in non-dangerous employment as proximate cause, see post, MASTER AND SERVANT.

II. ACTIONS FOR CAUSING DEATH.

(A) RIGHT OF ACTION AND DEFENSES.

§ 3. Nature and Form of Remedy.

Homicide Statute Not Penal.—An action under the homicide statute (Code 1907, § 2486), authorizing actions for damages for any wrongful act, omission, or negligence causing the death of another, is a civil, not a penal or quasi criminal, action, though the damages are punitive. *Watson v. Adams*, 187 Ala. 490, 65 So. 528.

Actions at Law—Jury Trial.—The fact

that the damages recoverable under Code 1907, § 2486 are declared thereby to be "such as the jury may assess" clearly shows the legislative intent to be that actions under such section should be brought in a court of law, where a jury trial can be demanded as of right, which could not be done in a court of equity, where the submission of issues of fact to juries is discretionary with the chancellor, and a verdict thereunder merely advisory. *Dowling v. Garner*, 195 Ala. 493, 70 So. 150.

§ 4. What Law Governs.

Right of Action—Lex Loci.—*Larue v.*

Kershaw Contracting Co., 177 Ala. 441, 59 So. 155. See the title DEATH, § 4, vol. 4, p. 693.

Limitations—Lex Fori.—*Larue v. Kershaw Contracting Co.*, 177 Ala. 441, 59 So. 155. See the title DEATH, § 4, vol. 4, p. 693.

§ 6. Survival of Right of Action of Person Injured.

Death Merely Aggravates Injury.—*Larue v. Kershaw Contracting Co.*, 177 Ala. 441, 59 So. 155. See the title DEATH, § 6, vol. 4, p. 694.

§ 8. Grounds of Action.

§ 9. — Nature of Act or Omission Causing Death.

One who willfully or wantonly runs one locomotive against another locomotive with knowledge that the act will probably result in the death of a particular person is guilty, when death ensues, of taking the life of such person, though the act is not necessarily murder. *Vessel v. Seaboard, etc.*, R. Co., 182 Ala. 589, 62 So. 180.

§ 10. — Right of Action of Person Injured.

Administrator Has Right Deceased Would Have Had.—*Lawrence v. Seay*, 179 Ala. 386, 60 So. 937. See the title DEATH, § 10, vol. 4, p. 694.

In an action brought in Alabama, where the injuries, causing death, occurred in Tennessee, the court held that Tennessee Code, §§ 4025, 4026 and 4029, relative to death by wrongful act, did not create a new or independent cause of action, but merely continued such cause which accrued to the injured person, so that it did not abate by his death, but survived to his widow, children or personal representative. The cause of action was not the death of the person injured, but the breach of duty that caused the injury, and if death results this is but an aggravation of the injury. *Larue v. Kershaw Contracting Co.*, 177 Ala. 441, 59 So. 155, cited in note in L. R. A. 1915E, 1115.

Father Suing under Employers' Liability Act.—Where a father sued in his individual capacity and not as administrator for the death of his son, the ac-

tion was necessarily under Code 1907, § 2485, and not under Employers' Liability Act, and the father's right was limited to the rights of the son had he survived. *Harris v. Spencer Lumber Co.*, 185 Ala. 648, 64 So. 557.

§ 11. — Proximate Cause of Death.

See post, MASTER AND SERVANT; NEGLIGENCE; RAILROADS.

§ 12. Defenses.

§ 13. — In General.

Construction of Statute.—Code 1907, § 2486, authorizing an action for death in cases where decedent could have sued for the wrongful act or negligence if it had not caused death, gives a cause of action for death caused by culpable act or omission, provided decedent, if living, could have sued for the injury caused thereby and hence the only question in an action under the statute for death is whether the case stated and made falls within the statute, and, if so, whether the liability may be avoided by omissions on the part of decedent or by exonerating acts. *Northern Alabama R. Co. v. Guttery*, 189 Ala. 604, 66 So. 580.

§ 15. — Contributory Negligence of Deceased.

Doctrine Stated.—*Scoggins v. Atlantic, etc., Cement Co.*, 179 Ala. 213, 60 So. 175. See the title DEATH, § 15, vol. 4, p. 696.

Where a servant, because of his own negligence, could not maintain an action for his injuries, his personal representative could not, after his death, maintain the action. *Sloss-Sheffield Steel, etc., Co. v. Stapp*, 195 Ala. 340, 70 So. 267.

Under Federal Employers' Liability Act.—Where a locomotive engineer was killed while operating his locomotive imprudently, negligently, or contrary, to some rule of the road for his governance, his representative was not necessarily barred from recovery, under the federal Employers' Liability Act. *Louisville, etc., R. Co. v. Fleming*, 194 Ala. 51, 69 So. 125.

§ 19. Persons Entitled to Sue.

§ 19 (2) Personal Representative.

Personal Representative of Servant.—*Hull v. Wimberley, etc., Hdw. Co.*, 178

Ala. 538, 59 So. 568. See the title DEATH, § 19 (2), vol. 4, p. 698.

Suit by Parent Bars Subsequent Suit as Administrator under Employers' Liability Act. — *Hull v. Wimberley, etc.*, Hdw. Co., 178 Ala. 538, 59 So. 568. See the title DEATH, § 19 (2), vol. 4, p. 698.

"The federal act gives a right of action for the unlawful death of an employee to his personal representative: (1) For the benefit of the surviving husband or wife and children of such employee; (2) if no surviving wife or husband or children, then to the parents of such employee; (3) if there are none belonging to the first or second class, then for the benefit of the next kin 'dependent' upon such employee." *Southern R. Co. v. Vessell*, 192 Ala. 440, 68 So. 336, cited in note in L. R. A. 1916E, 159.

§ 19 (4) Brother or Sister.

Married Sister—Federal Statute. — Under the federal Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. 1913, §§ 8657-8665), giving a right of action for wrongful death for the benefit of the dependent next of kin, an elder sister of a deceased employee, suing as his administratrix, who was married and in comfortable circumstances, and who had boarded deceased, in return for which he had made monthly contributions for about two years prior to his death, was not "dependent" upon deceased, and could not recover. *Southern R. Co. v. Vessell*, 192 Ala. 440, 68 So. 336, cited in note in L. R. A. 1916E, 159.

(B) JURISDICTION, VENUE, AND LIMITATIONS.

§ 21. Jurisdiction of Cause of Action.

No Jurisdiction in Equity.—See ante, "Nature and Form of Remedy," § 3.

§ 22. Application of General Statutes of Limitations.

Death in Another State—Statute Applicable.—*Larue v. Kershaw Contracting Co.*, 177 Ala. 441, 59 So. 155. See the title DEATH, § 22, vol. 4, p. 699.

§ 23½. Computation of Period of Limitations.

Accrual of Cause of Action. — Where the right of action given by statute is

not for the death of a person injured but for the breach of duty causing the death, which is a mere aggravation of the injury, the cause of action accrues, within the statute of limitations, at the time of the injury and not at the time of death. *Larue v. Kershaw Contracting Co.*, 177 Ala. 441, 59 So. 155, cited in note in Ann. Cas. 1916C, 714.

(C) PLEADING AND EVIDENCE.

§ 24. Declaration, Complaint, or Petition.

§ 25. — Form and Requisites in General.

Averment of Representative Character. —A count in an action for wrongful death brought by deceased's administrator is defective when it fails to aver that plaintiff sues as administrator. *Alverson v. Little Cahaba Coal Co. (Ala.)*, 77 So. 547.

§ 26. — Act or Omission Causing Death.

Counts Held Not Demurrable.—*Lawrence v. Seay*, 179 Ala. 386, 60 So. 937, cited in note in 46 L. R. A., N. S., 933. See the title DEATH, § 26, vol. 4, p. 701.

Counts Not Demurrable Though Not Sufficiently Charging a Conspiracy. — *Lawrence v. Seay*, 179 Ala. 386, 60 So. 937, cited in note in 46 L. R. A., N. S., 932. See the title DEATH, § 26, vol. 4, p. 701.

Counts Held Demurrable. — *Lawrence v. Seay*, 179 Ala. 386, 60 So. 937, cited in note in 46 L. R. A., N. S., 932. See the title DEATH, § 26, vol. 4, p. 701.

§ 29. Plea or Answer.

Plea of Ne Unques Administrator. — *Millbra v. Sloss-Sheffield Steel, etc., Co.*, 182 Ala. 622, 62 So. 176. See the title DEATH, § 29, vol. 4, p. 702.

§ 31½. Issues, Proof and Variance.

Obedience and Industry of Boy—Purpose of Evidence.—In an action for the death of a boy under 14 on the sole ground that it had resulted proximately from his employment in a mine contrary to Code 1907, § 1036, in which counts and pleas raising questions as to negligence and contributory negligence were afterwards eliminated, evidence while

they remained in the case that deceased was earning \$.75 a day, that he was an obedient boy and not given to roving or idleness, was admissible on the measure of damages recoverable under the issues so made. *Sloss-Sheffield Steel, etc., Co. v. Cole*, 191 Ala. 626, 68 So. 142.

§ 32. Admissibility of Evidence.

§ 33. — In General.

Physicians' Testimony — Nature and Cause of Death.—See post, EVIDENCE.

Surrounding Circumstances as Bearing on Self-Defense.—In damage action for homicide, evidence describing physical surroundings, etc., held admissible, where defendant pleaded self-defense. *Kuykendall v. Edmondson* (Ala.), 77 So. 24.

Sores on Mule to Show Direction and Range of Bullets.—In damage action for homicide, evidence that witness noticed places resembling sores on mule driven by deceased held admissible to show direction and range of bullets from defendant's gun, etc. *Kuykendall v. Edmondson* (Ala.), 77 So. 24.

Hostile Conduct and Declarations of Deceased.—In damage action for homicide, excluding testimony of deceased's conduct and declarations tending to show hostility toward defendant was erroneous; the defendant having pleaded self-defense. *Kuykendall v. Edmondson* (Ala.), 77 So. 24.

Same—Necessity of Reference to Defendant.—In damage action for homicide, testimony regarding hostile statements made by deceased were properly excluded, where their reference to defendant was not shown. *Kuykendall v. Edmondson* (Ala.), 77 So. 24.

Reconciliation Sought by Deceased.—Where defendant pleaded self-defense plaintiff may show that deceased sought a reconciliation with defendant. *Kuykendall v. Edmondson* (Ala.), 77 So. 24.

Previous Difficulties to Show Parties' State of Mind.—In damage action for homicide, testimony of previous difficulties is admissible only as tending to disclose state of minds of parties when fatal difficulty arose. *Kuykendall v. Edmondson* (Ala.), 77 So. 24.

Same—Details of Difficulties.—In dam-

age action for homicide, evidence that deceased had previously injured defendant's eye can not be supported by expert testimony that blow of kind described would have resulted in such injury without offending rule against inquiring into details of previous difficulties. *Kuykendall v. Edmondson* (Ala.), 77 So. 24.

Defendant's Attempts to Avoid Difficulty—Self-Serving Declarations.—See post, EVIDENCE.

Death in Collision—Conduct of Other Drivers.—In an action for wrongful death, under the homicide statute (Code, § 2486), where the death is alleged to have been caused by a collision between defendant's automobile and a motorcycle, the conduct of drivers of motorcycles with one of whom deceased was riding may be taken into consideration in determining the character of the offense, and assessing the punishment by way of damages. *Karpeles v. City Ice Delivery Co.* (Ala.), 73 So. 642.

§ 36. — Expectancy of Life of Deceased and His Health and Physical Condition.

Age and Expectancy.—In an action under the federal Employers' Liability Act for pecuniary loss of parents of deceased servant, evidence of the age and probable duration of life was admissible as showing damages. *Louisville, etc., R. Co. v. Fleming*, 194 Ala. 51, 69 So. 125. See also, *Citizens' Light, etc., Co. v. Lee*, 182 Ala. 561, 62 So. 199.

Health.—In an action under the federal Employers' Liability Act for pecuniary loss of parents of deceased servant, evidence of health of deceased was admissible. *Louisville, etc., R. Co. v. Fleming*, 194 Ala. 51, 69 So. 125.

§ 39. — Earning Capacity of Deceased.

In an action under the federal Employers' Liability Act for pecuniary loss of parents of deceased servant, evidence of earnings of deceased was admissible. *Louisville, etc., R. Co. v. Fleming*, 194 Ala. 51, 69 So. 125.

§ 40. — Character and Habits of Deceased.

Industry of Servant.—In an action under the federal Employers' Liability Act

for pecuniary loss of parents of deceased servant, evidence of the character, skill, intelligence and habits of industry of the deceased was admissible. *Louisville, etc., R. Co. v. Fleming*, 194 Ala. 51, 69 So. 125.

Obedience and Industry of Minor. — See ante, "Issues, Proof and Variance," § 31½.

Action under Employers' Liability Act. — In an action by a personal representative under the Employers' Liability Act (Code 1907, § 3912) for wrongful death of his intestate, evidence as to the age, habits, etc., of intestate was admissible on the question of damages. *Citizens' Light, etc., Co. v. Lee*, 182 Ala. 561, 62 So. 199.

§ 40½. Pecuniary Condition of Deceased.

In an action under the federal Employers' Liability Act for pecuniary loss of parents of deceased servant, evidence of means of deceased and his future expectations was admissible. *Louisville, etc., R. Co. v. Fleming*, 194 Ala. 51, 69 So. 125.

§ 45. Weight and Sufficiency of Evidence.

§ 46. — In General.

Wantonness — Inference from Facts and Circumstances.—Wantonness in an action for damages for death must generally be inferred from proof of other facts, and from all the attending circumstances, not being susceptible of direct proof. *Mobile Elect. Co. v. Fritz* (Ala.), 77 So. 235.

(D) DAMAGES, FORFEITURE, OR FINE.

§ 48. Compensation for Loss or Injury Resulting from Death in General.

Under the homicide statute (Code 1907, § 2486), enabling a personal representative to maintain an action for the wrongful death of his intestate, where, if such act had not caused death, the intestate could have maintained an action, the damages recoverable are punitive only. *Citizens' Light, etc., Co. v. Lee*, 182 Ala. 561, 62 So. 199.

Under the Employers' Liability Act (Code 1907, § 3912), enabling a personal representative to sue for injury to a servant resulting in death, the damages

recoverable are compensatory only, and not punitive. *Citizens' Light, etc., Co. v. Lee*, 182 Ala. 561, 62 So. 199.

§ 57. Exemplary Damages.

Homicide Statute—Punitive Damages. — *Citizens' Light, etc., Co. v. Lee*, 182 Ala. 561, 62 So. 199. See the title DEATH, § 57, vol. 4, p. 708.

In an action under the homicide statute (Code 1907, § 2486), punitive damages and not compensatory damages are recoverable. *Burnwell Coal Co. v. Setzer*, 191 Ala. 398, 67 So. 604.

The damages recoverable under Code 1907, § 2486, giving right of action for wrongful death, are punitive and not compensatory. *Dowling v. Garner*, 195 Ala. 493, 70 So. 150.

In action for wrongful death brought under the homicide statute (Code, § 2486), damages are punitive to prevent homicide. *Karpeles v. City Ice Delivery Co.* (Ala.), 73 So. 642.

Same—Negligence or Wantonness. — The damages recoverable under the homicide statute (Code 1907, § 2486), authorizing actions by an administrator for death of a minor child and a recovery of such damages as the jury may assess, are punitive, whether the wrongful act or omission complained of as causing the death was simple negligence or was wanton and willful, but the jury in fixing the amount of the damages may consider whether the wrongful act was wanton and willful or merely a negligent one. *Jones v. Birmingham R., etc., Co.*, 12 Ala. App. 474, 67 So. 801, cited in note in Ann. Cas. 1916B, 535.

Same—Action by Parent.—In an action to recover for death of deceased, brought under the homicide statute (Code 1907, § 2485), authorizing the parent to sue for the death of the child, recovery is punitive only. *Renfro v. Collins & Co.* (Ala.), 78 So. 395.

Recovery Erroneously Limited to Compensatory Damages.—*Louisville, etc., R. Co. v. Bogue*, 177 Ala. 349, 58 So. 392. See the title DEATH, § 57, vol. 4, p. 709.

Employers' Liability Act—Compensatory Damages.—*Citizens' Light, etc., Co. v. Lee*, 182 Ala. 561, 62 So. 199. See the title DEATH, § 57, vol. 4, p. 709. See

also, *Southern Iron, etc., Co. v. Boston*, 190 Ala. 30, 66 So. 684.

§ 58. Measure and Amount Awarded.

§ 59. — In General.

Action for Death of Servant.—*Louisville, etc., R. Co. v. Morris*, 179 Ala. 239, 60 So. 933, cited in notes in *L. R. A.* 1917F, 373, 374. See the title *DEATH*, § 59, vol. 4, p. 710.

Net Earning of Deceased during His Expectancy.—In an action for the death of a servant, brought under the Employers' Liability Act, the measure of compensatory damages recoverable is such sum as being put at interest will each year by taking the interest and a portion of the principal equal the amount of the net earnings of deceased; the portion of the principal taken being such that it will all be exhausted at the termination of the expectancy of deceased's life. *Southern Iron, etc., Co. v. Boston*, 190 Ala. 30, 66 So. 684.

In an administrator's action under the federal Employers' Liability Act to recover pecuniary loss occasioned the parents of a servant by his death, the measure of damages was the present worth of the amount which it was reasonably probable the deceased would have contributed to the support of his parents during their expectancy of life in proportion to his contributions at his death, not exceeding his expectancy. *Louisville, etc., R. Co. v. Fleming*, 194 Ala. 51, 69 So. 125.

§ 60. — Inadequate Damages.

Verdict Not Inadequate. — A verdict for \$500 for the death of a minor child killed by being run over by a street car operated by defendant's motorman was not inadequate where there was no evidence of wanton injury or recklessness by the motorman, the action being to recover punitive damages under Code 1907, § 2486. *Jones v. Birmingham, R., etc., Co.*, 12 Ala. App. 474, 67 So. 801, cited in note in *Ann. Cas.* 1916B, 467.

§ 61. — Excessive Damages.

Verdicts Not Excessive. — *Louisville, etc., R. Co. v. Morris*, 179 Ala. 239, 60 So. 933, cited in notes in *L. R. A.* 1916C, 835, 839; *Ann. Cas.* 1915C, 451. See the title *DEATH*, § 61, vol. 4, p. 711.

Under homicide statute (Code 1896, § 27), damages recoverable for wrongful death are punitive and such "as the jury may assess," and a verdict thereunder of \$16,000, for death of one killed on defendant's track is not so excessive as to indicate bias, prejudice, passion, or other improper motive. *Central, etc., R. Co. v. Ellison (Ala.)*, 75 So. 159.

A verdict of \$17,500 for death held not so large as to show prejudice or passion, where deceased was killed by a live wire lying in the street. *Mobile Elect. Co. v. Fritz (Ala.)*, 77 So. 235.

(E) TRIAL, JUDGMENT, AND REVIEW.

§ 63. Trial.

§ 64. — Questions for Jury.

Negligence of Defendant's Employees.

—In an administrator's action under the federal Employers' Liability Act for death of a locomotive engineer, whether defendant's servants were negligent in leaving an engine on a crossover, so near the track on which deceased was running that his engine struck it, was a fact for the jury. *Louisville, etc., R. Co. v. Fleming*, 194 Ala. 51, 69 So. 125.

Reduction of Damages for Contributory Negligence—Federal Statute.

—In an action under the federal Employers' Liability Act for death of a locomotive engineer, the extent to which deceased's contributory negligence, if it had existed should reduce his administrator's recovery, was a question of fact for the jury. *Louisville, etc., R. Co. v. Fleming*, 194 Ala. 51, 69 So. 125.

Killing by Design or in Self-Defense.

In damage action for homicide, evidence that defendant, while standing on his porch, shot deceased, who was unarmed and driving past on road, etc., held to make question whether defendant acted upon a previously formed unlawful design without hostile demonstration by deceased one for jury. *Kuykendall v. Edmondson (Ala.)*, 77 So. 24.

Defendant may act in self-defense upon reasonable appearances, and is not required, as a matter of law, to await deceased's actual drawing of a weapon.

Kuykendall v. Edmondson (Ala.), 77 So. 24.

§ 65. — Instructions.

§ 65 (1) In General.

See post, TRIAL.

Wanton or Wilful Wrong—Instructions Not Misleading.—Vessel v. Seaboard, etc., R. Co., 182 Ala. 589, 62 So. 180. See the title DEATH, § 65 (1), vol. 4, pp. 712, 713.

Self-Defense—Reasonable Appearance of Danger.—In damage action for homicide, an instruction that defendant was not justified in shooting unless deceased drew or handled his pistol so as to create a belief of danger, etc., held erroneous, since defendant might act upon reasonable appearances without awaiting actual drawing of weapon. Kuykendall v. Edmondson (Ala.), 77 So. 24.

§ 65 (3) Expectancy of Life of Deceased and Beneficiaries.

In an administrator's action under the federal Employers' Liability Act to re-

cover pecuniary loss to parents through the death of a servant an instruction on the measure of damages that it was the present worth of the amount which it was reasonably probable deceased would have contributed to the support of his parents during the "whole" expectancy of life, in proportion to the amount he was contributing at his death, not exceeding his expectancy of life, was not improper because the word "whole" was substituted for "latter's" in the accepted statement of the rule. Louisville, etc., R. Co. v. Fleming, 194 Ala. 51, 69 So. 125.

§ 65 (6) Measure and Amount Awarded.

Nominal Damages.—In an action for the death of a child struck by a train, a requested instruction that if the evidence showed that plaintiff was entitled to recover, and that a small sum or "nominal damages" would be sufficient punishment for defendant, the jury should so find held properly refused as faulty in reference to "nominal damages." Illinois Cent. R. Co. v. Robinson, 169 Ala. 333, 66 So. 519.

Debt, Action of.

See the title DEBT, ACTION OF, vol. 4, p. 716, and references there given.

Deceit.

See post, FALSE PRETENSES; FRAUD.

Decision.

See ante, APPEAL AND ERROR; COURTS; CRIMINAL LAW; post, EQUITY; JUDGMENT; REFERENCE; TRIAL.

Declaration.

As to declaration in evidence, see post, EVIDENCE. As to declaration in pleading, see post, PLEADING.

DEDICATION.

I. Nature and Requisites.

- § 3. Purpose of Dedication.
- § 4. — Public and Charitable Uses in General.
- § 9½. Acts Constituting Dedication in General.
- § 10. — Recitals or Description in Conveyances or Contracts.
- § 11. — Designation in Maps or Plats, and Sale of Lots.
- § 12. — Abandonment to or Acquiescence in Public Use.
- § 17. Acceptance.
- § 19. — Necessity.
- § 22. — User by Public.
- § 25. Evidence.
- § 28. — Weight and Sufficiency.

II. Operation and Effect.

- § 33. Title or Right Acquired.
- § 34. — In General.
- § 35½. Use of Property.
- § 35½a. Rights and Liabilities as to Control and Care of Property.

Cross References.

See the title DEDICATION, vol. 4, p. 721, and references there given.

I. NATURE AND REQUISITES.

§ 3. Purpose of Dedication.

§ 4. — Public and Charitable Uses in General.

Private Right of Way.—Dedication can properly be made only to the public, and a private right of way can not be created by dedication. *Hill v. Wing*, 193 Ala. 312, 69 So. 445.

§ 9½. Acts Constituting Dedication in General.

Irrevocable Property Right—License to Use.—For an act to constitute a dedication, it must confer some property right on the public which the grantor can not revoke, and, where the grantor merely gave the public a temporary right to use a private way, there was no dedication and members of the public had only a license to use the way. *Norton v. State*, 11 Ala. App. 216, 65 So. 689.

Verbally or in Writing — Single or Series of Acts.—Road may be effectually dedicated to public use either verbally or in writing, by a single act or series of acts, if clear and unequivocal as indicating owner's intention, and a single and un-

equivocal declaration by the owner may be sufficient. *Trammell v. Bradford* (Ala.), 73 So. 894.

§ 10. — Recitals or Description in Conveyances or Contracts.

Grant of Perpetual Use of Lane. — Grant to lot purchaser of perpetual right of use in lane on grantor's land between lot and remainder of grantor's property, which lane had been devoted to grantor's private use, was not dedication making it public, as where lands are platted into streets, etc. *Thomas v. Vanderslice* (Ala.), 77 So. 367.

§ 11. — Designation in Maps or Plats, and Sale of Lots.

Sale of Lots by Reference to Plat or Map.—Both at the present time and prior to Act Feb. 26, 1889 (Code 1896, § 3899 et seq.), an owner, making a plat of land with spaces indicating roads or streets and selling lots with reference thereto, held to dedicate them to the public, leaving them to be opened by the proper local authorities as streets or roads when the public interest requires and such dedication is irrevocable, save

by legislative authority. *Rudolph v. Birmingham*, 188 Ala. 620, 65 So. 1006, cited in note in *Ann. Cas.* 1917A, 1110, 1111.

Where an owner lays out his land into streets and lots, a sale of the lots with reference to the map is an irrevocable dedication of the streets to the purchasers, vesting in them and their successors the ultimate fee to the center of the street, unless such fee is reserved, and divests the owner of any right to prevent the use or impose an additional servitude. *South, etc.; R. Co. v. Davis*, 185 Ala. 193, 64 So. 606, cited in note in *Ann. Cas.* 1917A, 1110.

§ 12. — Abandonment to or Acquiescence in Public Use.

Time Requisite. — *Smith v. Southern Iron, etc., Co.*, 183 Ala. 482, 62 So. 766. See the title DEDICATION, § 12 (2), vol. 4, p. 726.

§ 17. Acceptance.

§ 19. — Necessity.

Highway. — Dedication of highway must be accepted by public. *Trammell v. Bradford* (Ala.), 73 So. 894.

Street.—An owner of land could not impose his dedication of a street upon the public by platting the territory and disposing of lots according to the plat, there being no acceptance by the public. *Ivey v. Birmingham*, 190 Ala. 196, 67 So. 506.

§ 23. — User by Public.

Acceptance through Municipal Officers.—Dedication of land as public road is completed by acceptance by public, through public user, and road need not be accepted by public through its municipal officers. *Trammell v. Bradford* (Ala.), 73 So. 894.

Length of Time.—Acceptance of the dedication of a street by platting may be shown by long-continued user by the unorganized public as of a right, and the length of time of such user, from which an acceptance may be implied, does not depend on the law governing prescription but is controlled entirely by circumstances of each case; the main question being whether the public convenience would be materially affected by a denial

of the enjoyment. *Ivey v. Birmingham*, 190 Ala. 196, 67 So. 506.

Formal acts are not necessary to show acceptance of dedication of highway, which may be effectually shown by general user, which need not be for any particular length of time, but only long enough to show that public are acting on theory of public right resulting from dedicatory act of owner. *Trammell v. Bradford* (Ala.), 73 So. 894.

§ 25. Evidence.

§ 28. — Weight and Sufficiency.

In a suit by a city to compel the removal of obstructions from a street, formerly a country road, evidence held to show a dedication of such road as it then existed, prior to the erection of such obstructions by the then owner of the land. *Rudolph v. Birmingham*, 188 Ala. 620, 65 So. 1006.

II. OPERATION AND EFFECT.

§ 33. Title or Right Acquired.

§ 34. — In General.

Fee in Abutting Owner. — *Cloverdale Home v. Cloverdale*, 182 Ala. 419, 68 So. 712. See the title DEDICATION, § 34, vol. 4, p. 732.

§ 35½. Use of Property.

Change of Use.—Public highway can not be used in manner foreign to dedication, and any encroachment thereon, or use thereof inconsistent with such purpose, constitutes enjoined nuisance and the obstruction or encroachment may consist in anything which renders the highway less commodious, as by plowing and sowing it in grain, accompanied with threats of prosecution to those who travel over it. *Troy v. Watkins* (Ala.), 78 So. 50.

§ 35½a. Rights and Liabilities as to Control and Care of Property.

Abutting Owners—Enjoining City from Converting Street into Cemetery. — An owner abutting on street, whose property was bounded on other sides by other streets, could maintain bill to enjoin city from converting street or part thereof into public cemetery. *Troy v. Watkins* (Ala.), 78 So. 50.

DEEDS.

I. Requisites and Validity.

(A) Nature and Essentials of Conveyances in General.

- § 1½. Nature and Requisites of Conveyance in General.
- § 5. Title or Interest of Grantor.
- § 6½. Parties.
- § 7. Consideration.
- § 9. — Sufficiency.
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(B) Form and Contents of Instruments.

- § 18. Designation and Description of Parties.
- § 19. — In General.
- § 24. Description of Property.
- § 25. — Certainty in General.
 - § 25 (1) In General.
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 - § 25 (7) Uncertainty of Reservation or Exception.
- § 27. — Reference to Maps or Plats.
- § 29. Amendment or Correction of Deed by Subsequent Instrument.

(C) Execution.

- § 30. Signature or Subscription.
- § 32. Attestation.
- § 33. Partial or Defective Execution.

(D) Delivery.

- § 35. Sufficiency.
- § 36. — In General.
- § 38. — Delivery to Third Person.
- § 39. — Record or Delivery for Record.
- § 41. — Deposit for Delivery on Death of Grantor.
- § 46. Questions for Jury.
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- § 48. Capacity and Assent of Parties in General.
- § 49. Mistake.
- § 50. Fraud and Misrepresentation.
 - § 50 (1) In General.
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 - § 50 (6) Subject Matter of Misrepresentations.
- § 51. Duress.
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 - § 52 (1) What Constitutes in General.
 - § 52 (4) Deed to Child.
- § 54. Estoppel or Waiver as to Defects or Objections.
- § 57. Questions for Jury.

II. Recording and Registration.

§ 60. Instruments Entitled to Record.

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III. Construction and Operation.**(A) General Rules of Construction.**

§ 64. Application to Deeds in General.

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§ 72½a. Construction by Parties.

§ 77. Time of Taking Effect.

(B) Property Conveyed.

§ 80. Construction in General.

§ 81. References to Maps, Plats, Other Instruments, or Records.

§ 83. Particular Description.

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§ 83 (4) Quantity of Interest Conveyed.

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§ 85. After-Acquired Property or Title.

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(C) Estates and Interests Created.

§ 87. Creation by Deed in General.

§ 90. Fee Simple.

§ 90 (1) Necessity and Sufficiency of Words of Inheritance or Perpetuity.

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§ 136 (1) Capacity and Assent of Parties in General.

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§ 137. Admissibility of Evidence.

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§ 142. Weight and Sufficiency of Evidence.

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§ 145. — Delivery.

§ 147. — Consideration.

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§ 148 (1) Capacity and Assent of Parties in General.

§ 148 (2) Fraud and Misrepresentation.

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§ 148 (4) Mistake.

Cross References.

See the title DEEDS, vol. 4, p. 735, and references there given.

In addition, see ante, ACKNOWLEDGMENT; APPEAL AND ERROR; BOUNDARIES; CANCELLATION OF INSTRUMENTS; CHATTEL MORTGAGES; CONTRACTS; CORPORATIONS; COVENANTS; post, EVIDENCE; FRAUDS, STATUTE OF; FRAUDULENT CONVEYANCES; HOMESTEAD; HUSBAND AND WIFE; INFANTS; INSANE PERSONS; JUDICIAL SALES; MORTGAGES; SPECIFIC PERFORMANCE; VENDOR AND PURCHASER.

I. REQUISITES AND VALIDITY.**(A) NATURE AND ESSENTIALS OF CONVEYANCES IN GENERAL.****§ 1½. Nature and Requisites of Conveyance in General.**

A "deed" is but an executed contract of sale. *Blackmon v. Quennelle*, 189 Ala. 630, 66 So. 608.

§ 5. Title or Interest of Grantor.

No title passed by conveyance, where the grantor at the time had no title, either legal or equitable. *Nolen v. Powell* (Ala.), 64 So. 566.

§ 6½. Parties.

Where land was conveyed to a wife and her children jointly, a deed by the husband, executed after her death, purporting to be a deed of the children, but executed by him without authority in the names of the children, was void as to the children, and when not recorded it did not give the children constructive notice of its existence. *Hays v. Dillard*, 176 Ala. 109, 57 So. 605.

§ 7. Consideration.**§ 9. — Sufficiency.**

In courts of law, a "voluntary deed" is one which is given without any valuable consideration as that term is defined by law, which must be substantial as opposed to nominal merely. *London v. Anderson Brass Works*, 197 Ala. 16, 72 So. 359.

The deed of a stockholder and director of a bank, who, when informed by the bank inspector that the bank must have greater assets or suspend business, conveyed his land to the bank, was based on sufficient consideration, and he could not thereafter recover the land, or its value, upon the allegations that the president of the bank agreed that, when the bank had sufficient assets, it would in turn make a deed of the land back to the stockholder. *Edwards v. Alabama Penny-Prudential Sav. Bank* (Ala.), 76 So. 285.

§ 10½. — Failure of Consideration.

A conveyance can not be canceled because the consideration for the conveyance had not been paid. *Sellers v. Knight*, 185 Ala. 96, 64 So. 329.

(B) FORM AND CONTENTS OF INSTRUMENTS.**§ 18. Designation and Description of Parties.****§ 19. — In General.**

A deed is void as a conveyance of the interest of B., who, with others, signed and acknowledged it; the body of the deed reciting it to be the deed of the others and making no mention of him. *Swindall v. Ford*, 184 Ala. 137, 63 So. 651, cited in notes in Ann. Cas. 1916E, 521; L. R. A. 1915D, 197.

All Signers Grantors. — *Bowles v. Lowery*, 181 Ala. 603, 62 So. 107, cited in notes in L. R. A. 1915D, 197; Ann. Cas. 1916E, 522. See the title DEEDS, § 19, vol. 4, p. 746.

§ 24. Description of Property.**§ 25. — Certainty in General.****§ 25 (1) In General.**

A deed at a judicial sale, which fails to describe the land by government numbers, is not for that reason alone inadmissible as evidence of the property conveyed. *Burnett v. Roman*, 192 Ala. 188, 68 So. 353.

Where a deed conveyed land by numbers without designating county or state, the grantor owning lands in Jefferson county, Ala., described by such numbers, and not owning other lands so described, the identification was sufficient for the validity of the conveyance of the Jefferson county lands. *Jenkins v. Woodward Iron Co.*, 194 Ala. 371, 69 So. 646.

Uncertainty of Description. — Where description specified in a deed involved a geometrical proposition which could be satisfied by an almost indefinite number of figures, the deed was void for uncertainty of description. *Wilson v. Carling*, 188 Ala. 543, 66 So. 188.

A deed described the property to be conveyed as 25 acres more or less in fractional sections 21 and 22, township 19, range 18, Elmore county, Ala., on the west side of the Coosa river, bounded on the south by Cohn & Goldberg, on the north by lands owned by the State of Alabama, on the west by the undersigned, the west line to be established by survey, bounded on the east by the

Coosa river. Held, that since the geometrical proposition involved in such description was: Given the length and direction of one side of a quadrangle containing 25 acres more or less and the direction of the two other sides which are parallel, to construct the fourth side, so that one of the parallel lines shall not exceed 396 feet and the other exceed a mile in length, and an almost indefinite number of figures might be constructed, any one of which would clearly meet the requirements of the proposition—the deed was void for want of certainty of description. *Wilson v. Carling*, 188 Ala. 543, 66 So. 188.

Description Not Void.—A description of land in a deed held not void for uncertainty. *Kyle v. Jordan*, 187 Ala. 355, 65 So. 522.

§ 25 (4) Conveyance of Part of Tract by Quantity.

The conveyance of "a certain strip of land, 100 feet wide," over a square named by number, was void, as a conveyance of any particular part of the square, of a width of 100 feet or less, and did not transmit to the respective grantees any particular area 100 feet in width within the confines of such square. *Alabama Corn Mills Co. v. Mobile Docks Co.* (Ala.), 75 So. 574.

§ 25 (6) Designation as Adjoining Other Property.

In General. — *Carling v. Wilson*, 177 Ala. 85, 58 So. 417. See the title DEEDS, § 25 (6), vol. 4, p. 750.

§ 25 (7) Uncertainty of Reservation or Exception.

A valid conveyance of land is not invalidated because of the uncertainty of a reservation. *Cantrell v. Cantrell*, 178 Ala. 273, 59 So. 652.

That the exception in a deed is void for uncertainty has no other effect than to make the conveyance operative as to the whole tract. *Swindall v. Ford*, 184 Ala. 137, 63 So. 651.

Where a deed, other than a tax deed, conveys an entire tract, except a part, and the description of the part is uncertain, the exception but not the grant will fail. *Southern Iron, etc., Co. v. Stowers*, 189 Ala. 314, 66 So. 677.

§ 27. — Reference to Maps or Plats.

A map or plat of land made by an owner for purposes of sale or other disposal may be constituted a part of a conveyance of a subdivision thereof without acknowledging, certifying, and filing it as prescribed by Code 1907, § 6028 et seq., relating to the survey and platting of town lots; but to make it a part of a conveyance there must be a definite reference therein to a map or plat showing the lot or plat intended to be conveyed. *Thrasher v. Royster*, 187 Ala. 350, 65 So. 796.

§ 29. Amendment or Correction of Deed by Subsequent Instrument.

Where title to land passed under a contract authorizing the grantee to pay the consideration in the future, and providing for forfeiture in case of nonpayment, the subsequent execution of a regular deed together with the execution of an instrument reciting receipt of payment does not affect the grantee's rights, and he may assert rights passing under the original instrument notwithstanding complainant's rights intervened between the execution of the original instrument and that of the deed. *Bethea v. McCullough*, 195 Ala. 480, 70 So. 680.

(C) EXECUTION.

§ 30. Signature or Subscription.

Where a deed is signed under direction of another, whether he can write or not, his mark is not essential to the validity of the deed. *Purser v. Smith* (Ala.), 76 So. 931.

§ 32. Attestation.

Under Code 1852, § 1266. — A deed signed by mark, acknowledged before a justice of the peace without formal attestation, was prima facie validly executed prior to Code 1852, § 1266, which required the attestation by two witnesses of a deed signed by a mark. *Veitch v. Hard* (Ala.), 75 So. 405.

Under Code 1907, § 3355, providing that, where one can not sign his name, two attesting witnesses are necessary, it is not necessary in a deed of land that there be two witnesses where the granting party is able to sign, but directs an-

other to do it for him in his presence. *Purser v. Smith* (Ala.), 76 So. 931.

An acknowledgment, though defective, will amount to an "attestation" by the officers making the same under Code 1907, § 3355, relating to attestation of deed where parties can not write. *Purser v. Smith* (Ala.), 76 So. 931.

Notary's Certificate.—*Spink v. Guarantee Bank, etc., Co.*, 181 Ala. 272, 61 So. 302, cited in note in Ann. Cas. 1917A, 235. See the title DEEDS, § 32, vol. 4, pp. 753, 754.

§ 33. Partial or Defective Execution.

A deed signed and acknowledged by B., when the body of the deed makes no mention of him, and recites it to be the deed of the other signers, while void as a conveyance of his interest, is, as a contract to convey, good and enforceable. *Swindall v. Ford*, 184 Ala. 137, 63 So. 651, cited in notes in Ann. Cas. 1916E, 521; *L. R. A.* 1915D, 197.

Where a conveyance was not witnessed or acknowledged as required by statute so as to pass legal title, but was such that legal title would have passed had it been witnessed and acknowledged, the equitable title to the property passed. *Bethea v. McCullough*, 195 Ala. 480, 70 So. 680.

(D) DELIVERY.

§ 35. Sufficiency.

§ 36. — In General.

Upon circumstances attending the making and retention of an instrument in the form of a warranty deed, held, that there was no delivery thereof to take effect in *præsentia*. *Seay v. Huggins*, 194 Ala. 496, 70 So. 113.

§ 38. — Delivery to Third Person.

Necessity of Grantor Parting with Control over Deed.—The mere deposit of a conveyance without intention of passing title is not sufficient delivery to vest title in the grantee. *Gibson v. Gibson* (Ala.), 76 So. 949.

§ 39. — Record or Delivery for Record.

Intention.—*Loring v. Grummon*, 176 Ala. 236, 57 So. 818. See the title DEEDS, § 39 (2), vol. 4, p. 757.

§ 41. — Deposit for Delivery on Death of Grantor.

In General.—*Seeley v. Curts*, 180 Ala. 445, 61 So. 807. See the title DEEDS, § 41, vol. 4, p. 757.

Deed Taking Effect on Death of Grantor.—Where a deed was duly signed and acknowledged and attested by the deputy clerk in the probate office and delivered by the grantor to some person in the probate office to be delivered at her death to the grantee named therein, and while it so remained in that custody grantor told the grantee personally that it had been so deposited for that purpose, and the grantor placed the grantee in possession several years before her death and said she had given the land to him and the delivery of the deed was unconditional, and control was reserved, the delivery of the deed to the depository was effectual to pass the title upon the death of the grantor. *Burgess v. Fowler* (Ala.), 75 So. 954.

§ 46. Questions for Jury.

Delivery with Intention of Passing Title at Death.—*Seeley v. Curts*, 180 Ala. 445, 61 So. 807. See the title DEEDS, § 46, vol. 4, p. 758.

§ 47. Operation and Effect.

Statutory Provisions.—Under Code 1907, § 3364, which dispenses with livery of seisin and declares that the property and possession of the grantor pass as fully by his conveyance as by delivery of seisin, the grantor's possession becomes that of the grantee from the time the deed is delivered. *Daniel v. Williams*, 177 Ala. 140, 58 So. 419.

Delivery of a deed to land imports contemporaneous transfer of the possession under Code 1907, § 3364, providing that livery of seisin is not necessary to complete a conveyance for land. *Chapman v. Chapman*, 194 Ala. 518, 70 So. 121.

(E) VALIDITY.

§ 48. Capacity and Assent of Parties in General.

Mental Capacity in General.—*Frederic v. Wilkins*, 182 Ala. 343, 62 So. 516. See the title DEEDS, § 48 (2), vol. 4, p. 759.

Intoxication.—Where drunkenness is relied on to avoid a conveyance it must

be shown that the grantor's intoxication incapacitated him from exercising his judgment and prevented him from understanding the consequences of his act. *Lewis v. Davis* (Ala.), 73 So. 419.

§ 49. Mistake.

A husband conveyed his property to his wife on a recited consideration of love and affection. Four years later she conveyed the property back to him, in consideration of love and affection, and the deed stipulated that he and his heirs and assigns should hold the property if he survived her, but that if she survived him, the title should revert to her, and that during her life he might convey the property. Immediately thereafter, the husband conveyed to her, in consideration of love and affection, an undivided half interest in the property. The wife, before executing the deed to the husband, was advised that if she survived him the title would revert to her. The attorney who so advised her was one whom the husband had been accustomed to consult, and he in these transactions acted for both in good faith, and attempted to prepare a deed which would carry out their wishes that, in case she survived, the property should revert to her. Held, that equity properly set aside the deed from the wife to the husband. *Manfredo v. Manfredo*, 191 Ala. 322, 68 So. 157.

§ 50. Fraud and Misrepresentation.

§ 50 (1) In General.

Though one of the grantees named in a deed did not participate in the fraudulent misrepresentations of his cograntee, he was equally responsible and answerable therefor so long as he stood as a grantee and beneficiary under the fraudulent deed. *Hartley v. Frederick*, 191 Ala. 175, 67 So. 983.

The mere refusal of party to perform, as by the payment of consideration for a deed, is not such fraud as will authorize rescission of the deed by a court of equity at the grantor's suit. *Sewell v. Walkley* (Ala.), 73 So. 422.

Before a deed can be canceled for fraud practiced in the procurement, the grantee must be shown to have participated in the fraud, or to have notice

thereof, actual or constructive, before paying the purchase price. *Olson v. Olson* (Ala.), 75 So. 313.

§ 50 (4) Inadequacy of Consideration.

Where by fraud land was obtained for an inadequate consideration, a court of equity will set aside the transaction. *Kirby v. Arnold*, 191 Ala. 265, 68 So. 17, cited in notes in L. R. A. 1915D, 1120; 1916D, 388; Ann. Cas. 1917C, 1033.

Where only evidence of fraud in procurement of deed is inadequacy of price paid, such inadequacy to show fraud must be so great as to shock conscience, especially where grantor attacks own conveyance as procured by fraud. *Wilson v. Mullins* (Ala.), 75 So. 900.

Mere inadequacy of price is not of itself sufficient ground to avoid a conveyance, but the conveyance must be shown to have been tainted by fraud. *Chance v. Chapman*, 195 Ala. 513, 70 So. 676.

§ 50 (6) Subject Matter of Misrepresentations.

Existence of unexpressed mental reservation of grantor of conveyance reserving life estate that she could, at any time, avoid its effect if she desired, as if it were bequest in will, is not evidence that it was procured by fraud; such idea being a mistake of law on her part not induced by grantees. *Craft v. Moon* (Ala.), 75 So. 302.

§ 51. Duress.

Where defendant threatened to have plaintiff's father sent to the penitentiary for fraud in the sale of lands unless plaintiff conveyed at an inadequate price lands which he owned, a court of equity will cancel the conveyance. *Embry v. Adams*, 191 Ala. 291, 68 So. 20, L. R. A. 1915D, 1118.

Where a creditor by repeatedly threatening to send his debtor to the penitentiary and finally by arresting him, secured, in satisfaction of his indebtedness, a deed of land by the debtor's mother and brothers and sisters, the deed could be set aside in equity. *Rice v. Henderson-Boyd Lumber Co.*, 197 Ala. 579, 73 So. 70.

Where the grantor's wife executed a

deed under coercion by her husband and the grantee, the deed would be void, although acknowledged by her before a justice of the peace as her own act. *Gilley v. Denman*, 185 Ala. 561, 64 So. 97.

§ 52. Undue Influence.

§ 52 (1) What Constitutes in General.

In General.—*Stroup v. Austin*, 180 Ala. 240, 60 So. 879. See the title DEEDS, § 52 (4), vol. 4, p. 763.

Rule of Courts of Equity.—While courts of equity are astute in discovering the signs of fraud and unfair dealing, they are careful not to interfere with the rights of free disposition of property which inhere in the ownership thereof, and will not defeat the uncoerced wishes of its owner. *Stroup v. Austin*, 180 Ala. 240, 60 So. 879.

Confidential Relations in General.—*Frederic v. Wilkins*, 182 Ala. 343, 62 So. 518. See the title DEEDS, § 52 (2), vol. 4, p. 763.

Deed to Nephew.—Where a single woman voluntarily made her home with her nephew and executed a deed of her property to him, the questions of consideration and of whether she sought and obtained independent advice were immaterial in determining the validity of the deed. *Stroup v. Austin*, 180 Ala. 240, 60 So. 879.

§ 52 (4) Deed to Child.

In General.—*Hawthorne v. Jenkins*, 182 Ala. 255, 62 So. 505. See the title DEEDS, § 52 (4), vol. 4, p. 763.

Law distinguishes relation of parent and child, in so far as gifts or grants from parent to child are concerned, from other classes of confidential relations, and it revokes such benefits only where exercise of actual undue influence is shown, and not merely because of confidential relation and absence of competent independent advice to grantor. *Hassell v. Hassell* (Ala.), 77 So. 716.

Even where dominance of parent has presumptively ceased, inquiry in suit to set aside her deed to child is whether, on all evidence, it reasonably appears that beneficial act proceeded from free volition of parent, without imposition or

coercion on the part of beneficiary. *Hassell v. Hassell* (Ala.), 77 So. 716.

In parent's suit to set aside deed to child for undue influence, inadequacy of pecuniary consideration is not evidence of undue influence. *Hassell v. Hassell* (Ala.), 77 So. 716.

§ 54. Estoppel or Waiver as to Defects or Objections.

A party signing and acknowledging a deed without reading it can not avoid it because not informed of its contents, unless induced by fraud to sign it; and to justify a setting aside of the deed it must appear that a misrepresentation or concealment materially contributed as an inducement to the signing of the deed without reading it. *Woody v. Matthews*, 194 Ala. 390, 69 So. 607.

That complainant, induced to execute a deed to defendant by his misrepresentations that he was the owner of the real estate by a deed from a former owner, and that the records would verify his statements, failed to investigate the state of the title for herself, did not defeat her right to have the deed set aside; as, where a fact represented is one peculiarly within the knowledge of the party making the representation, and of which the other party is ignorant, though the real facts appear on the public records, there is no obligation to examine the records, and the failure to do so does not affect the right of action, especially as the tendency of modern decisions is to relax the requirement of diligence, and to hold that a party guilty of intentional deceit should not be heard to say that the other ought not to have believed him. *Hartley v. Frederick*, 191 Ala. 175, 67 So. 983.

§ 57. Questions for Jury.

Mental Capacity.—In ejectment the question of the mental capacity vel non of grantor to a deed in question was for the jury. *Langley v. Shanks* (Ala.), 75 So. 924.

II. RECORDING AND REGISTRATION.

§ 60. Instruments Entitled to Record.

A deed signed by mark, acknowledged before a Mississippi justice of the peace,

without formal attestation, was not entitled to registration without proof of the official authority of the certifying officer. *Veitch v. Hard* (Ala.), 75 So. 405.

§ 63. Effect of Failure to Record as between Parties to Instrument.

In General.—*Enslen v. Thornton*, 182 Ala. 314, 62 So. 525. See the title DEEDS, § 63, vol. 4, p. 765.

III. CONSTRUCTION AND OPERATION.

(A) GENERAL RULES OF CONSTRUCTION.

§ 64. Application to Deeds in General.

A deed must be given effect if possible. *Southern Iron, etc., Co. v. Stowers*, 189 Ala. 314, 66 So. 677.

Construction in Favor of Validity.—Where deed admits of two constructions, that favorable to its validity will be accepted. *Alabama Corn Mills Co. v. Mobile Docks Co.* (Ala.), 75 So. 574.

Construed against Grantors.—*Vizard v. Robinson*, 181 Ala. 349, 61 So. 959; *Vandegrift v. Shortridge*, 181 Ala. 275, 61 So. 897. See the title DEEDS, § 64, vol. 4, p. 766.

A deed is to be construed against the grantor. *Southern Iron, etc., Co. v. Stowers*, 189 Ala. 314, 66 So. 677; *Alabama Corn Mills Co. v. Mobile Docks Co.* (Ala.), 75 So. 574.

Deed Drawn by Unskilled Draftsman.—Greater latitude of construction is indulged in in case of deed drawn by unskilled draftsman than in case of product of skilled scrivener. *Gamble v. Gamble* (Ala.), 75 So. 924.

§ 67. Intention of Parties.

A deed must be construed to carry out the intention of the parties, as ascertained by the deed. *Pendrey v. Godwin*, 188 Ala. 565, 66 So. 43.

Courts must ascertain and effectuate intent of parties in execution of conveyance, unless such intent is opposed to rule of law, and whole instrument is to be considered. *Alabama Corn Mills Co. v. Mobile Docks Co.* (Ala.), 75 So. 574.

Deed to Take Effect at Grantor's Death.—In construing a deed to take effect at grantor's death, intention of

grantor must be test in considering the character of instrument. *Josey v. Johnston*, 197 Ala. 482, 73 So. 27.

§ 71. Repugnant or Conflicting Parts or Clauses.

Where it is reasonably possible without doing violence to plain terms of deed, it is court's duty to so construe its provisions as to avoid repugnancy. *Gamble v. Gamble* (Ala.), 75 So. 924.

First Clause Must Prevail.—*Vizard v. Robinson*, 181 Ala. 349, 61 So. 959. See the title DEEDS, § 71, vol. 4, p. 768.

Conflicting clauses in a deed should, if possible, be reconciled, and if this can not be done the cause first appearing must control to the exclusion of a later one. *Robertson v. Robertson*, 191 Ala. 297, 68 So. 52.

Granting Clause Controls.—*Graves v. Wheeler*, 180 Ala. 412, 61 So. 341, cited in note in 1917D, 663. See the title DEEDS, § 71, vol. 4, p. 768.

§ 72. Construing Instruments Together.

Where a deed refers to another deed, that referred to is considered as incorporated in the latter deed. *Southern Iron, etc., Co. v. Stowers*, 189 Ala. 314, 66 So. 677.

Where a deed refers to a previous contract in pursuance of which it is given, the deed must be construed in the light of the contract, but the contract can not enlarge the grant, even though the deed stated that it conveyed the same land described in the contract, and there were elements in the description in the contract which might include more land than was described in the deed; since the deed determined the construction placed by the parties upon the contract. *Southern Iron, etc., Co. v. Stowers*, 189 Ala. 314, 66 So. 677.

Supplemental Writing Not Referred to.—The rule is not absolute that a deed and a supplemental paper claimed to be a part of it shall, on their face, indicate a reference to each other and in some cases parol evidence of contemporaneous facts may be admissible to show their connection, if there is proof of identity and unity. *Kyle v. Jordan*, 196 Ala. 509, 71 So. 417.

Whether or not a supplemental writ-

ing, not referred to nor identified in the executed deed, can be offered and received in evidence as a part of the deed must depend upon the considerations:

(1) It must be written contemporaneously with the deed by the grantor or his draftsman; (2) it must be physically before the grantor when he executes the deed; (3) it must be delivered to the grantee or his agent along with and as a part of the deed; (4) it must not contradict any of its expressed terms; and (5) it must, upon its face, be continuous, coherent, and consistent with that part of the deed which it purports to supplement, that is, there must be internal evidence of the identity and unity of the two writings as constituting a single transaction. *Kyle v. Jordan*, 196 Ala. 509, 71 So. 417; *S. C.*, 187 Ala. 355, 65 So. 522.

A supplemental writing on a separate piece of paper, containing matter of description additional to that in the deed, but contradicting the deed both as to parties and consideration, held not properly received in evidence as a part of the deed. *Kyle v. Jordan*, 196 Ala. 509, 71 So. 417, reversing 187 Ala. 355, 65 So. 522.

§ 72½. Extrinsic Circumstances.

The estate created by deed is to be determined, not alone from the words, but from the situation, circumstances, and the context and the fact as to whether the scrivener knew the use of legal technical words. *Smith v. Bachus*, 195 Ala. 8, 70 So. 261.

§ 72½a. Construction by Parties.

Though if a deed is of doubtful meaning, or its language ambiguous, the construction given it by the parties, as exhibited by their conduct, or admission, will be deemed the true one, unless the contrary be shown, yet, if the language is plain and certain, their acts and declarations can not be resorted to to aid a construction. *Hall v. Long* (Ala.), 74 So. 56.

§ 77. Time of Taking Effect.

Upon Delivery.—Title does not pass under a deed until delivery, no matter when signed and acknowledged. *Brown*

v. International Harvester Co., 179 Ala. 563, 60 So. 841; *Bennett v. Albrecht* (Ala.), 78 So. 823.

At Grantor's Death.—Conveyance in the usual form of bargain and sale, with habendum stipulating it should not become operative until the grantor's death, who should retain possession until such time, when the grantees should take possession, was valid as a deed of present conveyance with reservation of possession only in the grantors during their lives. *Jenkins v. Woodward Iron Co.*, 194 Ala. 371, 69 So. 646.

Effect of Condition in Deed.—An instrument reciting that in consideration of \$1, receipt of which was acknowledged, the grantor did bargain, sell, and convey described real estate, it being further understood that the grantee should have 30 days from date to pay a further sum of \$1,000, it being agreed that, if the payment should not be made, the conveyance should be no longer of any effect. The instrument was witnessed. Held, that though it made it purely optional whether the grantee should pay the consideration, title passed notwithstanding condition, and a recital that, if payment should be made, the conveyance should be binding. *Betha v. McCullough*, 195 Ala. 480, 70 So. 680.

(B) PROPERTY CONVEYED.

§ 80. Construction in General.

The law leans against the destruction of a deed for uncertainty of description, and will construe, where it can be done consistently with the rules, so as to effect, and not to defeat, the intention of the parties. *Nolen v. Henry*, 190 Ala. 540, 67 So. 500.

§ 81. References to Maps, Plats, Other Instruments, or Records.

A deed conveying a lot of 20 acres, "less lots 1 and 2 in block B, less 1 and 2 in block 12, also including lots 3 and 4 in block 13 in the town of Mountainboro," referred to the numbered lots in the plan of such town, and not to lots in the grantor's addition thereto. *Thrasher v. Royster*, 187 Ala. 350, 65 So. 796.

§ 83. Particular Description.**§ 83 (1) In General.**

A deed which describes the land as "S. W. S. E. sec. 29 & N. $\frac{1}{4}$ N. E. sec. 32, * * * T. 19, R. 13," describes the southwest quarter of the southeast quarter of section 29, and the north half of the northeast quarter of section 32, in township 19, range 13, and is sufficient. *Ballard v. Bank*, 187 Ala. 335, 65 So. 356.

When General Description Prevails.—

Where deed contains particular description covering only part of land included in general description, general description will prevail. *Pettit v. Gibson* (Ala.), 77 So. 703.

Where a deed describes the premises by governmental subdivisions, that description prevails as against a subsequent description designating the premises as the home place formerly owned by a decedent. *Garner v. Morris*, 187 Ala. 658, 65 So. 1000.

In statutory ejectment, where deed on which defendant relied contained two descriptions, one indicating land by governmental subdivisions, other designating premises as "home place of the late Thomas Pettit, Sr., now deceased," description by governmental survey must prevail. *Pettit v. Gibson* (Ala.), 77 So. 703.

A grantor conveying land described as the place know as the "Jess Myers place, described as follows," followed by a description according to government survey, shows a purpose to convey the Jess Myers place, and a misdescription in the government survey will be disregarded. *Pendrey v. Godwin*, 188 Ala. 565, 66 So. 43.

The limitation in a deed "west" of a certain creek held to apply to only one of the tracts. *Hall v. Long* (Ala.), 74 So. 56.

§ 83 (4) Quantity of Interest Conveyed.

"More or Less."—*Carling v. Wilson*, 177 Ala. 85, 58 So. 417. See the title DEEDS, § 83 (4), vol. 4, p. 773.

Deed Conveying Tracts Described by Government Numbers. — *Vandegrift v. Shortridge*, 181 Ala. 275, 61 So. 897. See the title DEEDS, § 83 (4), vol. 4, p. 773.

§ 83 (5) Specific Quantity Described as Part of Larger Tract.

In General.—*Daniels v. Williams*, 177 Ala. 140, 58 So. 419. See the title DEEDS, § 83 (5), vol. 4, p. 773.

Three of six heirs of a decedent whose land was sold under execution were permitted to redeem their respective interests, which were set off to them in the south half of the 40-acre tract. One of the other heirs and her husband redeemed and purchased the north half, and subsequently conveyed to defendant an undivided one-sixth interest in the 40 acres described as containing $6\frac{2}{3}$ acres and situated in the north half. Held, that as the particular description of the interest conveyed must prevail, defendant acquired a one-third interest in the north half. *Tribble v. Wood*, 186 Ala. 329, 65 So. 73.

Where plaintiff claimed under a deed conveying to him two 40-acre tracts, except 7 acres theretofore sold to defendant's predecessor, as described in the deed to him, and defendant claimed under a deed reciting that it was in fulfillment of the contract to convey about 7 acres out of the north side of the two 40's, which deed described the land conveyed as "seven acres more or less" situated in the two 40's lying north and northwest of a certain railroad and including the right of way, the plaintiff was entitled to all of the land south of the railroad right of way, although there were only three or four acres in the tract north of it; since quantity can not control the bounds in a description, especially where the words "about" and "more or less" are used. *Southern Iron, etc., Co. v. Stowers*, 189 Ala. 314, 66 So. 677.

§ 85. After-Acquired Property or Title.

In General.—*Clements v. Faulk & Co.*, 181 Ala. 219, 61 So. 264. See the title DEEDS, § 85, vol. 4, p. 774.

Deed conveying "all my right, title, interest, estate, claims, and demand, both at law and in equity, as well as in possession or in expectancy; of, in, and to all that certain farm," etc., included and conveyed a subsequently acquired title to the land. *Nance v. Walker* (Ala.), 74 So. 339.

Warranty Deed.—Grantor's after-acquired title passes to grantee under warranty deed. *State v. Mobile, etc., R. Co.* (Ala.), 78 So. 47.

A quitclaim deed, reciting that the grantor quitclaimed all present and expectant interest so that he and his heirs should never question the title of the grantee, carries with it an after-acquired title. *Garrow v. Toxey*, 186 Ala. 572, 66 So. 443.

§ 85½. Evidence.

Presumption.—Where a grantor conveys a certain quantity of land in a larger tract without describing the boundary, the presumption is in favor of a square or parallelogram, not a fanciful or unique figure. *Southern Iron, etc., Co. v. Stowers*, 189 Ala. 314, 66 So. 677.

Admissibility.—In an action for breach of covenant of seisin, based on the fact that the grantor had no title to part of the land which was conveyed by government description, and as the home place of a decedent, evidence that decedent had mortgaged the land in question was admissible. *Garner v. Morris*, 187 Ala. 658, 65 So. 1000, cited in note in *L. R. A.* 1916B, 390.

Where, in an action by a grantee for breach of the grantor's covenant of seisin, based on the fact that he did not own part of the land conveyed, the grantor was permitted to show that it was not the intention to include the described land, plaintiff could show that the bond for title included all the land described in the deed, and that the price was by the acre. *Garner v. Morris*, 187 Ala. 658, 65 So. 1000.

Same—Map.—A map is inadmissible as original evidence as to description, where it has not been adopted as a part of a conveyance by reference thereto on the face of the conveyance. *Thrasher v. Royster*, 187 Ala. 350, 65 So. 796.

§ 86. Questions for Jury.

Where defendant in statutory ejectment relied on the fact that plaintiff, who had purchased lands at a judicial sale, had, subsequent to the institution of the action and the filing of plea of not guilty, conveyed lands described as

all the lands purchased at the judicial sale, except those previously sold, the question whether the land involved was within the exception was a question of fact. *Burnett v. Roman*, 192 Ala. 188, 68 So. 353.

(C) ESTATES AND INTERESTS CREATED.

§ 87. Creation by Deed in General.

A warranty deed, signed by persons, several of whom were sons and daughters and wives and husbands of children of decedent, passed to the grantee the legal title of two signatories and equitable title of other signatories. *Townley v. Corona Coal, etc., Co.* (Ala.), 77 So. 1.

§ 90. Fee Simple.

§ 90 (1) Necessity and Sufficiency of Words of Inheritance or Perpetuity.

In General.—*Graves v. Wheeler*, 180 Ala. 412, 61 So. 341, cited in note in *Ann. Cas.* 1917D, 663. See the title DEEDS, § 90 (1), vol. 4, p. 775.

Code 1907, § 3396, providing that every estate in lands is to be taken as a fee simple although the words necessary to create an estate of inheritance are not used, unless it clearly appears that a less estate was intended, refers to the deed or conveyance as a whole and is to be resorted to only when from the whole instrument it is doubtful what estate was intended to be conveyed. *Slaughter v. Hall* (Ala.), 77 So. 738.

§ 90 (3) Limitations Inconsistent with Grant of Fee.

Where estate in fee simple is granted by sufficient words, clause in restraint of alienation will be rejected. *Gamble v. Gamble* (Ala.), 75 So. 924.

§ 93. Estates Tail.

Conversion into Fee Simple under Statutory Provisions.—A deed to a man and his children, he being childless at the time the conveyance takes effect, passes an estate tail, converted by statute into an unqualified fee. *Dallas Compress Co. v. Smith*, 190 Ala. 423, 67 So. 289.

Conveyance to a son and "his bodily heirs after him, and to be free from mortgage or any form of conveyance by

deed to the second generation," held to create estate tail converted by Code 1907, § 3397, into fee simple. *Gamble v. Gamble* (Ala.), 75 So. 924.

§ 94. Application of Rule in Shelley's Case.

The rule in Shelley's Case was abolished by statute subsequently carried into Code 1907, § 3403. *Smith v. Bachus*, 195 Ala. 8, 70 So. 261.

§ 95. Life Estates.

In General.—*Graves v. Wheeler*, 180 Ala. 412, 61 So. 341. See the title DEEDS, § 95 (1), vol. 4, p. 779.

Remainder to Heirs. — Deed to one during her life and after her death by way of remainder to her heirs held to create a life estate with remainder to the heirs. *Smith v. Bachus*, 195 Ala. 8, 70 So. 261.

§ 97. Remainders.

§ 98. — In General.

Where land was conveyed to a woman for life, and after her death to go by way of remainder to her heirs, her husband was not an heir, and her children were the remaindermen. *Smith v. Bachus*, 195 Ala. 8, 70 So. 261.

A deed to a woman during her natural life for her sole and separate use, to have and to hold unto her during her natural life, and after her death to go by way of remainder over to her heirs, falls within the express terms of Code 1907, § 3403, relative to remainders to the heirs, issue, or heirs of the body of a person to whom a life estate is given. *Smith v. Bachus*, 195 Ala. 8, 70 So. 261.

§ 99. — Vested or Contingent.

Devesting of Vested Estates.—*Mays v. Burleson*, 180 Ala. 396, 61 So. 75. See the title DEEDS, § 99 (3), vol. 4, p. 783.

(D) EXCEPTIONS AND RESERVATIONS.

§ 101½. Exceptions and Reservations Distinguished.

Where the subject of a restrictive clause was an estate in land less than the fee, and was incorporated in the granting clause of the deeds, it was in nature an exception, not a reservation.

Robertson v. Robertson, 191 Ala. 297, 68 So. 52, cited in notes in Ann. Cas. 1918A, 877, 878; 1917D, 663.

§ 103. Construction and Operation of Exceptions.

Deeds by heirs of intestate construed, and held to except from the conveyance their ultimate reversionary interest in the widow's dower. *Robertson v. Robertson*, 191 Ala. 297, 68 So. 52.

§ 106. Construction and Operation of Reservations.

An estate in land may be created by deed to take effect in possession before the grantor's death, with reservation to him of the intervening use and possession. *Smith v. Davis* (Ala.), 75 So. 22.

Life Estate to Grantor.—*Mays v. Burleson*, 180 Ala. 396, 61 So. 75. See the title DEEDS, § 106, vol. 4, p. 785.

(E) CONDITIONS AND RESTRICTIONS.

§ 107. Nature and Creation of Conditions.

A "condition" in the law of estate, where the term originated, is a qualification or restriction annexed to a deed or devise by virtue of which an estate is made to vest, to be enlarged or defeated upon the happening of a particular event or the nonperformance of a particular act; such conditions may be precedent or subsequent, a condition precedent being one which must happen before the estate dependent upon it can arise, while a condition subsequent is one which, when it does happen, will defeat the estate. *Metropolitan Life Ins. Co. v. Goodman*, 10 Ala. App. 446, 65 So. 449.

§ 108. Covenant Distinguished from Condition.

If there be a doubt as to whether a clause in a deed is a covenant or condition, it will be construed as a covenant. *Seaboard, etc., R. Co. v. Anniston Mfg. Co.*, 186 Ala. 264, 65 So. 187.

Language of Instrument. — Whether the language in a deed be a covenant or condition depends on the language employed in the instrument, the circumstances under which the contract was made, the relative position of the parties, and the purpose to be accomplished;

and the intention of the parties, when clearly ascertained, is controlling. *Seaboard, etc., R. Co. v. Anniston Mfg. Co.*, 186 Ala. 264, 65 So. 187.

§ 109. Validity of Conditions.

§ 110. — Restraint of Alienation.

Where an estate in fee is granted to a person by proper and sufficient words, a clause in a deed which is in restraint of alienation is void and will be rejected. *Graves v. Wheeler*, 180 Ala. 412, 61 So. 341.

§ 112. Construction and Operation of Conditions.

§ 115. — Conditions Subsequent.

No technical words are required in a deed to create a condition subsequent. *Seaboard, etc., R. Co. v. Anniston Mfg. Co.*, 186 Ala. 264, 65 So. 187, cited in note in *Ann. Cas.* 1916B, 608.

Not Favored. — Conditions subsequent are not favored in the law, and are strictly construed, as they tend to the destruction of estates. *Seaboard, etc., R. Co. v. Anniston Mfg. Co.*, 186 Ala. 264, 65 So. 187.

§ 116. Performance or Breach.

§ 121. — Effect of Breach.

In General.—*Shannon v. Long*, 180 Ala. 128, 60 So. 273. See the title DEEDS, § 121, vol. 4, p. 788.

§ 123. Enforcement of Forfeiture.

Other Remedies.—A forfeiture will not be declared for breach of a condition subsequent if the grantor have other remedies. *Seaboard, etc., R. Co. v. Anniston Mfg. Co.*, 186 Ala. 264, 65 So. 187.

Whether the grantee can be put in statu quo is an important factor in determining the question of forfeiture for breach of a condition subsequent. *Seaboard, etc., R. Co. v. Anniston Mfg. Co.*, 186 Ala. 264, 65 So. 187.

(F) LOSS OR RELINQUISHMENT OF RIGHTS.

§ 124. Revocation, Subsequent Conveyance, or Other Acts of Grantor.

If a grantor intended complete and valid delivery of deed to take effect upon her death, she could not, by subsequent

withdrawal of deed, nullify that act. *Burgess v. Fowler (Ala.)*, 75 So. 954.

Where deed intended to take effect on death of grantor was delivered to attesting witness, probate clerk, as depositary, its subsequent recaption and retention upon death of depositary held not to negative intent or impair effect of previous delivery. *Burgess v. Fowler (Ala.)*, 75 So. 954.

§ 128. Destruction, Mutilation or Alteration of Deed by Parties.

Where One of Several Grantors Erased His Name.—*Ely v. Brewer*, 182 Ala. 396, 63 So. 742. See the title DEEDS, § 128, vol. 4, p. 789.

IV. PLEADING AND EVIDENCE.

§ 129. Pleading.

§ 130½. — Invalidity.

A bill for cancellation of a deed and note, alleging that plaintiff, an ignorant, weak-minded negro, without education and business experience and easily influenced, was induced by respondent, a shrewd white man, by false representation as to the value of his land, to deed it to respondent for the latter's non-negotiable note, payable five years from date for a fraction of the value as stated of the land, held not demurrable as stating a conclusion of the pleader that the respondent procured the conveyance through fraud, duress, or undue influence or because not showing that complainant was mentally incompetent. *Broughton v. Walker*, 197 Ala. 284, 72 So. 539.

§ 131. Presumptions and Burden of Proof.

§ 133. — Execution, Existence, and Identity.

Burden of Proof.—*Dunson v. Heun*, 178 Ala. 152, 59 So. 54. See the title DEEDS, § 133, vol. 4, p. 790.

§ 134. — Delivery.

§ 134 (2) Presumption from Possession of Deed.

In General.—*Napier v. Elliott*, 177 Ala. 113, 58 So. 435. See the title DEEDS, § 134 (2), vol. 4, p. 791.

§ 134 (3) Time of Delivery.

In *General*.—*Daughdrill v. Lockhart*, 181 Ala. 338, 61 So. 802. See the title DEEDS, § 134 (3), vol. 4, p. 791.

§ 134 (5) Effect of Record or Delivery for Record.

In *General*.—*Napier v. Elliott*, 177 Ala. 113, 58 So. 435. See the title DEEDS, § 134 (5), vol. 4, p. 791.

The mere filing of a deed for record by the grantor is *prima facie* a delivery, acceptance of which will be presumed if the conveyance is beneficial to grantee. *Skipper v. Holloway*, 191 Ala. 190, 67 So. 991.

Rebuttal of Presumption. — The presumption of delivery arising from record of a deed may be rebutted by satisfactory evidence that the grantor did not intend by filing the conveyance to make delivery; the question of delivery being one of intention. *Skipper v. Holloway*, 191 Ala. 190, 67 So. 991.

§ 135. — Consideration.

One seeking to set aside deeds, on the ground of intoxication at the time of execution and insufficiency of consideration has the burden of proof. *Sellers v. Knight*, 185 Ala. 96, 64 So. 329.

§ 136. — Validity.**§ 136 (1) Capacity and Assent of Parties in General.**

Presumption of Sanity. — In suit to cancel a mortgage and deed on account of mental incapacity of mortgagor and grantor, where complainants made no proof of such incapacity at time of execution, they were not entitled to relief; the law presuming sanity. *Johnson v. Pinckard*, 196 Ala. 259, 72 So. 127.

Burden of Proving Intoxication.—A grantor seeking to cancel his deed has the burden of showing his incapacity from intoxication. *Lewis v. Davis* (Ala.), 73 So. 419; *Sellers v. Knight*, 185 Ala. 96, 64 So. 329.

§ 136 (2) Fraud in General.

Where one enfeebled in mind by the excessive use of intoxicating liquors executes a deed for an insufficient consideration, a presumption of fraud arises which must be overcome by evidence of

fair and honest dealing on the part of the one who claims the validity of the deed. *Sellers v. Knight*, 185 Ala. 96, 64 So. 329.

§ 136 (3) Undue Influence.**§ 136 (3a) In General.**

Where a principal seeks to avoid a conveyance to his agent because of undue influence, he must show that the agent occupied a position of advantage, before the burden of showing the voluntary character of the transaction will be cast upon the agent. *Curry v. Leonard*, 186 Ala. 666, 65 So. 362.

That a conveyance by a woman to her farm manager in payment for his services was made in contemplation of death, does not affect the burden of proof as to undue influence, where the grantor had contractual capacity. *Curry v. Leonard*, 186 Ala. 666, 65 So. 362.

§ 136 (3b) Confidential Relation in General.

Showing Confidential Relation. — To raise presumption that deed was procured by undue influence, evidence must show confidential relation between the parties and that grantee was the dominant spirit in procuring the deed. *Woody v. Matthews*, 194 Ala. 390, 69 So. 607.

Burden of Showing Undue Influence.—Where a woman conveyed her property shortly before her death to her farm manager, who had attended to her business affairs and acted as her personal servant, the conveyance reciting that it was in consideration of his services, which, it was undenied, were reasonably worth the value of the property, the burden of showing undue influence is upon the representatives of the grantor. *Curry v. Leonard*, 186 Ala. 666, 65 So. 362.

Burden of Showing Transaction Voluntary.—Where one claiming under a conveyance has acquired from another, to whom he stood in some confidential relationship, an unreasonable benefit, equity casts on him the burden of proving that the transaction was voluntary on the donor's part. *Curry v. Leonard*, 186 Ala. 666, 65 So. 362.

Presumption of Undue Influence—Rebuttal of Presumption.—Where a confi-

dential relation existed between the parties to a deed at the time of its execution, and the grantee was the dominating spirit, the law presumes the exercise of undue influence, and to rebut the presumption the grantee must by clear and convincing proof show that he acted in good faith and did not take advantage of the grantor. *Woody v. Matthews*, 194 Ala. 390, 69 So. 607; *Young v. Love*, 186 Ala. 292, 65 So. 337.

Mere presumption of undue influence exerted by a grantee over the grantor, arising from confidential relations between the parties, may be overcome by proof of competent independent advice and counsel, or by any other evidence which shows that the transaction was not affected by any abuse of confidence. *Manfredo v. Manfredo*, 191 Ala. 322, 68 So. 157.

§ 136 (3c) Transactions between Parent and Child.

In General.—*Hawthorne v. Jenkins*, 182 Ala. 255, 62 So. 505. See the title DEEDS, § 136 (3), vol. 4, p. 793.

In parent's action to set aside deed to her child for undue influence, parent has burden of proving such influence. *Hassell v. Hassell* (Ala.), 77 So. 716.

On a conveyance by parent to child, there is a presumption that there was no undue influence, and the burden is on the grantor or his heirs to overcome such presumption, but on proof that the child was the dominant party, the burden shifts to child to show fairness of transaction and that the parent acted freely and voluntarily. *Whaley v. Crittenden*, 199 Ala. 341, 68 So. 886, cited in notes in Ann. Cas. 1918B, 458, 459.

§ 137. Admissibility of Evidence.

§ 139. — Delivery.

In General.—*Napier v. Elliott*, 177 Ala. 113, 58 So. 435, cited in note in Ann. Cas. 1916E, 714. See the title DEEDS, § 139, vol. 4, p. 795.

§ 141. — Validity.

In General.—*Loring v. Grummon*, 176 Ala. 236, 57 So. 818. See the title DEEDS, § 141, vol. 4, p. 796.

§ 142. Weight and Sufficiency of Evidence.

§ 143. — In General.

In a suit to cancel conveyances of

land which plaintiff claimed were obtained from him while intoxicated and for an inadequate consideration, evidence held to show a ratification of the conveyance by complainant. *Sellers v. Knight*, 185 Ala. 96, 64 So. 329.

In a suit to set aside a conveyance, evidence held to show that complainant, who was told conveyance of a strip of land was necessary to save her grandfather from imprisonment, did not intend to convey the parcel claimed by defendant. *Kirby v. Arnold*, 191 Ala. 263, 68 So. 17.

§ 145. — Delivery.

In ejectment, evidence held to show delivery of deed under which plaintiff claimed. *Bennett v. Albrecht* (Ala.), 78 So. 823.

Proof that a purported deed was signed by the grantor, acknowledged, certified by a proper officer, and recorded in time in the office of the probate judge, is sufficient proof of delivery. *Sulzby v. Palmer*, 194 Ala. 524, 196 Ala. 645, 70 So. 1.

That deed to take effect at death of grantor recited that it was "signed, sealed and delivered" in presence of probate clerk who was attesting witness with other evidence held to support inference that deed was then delivered to attesting witness as depositary, and that its subsequent possession by grantor was consequent upon death of depositary. *Burgess v. Fowler* (Ala.), 75 So. 954.

§ 147. — Consideration.

In a suit to set aside a conveyance, evidence held to show inadequacy of consideration. *Kirby v. Arnold*, 191 Ala. 263, 68 So. 17.

In a suit to cancel conveyances of land, evidence held insufficient to show that a fair consideration was not given for the conveyances. *Sellers v. Knight*, 185 Ala. 96, 64 So. 329.

§ 148. — Validity.

§ 148 (1) Capacity and Assent of Parties in General.

In General.—*Hays v. Dillard*, 176 Ala. 109, 57 So. 695. See the title DEEDS, § 148 (1), vol. 4, p. 800.

Mental Incapacity.—Evidence held to sustain a finding that a deed to land, executed by a grantor at the age of 85, was void and ineffective because of mental incapacity of deceased. *Josey v. Johnston*, 197 Ala. 482, 75 So. 27.

§ 148 (2) Fraud and Misrepresentation.

In General. — *Dunson v. Heun*, 178 Ala. 152, 59 So. 54. See the title DEEDS, § 148 (2), vol. 4, p. 801.

Evidence held not to show that a deed was procured by the fraud of the grantee. *Woody v. Matthews*, 194 Ala. 390, 69 So. 607.

In action to cancel deed on ground of fraud, evidence held not to show fraud outside of inadequacy of purchase price. *Wilson v. Mullins* (Ala.), 75 So. 900.

In a suit to cancel two conveyances on the ground that they were procured by fraud and that the price was wholly inadequate, evidence held to warrant cancellation of one, but not of the other, conveyance. *Chance v. Chapman*, 195 Ala. 513, 70 So. 676.

Clear, Convincing and Satisfactory Proof.—A grantor, seeking to set aside a deed because of fraud inducing him to sign it without knowing its contents, has the burden of showing the fraud by clear, convincing and satisfactory proof; and where the proof is uncertain in any material respect, it is insufficient, though the court may feel that a great wrong has been done. *Woody v. Matthews*, 194 Ala. 390, 69 So. 607.

§ 148 (3) Undue Influence.

In General.—*Hawthorne v. Jenkins*, 182 Ala. 255, 62 So. 505. See the title DEEDS, § 148 (3), vol. 4, p. 801.

Parent's Deed to Child. — Evidence held insufficient to show that parent's deed to the child was secured by undue influence. *Hassell v. Hassell* (Ala.), 77 So. 716.

Confidential Relations.—In a suit by a grantor to set aside a deed on the ground of the grantee's fraud, evidence held not to show the existence of a confidential relation between the parties, so that the grantee did not have the burden of rebutting the presumption of undue influence. *Woody v. Matthews*, 194 Ala. 390, 69 So. 607.

§ 148 (4) Mistake.

In a suit to reform a deed so as to except growing timber excepted by the bond for title, where there was evidence that both parties treated the deed for some time after its execution as excepting the timber, that the grantees did not know of the omission of the exception until several months after its execution, and that they were then informed by third parties, and that it was only then that they objected to the grantor removing the timber, and there were other circumstances of the same bearing, the evidence sufficiently showed that the exception was omitted by mistake and not by agreement as claimed by defendants. *Jacobs v. Johnson*, 187 Ala. 205, 65 So. 802.

Defamation.

See post, LIBEL AND SLANDER.

Defraud.

See post, FALSE PRETENSES; FRAUD; FRAUDULENT CONVEYANCES.

Delivery.

As to delivery of instruments, contracts, goods, etc., see the specific titles, as for instance as to delivery of deeds, see ante, DEEDS; as to delivery of goods, see ante, CARRIERS; post, SALES, etc.

Demonstrative Evidence.

See ante, CRIMINAL LAW; post, EVIDENCE.

Demurrer in Pleading.

See post, EQUITY; PLEADING.

As to demurrer in criminal proceedings, see ante, CRIMINAL LAW; post, INDICTMENT AND INFORMATION.

Demurrer to Evidence.

See ante, CRIMINAL LAW; post, TRIAL.

DEPOSITARIES.

§ 3½. Deposits of Public Moneys.

Cross References.

See the title DEPOSITARIES, vol. 4, p. 808, and references there given.

In addition, see ante, BAILMENT; BANKS AND BANKING; post, WAREHOUSEMEN.

§ 3½. Deposits of Public Moneys.

Liability of Depositary.—Where bank having deposit to credit of president of board of convict inspectors in good faith delivered to president or authorized

agent, chief clerk in convict department, funds or values to amount of the deposit, bank was discharged from liability to state. *State v. Montgomery Sav. Bank* (Ala.), 74 So. 942.

DEPOSITIONS.

- § 19. Officers or Persons Authorized to Take Depositions.
- § 21. — Special Appointment or Designation.
- § 26. Notice of Taking.
- § 28. Examination of Witness.
- § 29. — In General.
- § 30. — Cross-Examination and Cross-Interrogatories.
- § 33. — Annexing Exhibits.
- § 43. Suppression.
 - § 43 (1) Right to Suppress in General.
 - § 43 (4) Motions.
- § 46. Admissibility in Evidence.
- § 52. — Insufficiency of Answers.
- § 53. — Part of Deposition.
- § 55. Actions and Proceedings in Which Deposition May Be Used.
- § 56. — Other Actions between Same Parties.
- § 57. — Other Actions between Different Parties.
- § 59. Defects and Objections.
- § 61. — Time for Objection in General.
- § 63. — Necessity of Objection before Trial.
 - § 63 (1) Interrogatories.
 - § 63 (8) Evidence in Deposition.
- § 65. — Waiver.

Cross References.

See the title DEPOSITIONS, vol. 5, p. 3, and references there given.

As to introducing answers to interrogatories on former trial to impeach witness, see post, WITNESSES.

§ 19. Officers or Persons Authorized to Take Depositions.

§ 21. — Special Appointment or Designation.

Where a party, when filing interrogatories, nominated one as a suitable person to take the deposition of a witness, and the adverse party, when filing cross-interrogatories, nominated another residing at the same place as a suitable person, commission addressed to both, or to such one or more of them as should act, conferred authority on either to take and certify the deposition. *Morton v. Clark*, 10 Ala. App. 439, 65 So. 408.

§ 26. Notice of Taking.

Under Code 1907, § 4032, as amended by Acts 1911, p. 487, providing, relative to depositions, that when the testimony is desired under § 4030, subd. 3, author-

izing the taking of depositions when the witness resides more than 100 miles from the place of trial or is absent from the state, the testimony may, unless the opposite party makes the affidavit therein prescribed, be taken by interrogatories, that the moving party may file interrogatories, of which and of the residence of the witness and of the commissioner to be appointed he must give the opposite party notice, and that, if thereupon such opposite party shall make affidavit that in his belief it is material that the testimony of such witness be taken orally, the clerk shall issue a commission to take such testimony by oral examination, provided, however, that in all cases in which testimony is to be taken by interrogatories the party against whom the testimony is proposed to be taken shall, within the time allowed to file cross-interrogatories, have

the right to demand reasonable notice of the time and place of taking the testimony and to attend such examination and cross-examine the witnesses orally in all cases where depositions are taken on commissions from the law courts, the party against whom it is proposed to take the testimony within the time for filing cross-interrogatories has a right to demand reasonable notice of the time and place of taking the testimony, though the meaning of the statute is somewhat obscure. *Barfield v. South Highland Infirmary*, 191 Ala. 553, 68 So. 30.

§ 28. Examination of Witness.

§ 29. — In General.

Under Code 1907, § 3139, providing that either party may require witnesses residing within the state to be examined orally instead of by interrogatories, a party to a suit in equity may be compelled by the adverse party to testify orally, and the method prescribed by § 3134, for an examination by filing interrogatories is not exclusive. *West v. Cowan*, 189 Ala. 138, 66 So. 816.

§ 30. — Cross-Examination and Cross-Interrogatories.

See ante, "Notice of Taking," § 26.

§ 33. — Annexing Exhibits.

Where exhibits to a deposition, though not referred to in the certificate of the commissioner, were specifically referred to by the testimony of the witness, and identified as exhibits marked by a designating letter, and were securely fastened to the deposition, they were sufficiently identified as to be receivable in evidence. *Crosswhite v. Chattanooga Brewing Co.*, 10 Ala. App. 425, 65 So. 298.

§ 43. Suppression.

§ 43 (1) Right to Suppress in General.

Exhibits Not Properly Identified.— That some exhibit or exhibits attached to a deposition were not properly identified was no ground for objection to the entire deposition, or for a motion to suppress it in its entirety, but the proper practice was to move to exclude or suppress the exhibits. *Crosswhite v.*

Chattanooga Brewing Co., 10 Ala. App. 425, 65 So. 298.

§ 43 (4) Motions.

Under Code 1907, § 4042, providing that objections to the admissibility of an entire deposition must be made before entering on the trial, a motion to suppress a deposition not made before entering on the trial comes too late. *Wooten v. Federal Discount Co.*, 7 Ala. App. 351, 62 So. 263.

§ 46. Admissibility in Evidence.

§ 52. — Insufficiency of Answers.

It is within the discretion of the trial court to determine whether answers by the plaintiff to interrogatories are evasive. *Roll v. Howell*, 9 Ala. App. 179, 62 So. 463.

§ 53. — Part of Deposition.

Answer of party to part only of interrogatories propounded by adverse party can not be received in evidence. *Portsmouth Cotton Oil Refin. Corp. v. Madrid Cotton Oil Co. (Ala.)*, 77 So. 8.

§ 55. Actions and Proceedings in Which Deposition May Be Used.

§ 56. — Other Actions between Same Parties.

Depositions and exhibits which were detached for convenience by order of the court and without objection, in a former proceeding are admissible in evidence in the subsequent trial, where their genuineness and identity are not questioned. *Roll v. Howell*, 9 Ala. App. 179, 62 So. 463.

§ 57. — Other Actions between Different Parties.

In a suit to set aside a fraudulent conveyance, where the grantor's fraud might have been inferred from his having retained possession of the land, his deposition taken in a previous suit on different issues, between different parties, was admissible as being relevant to the facts of the conveyance. *Murphy v. Pipkins*, 191 Ala. 111, 67 So. 675.

§ 59. Defects and Objections.

§ 61. — Time for Objection in General.

Objection Made When Deposition Is

Offered in Evidence.—Objections to interrogatories and answers are too late when first made when the deposition is offered in evidence. *Hurst v. Fitz Water Wheel Co.*, 197 Ala. 10, 72 So. 314.

Incompetency and Illegality Apparent on Face of Deposition.—An objection to evidence contained in deposition may be made at any stage of trial, where incompetency and illegality of such evidence is apparent on face of deposition. *Karpeles v. City Ice Delivery Co. (Ala.)*, 73 So. 642.

Statements Not Based on Witnesses' Own Knowledge.—Though plaintiff did not file objections to interrogatory to a witness, but filed cross-interrogatories, objection may be received thereafter where it did not appear until witness answered interrogatory that he was making statements as to a question of fact not based on his own knowledge. *Boshell v. Cunningham (Ala.)*, 76 So. 937.

§ 63. — Necessity of Objection before Trial.

§ 63 (1) Interrogatories.

Where interrogatories are filed, and no objections are taken to them, and cross-interrogatories are filed, and the answer is responsive to the interrogatory and material to the issues of the cause, a party can not thereafter object. *Boshell v. Cunningham (Ala.)*, 76 So. 937.

Objections on Trial.—Where no objections are filed to interrogatories, and the answers and exhibits are responsive and material, it is too late to object to the depositions on the trial. *Crosswhite v. Chattanooga Brewing Co.*, 10 Ala. App. 425, 65 So. 298.

Same — No Opportunity Earlier.—Where a deposition was regularly taken and returned, objection at the trial that portion of deposition was not respon-

sive or stated more or less than was called for by the interrogatories, held not available, unless accompanied by proof that the objector had no opportunity of making the objection earlier. *Hill v. Condon*, 14 Ala. App. 332, 70 So. 208.

Time for Objection — Hearsay Evidence.—Where in an action for damages to automobile though defendant was represented by counsel at the oral examination of plaintiff before a commissioner, he did not then, or subsequently and prior to the trial object to a question as to cost of repairs and hearsay testimony that the amount charged was reasonable, contained in a deposition, held such objection not available at the trial. *Hill v. Condon*, 14 Ala. App. 332, 70 So. 208.

§ 63 (8) Evidence in Deposition.

Objection to portions of deposition which contain mere conclusions of witness on merits of ultimate issue was not waived by failure to object before trial. *Karpeles v. City Ice Delivery Co. (Ala.)*, 73 So. 642.

§ 65. — Waiver.

Improperly Certified—Waiver of Objection. — Depositions procured by respondents, which were not properly certified, held properly considered by the chancellor when not objected to, and where complainant introduced as part of his own evidence the testimony given by each deponent on cross-examination. *Smith v. Morris*, 181 Ala. 279, 61 So. 276.

Objection That Evidence Not Best.—An objection that a copy of an order for sewing machines attached to a witness' deposition was not the best evidence was waived by failing to object before going to trial. *Forehand v. White Sewing Mach. Co.*, 195 Ala. 208, 70 So. 147.

Deposits in Court.

See the title DEPOSITS IN COURT, vol. 5, p. 32, and references there given.

Depots.

See ante, CARRIERS; post, RAILROADS.

DESCENT AND DISTRIBUTION.

I. Nature and Course in General.

- § 2. What Law Governs.
- § 4. — Real Property and Interest Therein.
- § 7. Property Subject to Descent or Distribution.

II. Persons Entitled and Their Respective Shares.

- (A) Heirs and Next of Kin.
 - § 16. Grandparents and Remote Ascendants.
- (B) Surviving Husband or Wife.
 - § 21. Nature of Right in General.
 - § 22. Constitutional and Statutory Provisions.
 - § 23. Issue of Intestate Also Surviving.
 - § 24. — In General.
 - § 25. Estoppel, Waiver or Release of Right.

III. Rights and Liabilities of Heirs and Distributees.

- (A) Nature and Establishment of Rights in General.
 - § 27. Establishment and Determination of Heirship or Right to Share in Distribution.
 - § 28. Title of Heirs or Distributees.
 - § 30. — Real Property and Interests Therein.
 - § 36. Conveyances of Property by Heirs or Distributees.
 - § 37. Assignments of Distributive Shares.
 - § 38. Rights and Liabilities of Purchasers from or Assignees of Distributees.
 - § 39. Actions by Heirs or Distributees.
 - § 41. — Relating to Real Property or Interests Therein.
 - § 41 (1) Rights of Action, Nature of Remedy, and Conditions Precedent.
 - § 41 (2) Parties.
- (C) Debts of Intestate and Incumbrances on Property.
 - § 64. Liabilities on Descent of Real Property.
 - § 65. — Specialties and Debts of Record.
 - § 66. — Liens and Incumbrances Created by Intestate.

Cross References.

See the title DESCENT AND DISTRIBUTION, vol. 5, p. 35, and references there given.

In addition, see post, EXECUTORS AND ADMINISTRATORS; HUSBAND AND WIFE; WILLS.

I. NATURE AND COURSE IN GENERAL.

- § 2. What Law Governs.
- § 4. — Real Property and Interest Therein.

A due regard for security, independence and dignity of a sovereign state

requires that its law shall govern exclusively descent or heirship of real estate within its jurisdiction. *Frederick v. Wilbourne* (Ala.), 73 So. 442.

- § 7. Property Subject to Descent or Distribution.

Where an ancestor once had possession but not at his death, and had no ti-

de, nothing could descend to his children, and, for them to have an interest which could be conveyed, they must have had possession themselves or by their guardian up to the time of the conveyance, or, if the possession was discontinued, there must have been an animus revertendi. *Hicks v. Burgess*, 185 Ala. 584, 64 So. 290.

II. PERSONS ENTITLED AND THEIR RESPECTIVE SHARES.

(A) HEIRS AND NEXT OF KIN.

§ 16. Grandparents and Remote Ascendants.

Under the statute of descents (Code 1907, § 3754), grandparents take before uncles and aunts. *Rucker v. Jackson*, 180 Ala. 109, 60 So. 139.

(B) SURVIVING HUSBAND OR WIFE.

§ 21. Nature of Right in General.

Value of decedent's land in relation to widow's exemption should have been computed upon so much of the land as decedent owned, and not the entire tract. *Landers v. Hayes*, 196 Ala. 533, 72 So. 106.

Widow's Share—Homestead Exemption.

—Under the statutes, upon decedent's death, leaving no minor children, the absolute fee in all of his lands, valued at less than \$2,000, passed to his widow, notwithstanding there was no proceeding setting such lands apart to her as the homestead exemption. *Combs v. Greene*, 181 Ala. 321, 61 So. 898.

§ 22. Constitutional and Statutory Provisions.

Rights of Surviving Husband.—*Lake v. Russell*, 180 Ala. 199, 60 So. 850. See the title DESCENT AND DISTRIBUTION, § 22, vol. 5, p. 42.

Rights of Surviving Wife. — *Lake v. Russell*, 180 Ala. 199, 60 So. 850. See the title DESCENT AND DISTRIBUTION, § 22, vol. 5, p. 41.

§ 23. Issue of Intestate Also Surviving.

§ 24. — In General.

Where at husband's death he owned only a single tract of land, which did not exceed \$2,000 in value, and his only child

was not a minor, the title, under Code of 1896, § 2098, vested absolutely in the widow. *Landers v. Hayes*, 196 Ala. 533, 72 So. 106.

It not appearing that one who died in 1874 was insolvent and hence, being presumed that his estate was solvent, his land vested in his children as his heirs, subject to the widow's right as such and her right under Acts 1872-3, pp. 64-69, to retain possession, along with the children, of the household until solvency of the estate was determined. *Sloss-Sheffield Steel, etc., Co. v. Taff*, 178 Ala. 382, 59 So. 658.

§ 25. Estoppel, Waiver or Release of Right.

Secret Marriage. — Mere fact that widow has kept her marriage secret does not estop her from claiming share in husband's estate. *Darrow v. Darrow* (Ala.), 78 So. 383.

III. RIGHTS AND LIABILITIES OF HEIRS AND DISTRIBUTEES.

(A) NATURE AND ESTABLISHMENT OF RIGHTS IN GENERAL.

§ 27. Establishment and Determination of Heirship or Right to Share in Distribution.

Heirship — "Filiation" — Evidence. — "Filiation," which is the relation of parent and child, may be established by proof that the child has always borne the name of the father to whom he claims to belong, and that the father has treated him as his child. *Lay v. Fuller*, 178 Ala. 375, 59 So. 609.

In ejectment, where the heirship of plaintiff was in issue, evidence held to conclusively establish both filiation and legitimacy. *Lay v. Fuller*, 178 Ala. 375, 59 So. 609.

§ 28. Title of Heirs or Distributees.

§ 30. — Real Property and Interests Therein.

See ante, "In General," § 24.

Subject to Homestead Exemptions — Devolution of Property.—On the death of the owner of real property, the legal title descends to his heirs at law, subject to the homestead exemptions of his

widow and minor children. *McDuffie v. Morrissett*, 184 Ala. 360, 63 So. 542.

Statutory Powers of Personal Representative.—*Rucker v. Tennessee Coal, etc.*, R. Co., 176 Ala. 456, 58 So. 465; *Randolph v. Vails*, 180 Ala. 82, 60 So. 159. See the title DESCENT AND DISTRIBUTION, § 30, vol. 5, p. 44.

On death intestate of one seized of a heritable estate in lands, title descends immediately to heir subject to exercise by administrator of his statutory powers. *Southern R. Co. v. Hayes (Ala.)*, 73 So. 945.

Distribution without Administration — Foreclosure of Mortgage.—*Braun v. Pettyjohn*, 176 Ala. 592, 58 So. 907. See the title DESCENT AND DISTRIBUTION, § 30, vol. 5, p. 44.

§ 36. Conveyances of Property by Heirs or Distributees.

Common Law — Statutory Powers of Personal Representative. — *Rucker v. Tennessee Coal, etc.*, R. Co., 176 Ala. 456, 58 So. 465. See the title DESCENT AND DISTRIBUTION, § 36, vol. 5, p. 47.

§ 37. Assignments of Distributive Shares.

A note belonging to deceased at his death, and not disposed of by his will, passed to the distributees, subject to administration, so that, with this qualification, sole ownership of it vested in one of them, on the others transferring to her their interests therein. *Reynolds v. Reynolds*, 10 Ala. App. 420, 65 So. 194, certiorari denied in *Ex parte Reynolds*, 187 Ala. 672, 65 So. 1034.

§ 38. Rights and Liabilities of Purchasers from or Assignees of Distributees.

See ante, "Assignments of Distributive Shares," § 37.

Will as Evidence.—The transferee of all the property owned by R. at the time of his death, except that disposed of by his will, may, in an action on a note included in such estate, introduce the will, to show the note was not within the exception. *Reynolds v. Reynolds*, 10 Ala. App. 420, 65 So. 194, certiorari denied in *Ex parte Reynolds*, 187 Ala. 672, 65 So. 1034.

§ 39. Actions by Heirs or Distributees.

§ 41. — Relating to Real Property or Interests Therein.

§ 41 (1) Rights of Action, Nature of Remedy, and Conditions Precedent.

Where administrator had never exercised power and had resigned, heir may maintain action for trespass on lands descended to him, though administrator prior to trespass obtained an order to sell to pay debts. *Southern R. Co. v. Hayes (Ala.)*, 73 So. 945.

Contract between Heirs—Construction.—*Caldwell v. Caldwell*, 183 Ala. 590, 62 So. 951. See the title DESCENT AND DISTRIBUTION, § 41 (1), vol. 5, p. 43.

Laches.—*Caldwell v. Caldwell*, 183 Ala. 590, 62 So. 951. See the title DESCENT AND DISTRIBUTION, § 41 (1), vol. 5, p. 48.

§ 41 (2) Parties.

Action Through Personal Representative.—Where all the debts against an estate have been paid, each heir may assert his right to the beneficial interest in liens upon the land created by an agreement between the heirs charging the share of each with a lien for his indebtedness to the estate, without recourse to an action through a personal representative. *Caldwell v. Caldwell*, 183 Ala. 590, 62 So. 951.

(C) DEBTS OF INTESTATE AND INCUMBRANCES ON PROPERTY.

§ 64. Liabilities on Descent of Real Property.

§ 65. — Specialties and Debts of Record.

Debts of Ancestor—Liability of Heir.—*McCurdy v. Kenon*, 178 Ala. 345, 59 So. 489. See the title DESCENT AND DISTRIBUTION, § 65, vol. 5, p. 56.

§ 66. — Liens and Incumbrances Created by Intestate.

Lien—Rights of Heirs.—The debt of a purchaser of land, who has given notes to secure the purchase money, is a lien on the land, which it follows upon its descent to heirs. *Turner v. Turner*, 193 Ala. 424, 69 So. 503.

Description.

As to description in particular instruments, pleading, etc., see the particular titles.

Destruction of Property.

See ante, ANIMALS; post, LANDLORD AND TENANT.

Detainer.

See post, FORCIBLE ENTRY AND DETAINER.

DETINUE.

- § 1. Nature and Scope of Remedy.
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- § 9. Taking and Detention by Defendant.
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- § 42. — Right of Action.
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Cross References.

See the title DETINUE, vol. 5, p. 60, and references there given.

As to plea in detinue setting up invalidity of chattel mortgage under which plaintiff claimed, see ante, CHATTEL MORTGAGES. As to whether mortgage covered property subject of action in detinue and defendant had notice, see ante, CHATTEL MORTGAGES. As to admissibility of mortgage in evidence in detinue, where identity of property mortgaged is in issue, see ante, CHATTEL MORTGAGES. As to propriety of charge, in detinue, assuming identity of property covered by mortgage, same being in controversy, see ante, CHATTEL MORTGAGES. As to

explanation by parol evidence of a receipt in detinue taken for goods purchased, see post, EVIDENCE. As to abstract instructions in detinue for mule traded to plaintiff by defendant and retaken after rescission for fraud and breach of warranty, see post, TRIAL. As to *res gestæ* in detinue in taking a mule traded by defendant to plaintiff, see post, EVIDENCE.

§ 1. Nature and Scope of Remedy.

Wrongful Detention — One or More Defendants.—Detinue is an action *ex delicto*, not *ex contractu*, the gist of the action being wrongful detention, and will lie against one or more in possession, at the time suit is commenced. *Gossett v. Morrow*, 187 Ala. 587, 65 So. 826.

Specific Property — Note. — Detinue may be maintained for specific property, such as a note. *Hicks v. Meadows*, 193 Ala. 246, 69 So. 432.

§ 3. Title and Possession of Plaintiff.

Right of Action — Prior Possession.—A plaintiff's prior possession of personal property, though he be not the owner, entitles him to recover it in detinue, where defendant's subsequent possession is unconnected with the true ownership. *Cammack v. Lavender*, 9 Ala. App. 443, 63 So. 686.

Self-Serving Declaration.—In detinue for cotton, of which defendant claimed he and plaintiff were cotenants on the ground that they had been partners in cultivation, evidence by defendant that he had charged himself with the fertilizer used on the land is inadmissible, being a mere self-serving act, when not shown to have been with the consent of plaintiff. *Williams v. Lay*, 184 Ala. 54, 63 So. 466.

Sufficiency of Plaintiff's Title to Support Action.—An agreement by defendants in consideration of plaintiffs' acceptance of a draft for \$500 in favor of defendants to allow plaintiffs to hire a barge, which the agreement recited was valued at \$1,200, for one-half the usual charges of barge hire, when idle, and to forfeit the barge to plaintiffs if defendants did not retire the draft, was not a legal chattel mortgage, as it did not purport to transfer the legal title, nor a pledge, defendants retaining possession of the property, nor was it for sale, as there was no delivery, and the ownership remained in defendants, and moreover a sale was not intended, but was only an executory contract, and for a breach

thereof plaintiffs' remedy was an action for the breach, and he could not maintain detinue, since a mere equitable title or a right resting on an unexecuted executory contract does not entitle one to maintain such an action. *Minge & Co. v. Barrett Bros. Shipping Co.*, 10 Ala. App. 592, 65 So. 671.

Equitable Claim to Unidentified Part of Property.—Plaintiff in detinue, whose evidence shows only an equitable claim to an unidentified part of the cotton claimed, can not recover since to maintain that action he must show a general or special property in the cotton claimed or some identified part thereof and the right to immediate possession and if he has never been in possession, must show a legal title. *Butler-Kyser Mfg. Co. v. Central, etc., R. Co.*, 190 Ala. 646, 67 So. 393.

Equitable Title—Claim by Third Party.—Code 1907, § 6039, allowing one claiming a legal or equitable title to property upon which an execution or attachment has been levied to assert his claim, does not change the rule that an equitable title will not support detinue even when the claim is interposed by a third person. *Butler-Kyser Mfg. Co. v. Central, etc., R. Co.*, 190 Ala. 646, 67 So. 393.

General or Special Property in—Immediate Possession.—To maintain detinue or the corresponding action for the recovery of chattels in specie, the plaintiff must, at the commencement of the action, have a general or special property in the goods sought to be recovered, and must be entitled to the immediate possession. *Minge v. Clark*, 193 Ala. 447, 69 So. 421.

Protection to Bona Fide Purchaser.—Under Code 1907, § 3788 et seq., plaintiff in detinue, asserting an outstanding claim to, or lien on, the property, is not entitled to the immediate possession of the chattel as against a bona fide purchaser, who has paid part of the purchase price before notice of such outstanding claim or lien, since the detinue statutes do not provide for an ascertainment and allowance of the

purchaser's pro tanto protection, and if the powers of equity are to be invoked to apportion such protection the plaintiff must become the actor. *Donahoo Horse, etc., Co. v. Durick*, 193 Ala. 456, 69 So. 545.

Equitable Title.—A mere equitable title is not sufficient to sustain or defeat an action of detinue. *Hicks v. Meadows*, 193 Ala. 246, 69 So. 432.

Wrongful Detention. — Under Code 1907, § 3788 et seq., a plaintiff in detinue must be entitled to the immediate possession of the chattel at the time he commenced his suit; the gist of the action being its wrongful detention. *Donahoo Horse, etc., Co. v. Durick*, 193 Ala. 456, 69 So. 545.

Executory Sale—Breach of Contract.—Where in detinue brought by the buyer to recover a machine bought it appeared that, though the machine had been shipped consigned to the seller, the sale was executory, and title had never passed to the buyer, plaintiff was not entitled to recover, regardless of whether there had been any breach of contract by the seller, the only questions involved in detinue being the questions of title and right to immediate possession. *Howell v. Home Nat. Bank*, 195 Ala. 73, 70 So. 686.

"Boot" Money as Lien—Right Under as Mortgagee.—A. and B. traded cows under an agreement that A. was to pay \$5 "boot" money, which was to be lien on cow until paid, held, that the purchase by plaintiff of B.'s interest in the cow did not give plaintiff any right or title to cow as B.'s successor as a mortgagee which would sustain an action for detinue. *Dickey v. Vaughn (Ala.)*, 73 So. 507.

Joint Plaintiffs—Lawful Possession as to One.—Where a pledgee in possession of property is entitled to its possession as against one of two joint owners, the joint owners can not recover it from him in detinue. *Rogers v. Whittle (Ala. App.)*, 74 So. 96.

General or Special Property—Immediate Possession. — In detinue, plaintiff must show that he has property, general or special, in chattels sought to be recovered, and must be entitled to their immediate possession. *Louisville, etc., R.*

Co. v. Parish (Ala. App.), 75 So. 638; *Rogers v. Whittle (Ala. App.)*, 74 So. 96.

§ 9. Taking and Detention by Defendant.

Character of Action.—The mortgage of property alleged to have been wrongfully obtained is not the foundation of a suit in detinue, although the right to possession may rest wholly on the mortgage, but the gist of the action is the detention. *Knight v. Garden*, 196 Ala. 516, 71 So. 715.

Gist of action of detinue is wrongful detention of property of plaintiff by defendant. *Rogers v. Whittle (Ala. App.)*, 74 So. 96.

§ 12. Demand.

Necessity to Render Retention of Property by Defendant Unlawful.—*Black v. Slocumb Mule Co.*, 8 Ala. App. 440, 62 So. 308. See the title DETINUE, § 12, vol. 5, p. 69.

Necessity to Authorize Damages for Detention.—*Black v. Slocumb Mule Co.*, 8 Ala. App. 440, 62 So. 308. See the title DETINUE, § 12, vol. 5, p. 69.

Failure to Demand.—In detinue and trover by a chattel mortgagor against a purchaser from the chattel mortgagee who set up no claim to the property, except under the foreclosure of such mortgage, such purchaser had the burden of proving the mortgagor's consent that the mortgage should stand as security for claims or debts not mentioned therein and for the payment of which the mortgage was foreclosed, and hence an instruction that the burden was on defendant to prove the correctness of items not authorized by the mortgage was proper. *Hodges v. Kyle*, 9 Ala. App. 449, 63 So. 761.

Necessity — Tortious Taking.—Where defendants' granddaughter, who was living with them, took possession of plaintiff's cow, claiming it to be one which she had lost, and defendants kept the cow as their granddaughter's property, no demand is necessary to enable plaintiff to maintain detinue, since such demand is necessary only when the original taking is lawful, and the taking was none the less tortious because made under a bona fide claim of ownership. *Chappell v. Falkner*, 11 Ala. App. 382, 66 So. 890.

Where Sufficient—Bailor and Bailee.—

If the relation of bailor and bailee does not exist between the parties in respect of the property in question, the service of the writ in detinue is a sufficient demand. *Bank v. Freeman* (Ala.), 75 So. 325.

When Essential.—A demand for property before suit brought is not essential to authorize a plaintiff to maintain detinue unless necessary to change a rightful possession into an unlawful detention. *Bank v. Freeman* (Ala. App.), 75 So. 325.

Damages — Special Demand.—In detinue, if the plaintiff would recover damages for detention prior to institution of his action, he must have made a special demand for the possession of the property. *Bank v. Freeman* (Ala.), 75 So. 325.

§ 13. Defenses.

Estoppel — Agent of Transferee. — Where, in detinue for certain staves, it was undisputed that defendant manufactured and removed the staves from land, the timber on which had been conveyed to plaintiff, and on service of the writ defendant gave a forthcoming bond and instituted no claim suit in favor of his alleged transferee prior to suit brought, he was estopped to deny that he was in possession of the staves at the commencement of the suit and to claim that his possession was merely that of custodian or agent for his transferee. *Gustin v. Wilson*, 188 Ala. 580, 66 So. 461.

Replevin Bond — Estoppel — Superior Title.—A defendant who executed replevin bond in action of detinue is estopped to deny that he was in possession of property at institution of suit; such estoppel being limited to defendant's possession of the property, and not precluding a showing he had a title superior to plaintiff's. *Howze v. Powers* (Ala. App.), 77 So. 985.

§ 14. Persons Entitled to Sue.

Where A. furnishes land and stock with which to cultivate it, and B. furnishes labor for a crop for equal division thereof, the parties are either tenants in common or the relation of landlord and tenant exists, and A. may not maintain detinue against B. for part of the crop. *Tate v. Cody-Henderson Co.*, 11 Ala. App. 350, 66 So. 837.

§ 21. Claims by Third Persons.

Necessity of Compliance With § 6041 of Code.—*McMillan v. Nettles*, 7 Ala. App. 416, 60 So. 957. See the title DETINUE, § 21, vol. 5, p. 76.

Affidavit and Bond — Jurisdiction.—The interposition of a claim to personal property seized under a writ of detinue against another by the filing of the claimant's affidavit and bond as required by Code 1907, § 3792, is jurisdictional, and, where the claimant files no affidavit and gives no bond, the court is without jurisdiction to render any judgment whatever, and the proceeding is coram non judge and void. *Porter & Co. v. Godfrey*, 14 Ala. App. 566, 70 So. 204.

Affidavit by Defendant Not Claiming Title.—Under Code 1907, § 6051, providing that defendant in an action for recovery of chattels in specie, not claiming title, may make affidavit that a person not a party to the suit, claims the chattels, and pray an order that he come in and defend, and that if such person makes himself a party defendant, the original defendant may be discharged, the proceeding between plaintiff and the substituted defendant is not an independent proceeding, but depends on a suit against an original defendant and, where the original defendant does not make the statutory disclaimer and affidavit, does not permit the case to proceed to judgment separately against the defendant and the claimant; but, in such case § 3792, relating to an interposition of a claim by filing of an affidavit and giving of bond, is the remedy. *Porter & Co. v. Godfrey*, 14 Ala. App. 566, 70 So. 204.

Trial between Plaintiff and Claimant—Statutory Provision.—Where a claim is interposed in detinue under Code 1907, § 3792, the claim case stands for trial between plaintiff and claimant as though they were original parties, plaintiff and defendant respectively, to a statutory action in detinue. *Hesk v. Ellis* (Ala.), 75 So. 329.

Legal Title and Right to Possession.—When a claimant intervenes in a detinue suit under Code 1907, § 3792, the issue is upon the legal title and right to possession of the chattel sued for. *Houston Nat.*

Bank v. Edmonson & Co. (Ala.), 75 So. 568.

Statements by Claimant.—On the trial of a claim interposed in detinue, setting up ownership of a hog, evidence as to statements made to a witness by one claimant about a hog was properly admitted over objection that the witness did not know that the claimant was speaking of the hog in controversy, where there was other evidence from which the jury could have inferred that claimant was speaking of such hog. *Hesk v. Ellis (Ala.)*, 75 So. 329.

§ 23. Pleadings.

Damages for Detinue—Necessity of Demand.—The necessity of a demand to authorize a recovery of damages for detention prior to the bringing of detinue can not be raised by a request for the general affirmative charge, especially where the claim for such damages was expressly waived by the plaintiff. *Chappell v. Falkner*, 11 Ala. App. 328, 66 So. 890.

General Issue—Possession by Defendant.—Under Laws 1911, p. 33, providing that the general issue in detinue is an admission of possession of property by the defendant at the commencement of the suit, plaintiff in detinue need not prove possession by defendant, who pleaded the general issue. *Chappell v. Falkner*, 11 Ala. App. 382, 66 So. 890.

Plaintiff's Ownership — Possession as Agent of Another.—Where, in detinue for certain staves, defendant pleaded the general issue only, and plaintiff proved a conveyance of the timber on the land from which the staves had been cut, evidence that he had not paid for the timber, had not paid the taxes, and that defendant had sold the staves prior to the bringing of the action, and was only in possession as agent of his transferee, was not within the issues and inadmissible. *Gustin v. Wilson*, 188 Ala. 580, 66 So. 461.

Proof of Defendant's Possession — the General Issue.—Under Gen. Acts 1911, p. 33, a plea of the general issue in detinue relieves plaintiff from proving defendant's possession at the institution of the suit. *Padgett v. Gulfport Fertilizer Co.*, 11 Ala. App. 366, 66 So. 866.

Evidence Negating the Right of Both Plaintiff and Defendant.—In detinue for

a mule, the general issue being nondetinet, an averment that the allegations of the complaint are untrue is a plea of the general issue, which puts in issue plaintiff's right to recover, and renders evidence negating the right of either plaintiff or defendant admissible; so that, when the mule was claimed under a mortgage, the mortgagor should have been permitted to testify whether he signed the mortgage. *Knight v. Garden*, 196 Ala. 516, 71 So. 715.

Rights of Parties — What Defendant May Prove.—Where the plaintiff in detinue introduces a mortgage, under which he claimed, the defendant may under a plea of general issue, defeat such prima facie right of possession, by showing an outstanding title in a third person, or proving payment or showing that the mortgage has been rendered nugatory, or that the property was a gift, or that the plaintiff is estopped to deny defendant's right of possession. *Knight v. Garden*, 196 Ala. 516, 71 So. 715.

General Issue — Effect.—Plea of general issue in detinue was admission by defendant that he had possession of property sued for, relieving plaintiff from proving same. *Wells v. Parker (Ala.)*, 75 So. 914.

§ 23. Evidence.

§ 23 (1) Presumptions and Burden of Proof.

When Plaintiff Need Not Prove Value.—In detinue, where defendant declined to replevy the property, plaintiff need not prove its value. *Padgett v. Gulfport Fertilizer Co.*, 11 Ala. App. 366, 66 So. 866.

Burden of Proving Title and Possession in Detinue.—In an action of detinue the burden is on plaintiff to show legal title to the property involved and a right of immediate possession. *Howell v. Home Nat. Bank*, 195 Ala. 73, 70 So. 686.

In an action of detinue to recover a bale of cotton, the burden is upon plaintiff to establish his title to the specific cotton. *Bowen v. Evans (Ala.)*, 76 So. 928.

Same — General or Special Property—Identified Part.—The burden is on plaintiff in detinue to prove that he has a general or special property in all or some identified part of chattels sued for with the right to immediate possession, and if he has never had actual possession, he must

show legal title. *Gwin v. Emerald Co.* (Ala.), 78 So. 758.

§ 23 (2) Admissibility of Evidence.

§ 23 (2a) In General.

Plaintiff Showing Demand and Refusal.—In detinue for cotton, of which defendant was the legal custodian, plaintiff may show a demand and refusal before suit was brought for defendant was not a tort-feasor until put in default. *Williams v. Lay*, 184 Ala. 54, 63 So. 466.

Existence of Debt—Receipts.—In detinue, where plaintiff claimed title to the chattels under certain mortgages, receipts showing that the mortgages had been paid were admissible. *King Mercantile Co. v. Adams*, 193 Ala. 466, 69 So. 524.

Purchase Conditioned on Existence of Mortgage — Disproving Mortgage.—In detinue to recover a mower by plaintiff claiming as having purchased from a widow, who testified that her agreement to sell was conditioned on fact plaintiff had a mortgage on the property, it was proper for defendant to prove plaintiff had no mortgage. *Windham v. Hydrick*, 197 Ala. 125, 72 So. 403.

Debt Paid by Other Property.—In detinue by party claiming as having taken from widow in satisfaction of her husband's indebtedness to him, secured by mortgage, evidence that all the indebtedness due plaintiff from husband was paid by other property taken by plaintiff and applied thereto and that no consideration passed from him for the mower, held admissible. *Windham v. Hydrick*, 197 Ala. 125, 72 So. 403.

Value of Other Property Paid on Debt.—In detinue to recover a mower which plaintiff claimed by purchase from a widow, where plaintiff had voluntarily testified to the purchase of mules, wagons, etc., with the mower, and introduced a receipt as to all or part thereof, and a showing as to the value of each and as to the amount of the mortgage debt and other debts which the widow's deceased husband owed him, and that the property was taken in payment of such debt, defendant's proof, by plaintiff and other witnesses of the value of the mules, wagons, etc., was admissible. *Windham v. Hydrick*, 197 Ala. 125, 72 So. 403.

Effort to Collect Checks of Defendant.

—In detinue by plaintiff to recover bales of cotton bought by defendant from plaintiff's mortgagor, evidence that both plaintiff and mortgagor made efforts to collect checks given by defendant for such cotton was admissible as tending to show that the attempted sale of the cotton had not been perfected. *Wells v. Parker* (Ala.), 75 So. 914.

Mortgage — Ownership of Property.

Where in detinue under a mortgage to recover cotton the question whether the relation between the mortgagor and his son was that of tenants in common in the cotton so that the mortgage covered only the father's interest was in issue, evidence that the son was under age and lived in the same house with his father as a member of the father's family, and of other circumstances tending to support plaintiff's theory, was properly admitted. *Consolidated Mercantile Co. v. Warren* (Ala. App.), 74 So. 738.

Competent in Rebuttal. — In detinue under a mortgage to recover cotton, plaintiff's testimony that the mortgagor's son never claimed the crop until "the cotton began to move" was competent to rebut defendant's testimony that the father had no interest in the crops raised by his son. *Consolidated Mercantile Co. v. Warren* (Ala. App.), 74 So. 738, certiorari denied in 73 So. 1003.

§ 23 (2b) Title and Right to Possession.

Purchase as Agent of Plaintiff—Privilege to Pay Back.

—In detinue, tried by the court, against two defendants, testimony of the manager of the plaintiff corporation that the property in suit was purchased from a third person by one defendant as agent for plaintiff and was to remain plaintiff's property, with the privilege in such defendant of paying plaintiff the purchase money furnished by it and acquiring the property, which was done, was admissible on the question of title to the property as between plaintiff and such defendant and to shed light upon such defendant's act in making a bill of sale to it to plaintiff without other consideration, even though it could not affect the claim of the other defendant to title as a purchaser for value without notice. Page

v. Haas Bros. Packing Co., 9 Ala. App. 445, 63 So. 691.

Title to Land Evidencing Title to Chattels.—In detinue for a mule and wagon, and a cane mill outfit alleged to be affixed to the land of defendant, evidence that title to the land was in defendant was admissible, as tending to show title to the chattels sought to be recovered. *King Mercantile Co. v. Adams*, 193 Ala. 466, 69 So. 524.

Evidence Tending to Show Plaintiff's Title.—In detinue, plaintiff claiming title to cow by purchase from H., and defendant claiming title by purchase from Mrs. H., the wife of H., where defendant offered evidence tending to show that Mrs. H. bought the first cow from J. B., and that this cow was chief consideration for sale by said J. B. of cow in suit to Mrs. H., it was error to exclude evidence in behalf of plaintiff that first cow was in fact sold by J. B. to H., since such evidence would tend to sustain plaintiff's title derived from H. *Dickey v. Vaughn* (Ala.), 73 So. 507.

Title to Lumber—Mortgage on Standing Timber.—In detinue for a carload of lumber, court erred in not permitting plaintiff to introduce its mortgage on all timber on certain land, in connection with proffered proof that lumber came off such land; the mortgage conveying a legal title to plaintiff, and maturing before suit was brought. *Owings Lumber Co. v. Reform Feed, etc., Co.* (Ala.), 76 So. 973.

Mortgage — Subsequent Purchasers.—In detinue for lumber, where plaintiff claimed lumber was sold to it as partial payment of former owner's mortgage indebtedness, mortgage on timber or land from which lumber was cut was competent evidence, though not such as to convey legal title as against subsequent purchasers. *Owings Lumber Co. v. Reform Feed, etc., Co.* (Ala.), 76 So. 973.

§ 24. Damages.

Code 1907, § 6041, relating to the value of property assessed and damages for delay in trials of the right of property and claim suits, and providing that if the jury finds the property levied on to be applicable to the satisfaction of the writ they must assess the value at the time of the interposition of the claim, is not applicable to claim suits in detinue wherein, with re-

spect to the damages recoverable, the principles of detinue actions prevail. *Houston Nat. Bank v. Edmonson & Co.* (Ala.), 75 So. 568.

§ 25. Trial.

§ 27. — Questions for Jury.

Previous Sale of Lumber.—In detinue for carload of lumber, whether or not original owner had sold the lumber to plaintiff before its sale to defendants held for jury under the evidence. *Owings Lumber Co. v. Reform Feed, etc., Co.* (Ala.), 76 So. 973.

Failure to Prove Property's Value—General Charge.—Under Code 1907, § 3781, providing that upon the trial of an action in detinue the jury must, after they find for plaintiff, assess the value of each article separately, if practicable, and also assess damages for its detention, and if they find for defendant, they must in like manner assess the value, and if in possession of the plaintiff assess damages for its detention, where plaintiff has failed to prove the value of the property sued for judgment can not be entered for him, and it is not error to give a general charge for defendant. *Gwin v. Emerald Co.* (Ala.), 78 So. 758.

Direction of Verdict.—In detinue for a mule claimed by defendant as assignee under a mortgage, where there was no evidence that such mortgage had been paid off and discharged, and it appeared that the transfer to defendant was legal, verdict for defendant was properly directed. *Hooten & Co. v. Adair* (Ala.), 78 So. 872.

§ 28. — Instructions.

Misleading Instructions.—In detinue for a mule traded by defendant to plaintiff and retaken by defendant after rescinding the contract for fraud or breach of warranty, a charge that, if the animal was the property of plaintiff when defendant took it, the verdict should be for plaintiff, was misleading. *McCoy v. Prince*, 11 Ala. App. 388, 65 So. 950.

Harmless Error.—In detinue for chattels, brought by virtue of a mortgage executed by defendant's husband, an instruction that, in order that defendant's husband might convey title to the property sued for, he must have owned it, was not

erroneous. *King Mercantile Co. v. Adams*, 193 Ala. 466, 66 So. 524.

Proper Charge.—In detinue for chattels, brought by virtue of a mortgage, an instruction that the burden was on plaintiff to show that, at the commencement of suit, plaintiff had such title as would justify immediate possession, was not erroneous. *King Mercantile Co. v. Adams*, 193 Ala. 466, 69 So. 524.

§ 29. — Verdict and Findings.

Conformity to Statute.—A verdict in detinue, where the claim for damages for detention was waived, finding "for the plaintiff for the property sued for, or its alternative value of \$35," is in substantial compliance with the requirements of Code 1907, § 3781, that if the jury find for the plaintiff, they must assess the value, and also the damages for the detention of the property, and that the judgment must be for the property sued for or its alternative value. *Chappell v. Falkner*, 11 Ala. App. 382, 66 So. 890.

Assessing Value — Statutory Provisions.—A verdict in detinue, where several articles are claimed, should, under the direct provisions of Code 1907, § 3781, assess the value of each article separately. *Nixon v. Smith*, 193 Ala. 443, 69 So. 117.

Unsupported Verdict.—Where plaintiff was the only one who testified as to the value of the property in controversy, a verdict in defendants' favor, which fixed the value at a greater sum, is without support in the evidence. *Nixon v. Smith*, 193 Ala. 443, 69 So. 117.

Claims by Third Persons—Alternative Judgment.—Code 1907, § 6051, provides that the defendant in detinue may make an affidavit that a person not a party claims the chattels, and that, if such person does not voluntarily come in, the court must order a summons issued to him. Section 3792 provides that in a suit to recover personal property in specie, where defendant neglects to give the statutory bond, if the property is claimed by a person not a party, and bond is executed, the property must be delivered to the claimant, and that the same proceedings must be had as in other trials of the right of property. Section 3781 provides in detinue that the

jury, if they find for plaintiff, must assess the value of each article separately, and also damages for its detention, and that judgment against either party must be for the property or its alternative value, with damages. Section 3783 provides that, if claimant who has given bond and taken the property fails for 30 days to deliver and pay the damages assessed, the sheriff must make return, and thereupon the bond has the force and effect of a judgment upon which execution may issue. Held, that where a claim is asserted under § 3792, a new proceeding is put on foot which stands for trial between plaintiff and the claimant as though they were parties to a statutory action of detinue, and the jury must assess the value of each article separately and damages for its detention, and the judgment must be in the alternative. *Slaughter v. Webster*, 194 Ala. 642, 70 So. 128.

Same—Correcting Judgment.—In detinue to recover a mule, where the jury found for plaintiff for the property sued for, and assessed his damages at \$100, whereupon the court entered judgment for plaintiff against the claimant and his sureties for \$100, and costs, neither that court nor the supreme court could correct the judgment in the absence of a verdict assessing the alternate value of the mule. *Slaughter v. Webster*, 194 Ala. 642, 70 So. 128.

Valuing Items Separately.—Where there was no definite evidence that cotton in two bales were of different classification, verdict was not faulty because bales were not valued separately as required by statute when practicable. *Wells v. Parker (Ala.)*, 75 So. 914.

Fraudulent Transfer.—In detinue, the question whether transfer from mortgagee to defendant was in good faith, to transfer title, or temporary and solely for use in defending action and to be transferred back later, was properly submitted to the jury. *McCart v. Smith (Ala. App.)*, 77 So. 967.

§ 30. Judgment.

Alternate Value—Sufficiency of Judgment.—In detinue a judgment entry which failed to show a judgment for the

alternative value as well as for the property sued for is insufficient. *Carroll v. Blackburn*, 12 Ala. App. 648, 68 So. 515.

Liability of Sureties.—Where, in detinue, third party claims property judgment against him and his sureties for damages and costs held error; the sureties becoming liable only upon failure to deliver the property. *Slaughter v. Webster*, 194 Ala. 642, 70 So. 128.

§ 34. Execution and Enforcement of Judgment.

Detinue being an action *ex delicto*, a dismissal as to one of several defendants will not discontinue the entire action. *Gossett v. Morrow*, 187 Ala. 387, 65 So. 826.

§ 36. Liability on Bonds and Recognizances.

§ 40. — Claimant's Bond.

Where plaintiff brought detinue for all of the lumber at a certain yard, and defendants filed a claim therefor and gave a bond conditioned to have the property forthcoming if found liable therefor, and after judgment for plaintiff, claimant delivered to the sheriff all the lumber "then" at the yard, but there was evidence that not all of the lumber was there when the suit was begun and the bond given was delivered, the delivery was insufficient to relieve claimant from liability on the bond. *Henderson v. Holman*, 185 Ala. 538, 64 So. 11.

§ 41. Actions on Bonds and Recognizances.

§ 42. — Right of Action.

What Law Governs.—Under Rev. St. § 915 (U. S. Comp. St. 1901, p. 684), declaring that in common-law causes in the federal courts the plaintiff shall be entitled to similar remedies against the property of the defendants as are provided by the laws of the state wherein the court is held, upon furnishing the security required by the state laws, the federal court, in issuing a writ of detinue in accord with the state practice, does so by the authority of the federal statutes, the proviso that similar security as is required by state laws shall be given relating to the form and substance of the detinue bond, and not to the elements of damage which may be recognized by the state courts as part of their general jurisprudence; and therefore, in an action on a detinue bond given in the federal court, the defendant, though successful, can not recover attorney's fees, as such fees are not allowed in federal courts. *National Surety Co. v. Fletcher*, 186 Ala. 605, 65 So. 150.

§ 46. — Pleading.

Voluntary Nonsuit.—*Orr v. Watson*, 9 Ala. App. 119, 62 So. 381. See the title DETINUE, § 46 (1), vol. 5, p. 101.

Sufficiency of Complaint.—*Orr v. Watson*, 9 Ala. App. 119, 62 So. 381. See the title DETINUE, § 46 (1), vol. 5, p. 101.

Devise.

See post, WILLS.

Dilatory Pleas.

See post, PLEADING.

Diligence.

See ante, BILLS AND NOTES; CARRIERS; CONTINUANCES; post, ESTOPPEL; EVIDENCE; NEGLIGENCE; NEW TRIAL; PROCESS.

Direct Examination.

See post, WITNESSES.

Directing Verdict.

See ante, CRIMINAL LAW; post, TRIAL.

Directors.

See ante, CORPORATIONS.

Directory Statutes.

See post, STATUTES.

Disabilities.

As to disabilities of particular classes of persons, see the particular titles such as HUSBAND AND WIFE; INFANTS; INSANE PERSONS, etc.

Discontinuance.

See ante, ABATEMENT AND REVIVAL; APPEAL AND ERROR; CRIMINAL LAW; post, DISMISSAL AND NONSUIT.

Discovered Peril.

See post, NEGLIGENCE; RAILROADS; STREET RAILROADS.

DISCOVERY.

I. In Equity.

- § 2. Existence of Other Remedy.
- § 5. Grounds of Remedy in General.
- § 6. Matters as to Which Discovery May Be Obtained.
- § 7. — Facts Supporting Case of Complainant or of Defendant.
- § 11. Defenses and Objections.
- § 12. Jurisdiction.
- § 13. Parties.
- § 14. Bill or Cross-Bill for Discovery.

II. Under Statutory Provisions.

- (A) Interrogatories and Examination of Parties and of Other Persons.
 - § 24. Right to Examination in General.
 - § 24½. Grounds and Purposes of Examination.
 - § 25. Subject Matter of Examination.
 - § 25½. — Facts Supporting Cause of Action or Defense.
 - § 41. Answers to Interrogatories.
 - § 42. — Making and Filing in General.
 - § 43. — Requisites and Sufficiency.
 - § 44. — Defects and Objections.
 - § 45. Failure to Answer Interrogatories.
 - § 47. Use of Evidence Obtained.
- (B) Production and Inspection of Writings and of Other Matters.
 - § 47½. Nature and Scope of Remedy.
 - § 50. Writings and Matters Subject to Inspection.

Cross References.

See the title DISCOVERY, vol. 5, p. 107, and references there given.
In addition, see ante, CREDITORS' SUIT.

I. IN EQUITY.

§ 2. Existence of Other Remedy.

Where complainant, who filed bill for discovery and relief, could have secured all desired evidence of facts, as well as books, etc., through use, in actions at law against him, of statutory system for examination of one party by another through interrogatories, prescribed by Code 1907, § 4049 et seq., the bill did not have equity. *Metcalf v. Clemmons-Powers & Co.* (Ala.), 76 So. 9.

A creditor of an insolvent estate held to have no right of action in equity to compel discovery of withheld or concealed assets; an adequate remedy being afforded by the probate court. *Pollock & Co. v. Haigler*, 195 Ala. 522, 70 So. 258.

Statutory Bills of Discovery. — The

statutes authorizing parties to suits at law or in equity to file interrogatories to their adversaries, which practice is sometimes called statutory bills of discovery, do not deprive the chancery court of any of its original jurisdiction as to bills for discovery. *Carmichael v. Pond*, 190 Ala. 494, 67 So. 384.

§ 5. Grounds of Remedy in General.

In a suit to foreclose a lien for the purchase price of a stock of goods and fixtures reserved in a contract of sale which authorized the purchaser to sell the goods and provided for a special deposit of the proceeds of sales in a bank, and that the lien should attach to all proceeds of sales and accounts arising out of sales, where it was alleged that the purchaser had failed to make such

deposit, that contrary to the contract it had mingled the goods subject to the lien with other goods, and that its officers, agents, and employees were the only persons having full and complete knowledge and information as to the property, accounts, and moneys in its possession and control subject to the lien, a discovery was necessary, and was not prejudicial, but beneficial to sureties guaranteeing performance of the contract by the purchaser, who were made parties to the suit. *Avert Drug Co. v. Ely-Robertson-Barlow Drug Co.*, 194 Ala. 507, 69 So. 931.

Though a litigant is not compelled to request a wrongdoer to respond as to payment of damages before suing, therefore, he should not ask the court to discover evidence in aid of suit, and to ascertain whether he has any suit, and, if he has, the amount of damages, until he himself has made some effort to ascertain them. *Cullman Property Co. v. Hitt Lumber Co. (Ala.)*, 77 So. 574.

A bill for discovery in aid of an application for injunction against trespass, which does not show that the complainant is unable to prove the facts sought to be recovered otherwise than by defendant's answer, is insufficient. *Hitt Lumber Co. v. Cullman Property Co.*, 189 Ala. 13, 66 So. 720.

§ 6. Matters as to Which Discovery May Be Obtained.

§ 7. — Facts Supporting Case of Complainant or of Defendant.

Discovery sought by bill of administratrix for accounting by one in trust relation, being merely incidental to relief sought and of facts peculiarly in respondent's knowledge, is proper. *Adams v. Adams (Ala.)*, 73 So. 984.

Where the discovery sought by a bill is merely in aid of another and primary equity, any defendant may be called upon to disclose matters relevant to the issue and legally admissible as evidence. *Shelton v. Timmons*, 189 Ala. 289, 65 So. 9.

§ 11. Defenses and Objections.

As complainant seeking to enjoin trespasses upon lands and damages for prior trespassers could have ascertained par-

ticular lands trespassed upon and quantity, quality, and value of timber taken before bill was filed as well as the court could do so, a bill asking discovery of such matter, and not showing an attempt by complainant to obtain such information, was insufficient. *Cullman Property Co. v. Hitt Lumber Co. (Ala.)*, 77 So. 574.

§ 12. Jurisdiction.

See ante, "Existence of Other Remedy," § 2.

§ 13. Parties.

Joining Officers of Corporation. — *King v. Livingston Mfg. Co.*, 180 Ala. 118, 60 So. 143. See the title DISCOVERY, § 13, vol. 5, p. 112.

§ 14. Bill or Cross-Bill for Discovery.

Information Indispensable. — *King v. Livingston Mfg. Co.*, 180 Ala. 118, 60 So. 143. See the title DISCOVERY, § 14 (1a), vol. 5, p. 114.

Where the object sought by a bill in equity is discovery and relief, though only the inhibition of further prosecution of an action at law, complainant must aver and prove not only the materiality of the matter of which he would have discovery, but also that it is indispensable to the establishment of his cause or defense, and that he is unable otherwise to make his proof. *Metcalf v. Clemmons-Powers & Co. (Ala.)*, 76 So. 9.

Bill in Aid of Administration. — A bill, alleging that complainant was the administrator of an estate, that certain promissory notes made by some of the respondents to his intestate, certain moneys, and certain muniments of title to the estate, were in possession of some one of the respondents, that complainant did not know, and without the aid of a court of equity could not ascertain, which one of respondents possessed the documents, that they deliberately concealed from him the identity of the person in possession to prevent him from administering the estate in the court of chancery, that he could not bring detinue because he did not know the person in possession of the documents, contained equity as a bill for discovery in aid of the administration of

the estate. *Carmichael v. Pond*, 190 Ala. 494, 67 So. 384.

In Aid of Other Relief. — Wife's bill against divorced husband, his brother, and her mortgagee, held not one for discovery only; discovery feature being in aid of other relief. *Macke v. Macke* (Ala.), 76 So. 26.

In Aid of Another Equity. — The allegations necessary to support an independent bill for discovery are not required, where the discovery is sought in aid of another and primary equity. *Shelton v. Timmons*, 189 Ala. 289, 66 So. 9.

No Prior Attempts to Obtain Information. — A bill for an accounting and for a discovery was not sufficient as a bill for discovery as to the purchase price received by defendant for land in which complainant claimed to be interested, where no attempt to obtain this information from the parties to the deeds was shown to have been made; the mere fact that the deeds did not recite the actual consideration not authorizing the bill. *Gayle v. Pennington*, 185 Ala. 53, 64 So. 572.

Interrogatories under Statutory System Answered. — A bill seeking discovery, and relief consequent thereupon, or discovery only, disclosing on its face that complainant's adversary had answered interrogatories propounded in a pending action at law under the statutory system for the examination of one party by another prescribed by Code 1907, § 4049 et seq., in disclosure of the relevant material matters sought to be discovered through answer to the bill, is subject to demurrer. *Metcalf v. Clemmons-Powers & Co.* (Ala.), 76 So. 9.

II. UNDER STATUTORY PROVISIONS.

(A) INTERROGATORIES AND EXAMINATION OF PARTIES AND OF OTHER PERSONS.

§ 24. Right to Examination in General.

Under the direct provisions of Code 1907, § 4049, a defendant, instead of asking a bill of particulars, may secure a statement of particulars desired which are known to plaintiff, by filing interroga-

tories to be answered by plaintiff. *Stearnes v. Edmonds*, 189 Ala. 487, 66 So. 714.

§ 24½. Grounds and Purposes of Examination.

Discovery of Evidence. — Under Code 1907, § 4049, requiring affidavit that interrogatories put to a party are material to the cause, and § 4054 providing that if the interrogatories are not pertinent they need not be answered, an interrogatory, requiring defendant to give names and addresses of witnesses of accident on which suit is based, need not be answered, being only for the purpose of obtaining the witnesses, and evidence of defendant. *Montgomery Light, etc., Co. v. Harris*, 197 Ala. 358, 72 So. 619.

§ 25. Subject Matter of Examination.

§ 25½. — Facts Supporting Cause of Action or Defense.

Where plaintiff corporation merely describes itself in the complaint as a corporation, defendant, desiring knowledge as to the facts constituting plaintiff a corporation, or as to whether it is a domestic or foreign corporation, may propound interrogatories under the statute. *Head v. Robinson, etc., Co.*, 191 Ala. 352, 67 So. 976.

§ 41. Answers to Interrogatories.

§ 42. — Making and Filing in General.

Whether a party shall "further answer" a special interrogatory is discretionary with the court. *Sovereign Camp, W. O. W. v. Ward* (Ala.), 78 So. 824.

§ 43. — Requisites and Sufficiency.

Interrogatories and Examination of Parties and Others. — *Southern R. Co. v. Hayes*, 183 Ala. 465, 62 So. 874. See the title DISCOVERY, § 43, vol. 5, p. 120.

§ 44. — Defects and Objections.

Defendant responding to interrogatories propounded to him by the plaintiff, under Code 1907, § 4049, providing that either party in a civil suit may propound interrogatories to the other party, was privileged in his answers to incorporate any matter in avoidance of the plaintiff's demand or in his own defense pertinent to the issues, and the striking by the

court of certain parts of the answers on the ground that they were not responsive to the interrogatories was erroneous. *Allen v. Camp*, 14 Ala. App. 341, 70 So. 290.

§ 45. Failure to Answer Interrogatories.

Under Code 1907, § 4055, providing that, when the answers to interrogatories are not full or are evasive, the court may either attach the party and cause him to answer fully in open court, or tax him with so much of the costs as may be just and continue until full answers are made, or direct a nonsuit or judgment by default, it was within the discretion of the court to select any one of the three penalties, and not error to refuse a motion insisting that a nonsuit be granted. *Russell v. Bush*, 196 Ala. 309, 71 So. 397.

On suit to subject nonexempt life insurance policies to deceased husband's debts, where the wife and administrator were made defendants and refused fully to answer interrogatories filed under Code 1907, § 4049 et seq., a decree pro confesso was authorized by § 4055, as to decree on failure to answer. *Kimball v. Cunningham Hdw. Co.*, 197 Ala. 631, 73 So. 323.

On plaintiff's failure to answer within 30 days special interrogatories propounded by defendant, that order of dismissal under Code 1907, §§ 4049-4057, was made on same day as order requiring payment of costs was not error, where plaintiff refused to comply with the first order. *Street v. Griffin (Ala.)*, 78 So. 965.

§ 47. Use of Evidence Obtained.

Effect.—*Southern R. Co. v. Hayes*, 183 Ala. 465, 62 So. 874. See the title DISCOVERY, § 47, vol. 5, p. 125.

Contradiction.—Answers of a party to interrogatories propounded to him as authorized by Code 1907, § 4049, may under § 4056 be contradicted by the party who

introduces the answers in evidence. *McDougal v. Alston*, 190 Ala. 78, 66 So. 683.

Answers as Evidence in Suit by Respondent.—*Calvert v. Calvert*, 180 Ala. 105, 60 So. 261. See the title DISCOVERY, § 47, vol. 5, p. 125.

(B) PRODUCTION AND INSPECTION OF WRITINGS AND OF OTHER MATTERS.

§ 47½. Nature and Scope of Remedy.

At common law the court was without authority, except in rare instances, to compel either party to a suit to produce documents or writings, belonging to and in his possession, for the benefit of the adverse party, whose only recourse was a bill in equity for discovery. *Steverson v. Agee & Co.*, 14 Ala. App. 448, 70 So. 298.

§ 50. Writings and Matters Subject to Inspection.

Under Code 1907, § 4058, providing that, in the trial of an action at law, the court may, on motion and due notice, require the parties to produce books, etc., in their custody, containing evidence pertinent to the issue, in cases wherein they might be compelled to produce by the ordinary rules of procedure in chancery, where defendant moved to require the plaintiff to produce a ledger, at the trial, without offering evidence tending to show that if the ledger was produced it would contain evidence material to the issue, denial of the motion was proper, since courts are not required to afford a party a fishing examination to determine, by an inspection of the adverse party's papers, whether they contain beneficial evidence, and as a prerequisite to granting such motion it must satisfactorily appear that the books, etc., contain pertinent evidence. *Steverson v. Agee & Co.*, 14 Ala. App. 448, 70 So. 298.

Discredit.

See post, WITNESSES.

Discrimination.

See ante, CARRIERS; COMMERCE; CONSTITUTIONAL LAW.

DISMISSAL AND NONSUIT.

I. Voluntary.

- § 13. Dismissal as to One or More Codefendants.
- § 15. — In Actions on Contract.
- § 17½. Discontinuance by Omission or Irregularity in Proceedings.
- § 19½. Application for Leave and Proceedings Thereon.
- § 24. Setting Aside and Reinstatement of Cause.

II. Involuntary.

- § 30. Want of Jurisdiction.
- § 34. Discontinuance by Omission or Irregularity in Proceedings.
- § 37. Disobedience to Order of Court or Other Misconduct.
- § 38. Parties Entitled to Dismiss.
- § 40. Motion for Dismissal or Nonsuit.
- § 41. — Time for Making.
- § 48. Setting Aside and Reinstatement of Cause.

Cross References.

See the title DISMISSAL AND NONSUIT, vol. 5, p. 129, and references there given.

In addition, see ante, APPEAL AND ERROR; CRIMINAL LAW; post, EQUITY.

I. VOLUNTARY.

§ 13. Dismissal as to One or More Codefendants.

§ 15. — In Actions on Contract.

Joint and Several Note.—In an action on a joint and several note, the dismissal as to one of the parties who was duly served works a discontinuance as to the others. *King v. Gibbs*, 12 Ala. App. 504, 67 So. 757.

§ 17½. Discontinuance by Omission or Irregularity in Proceedings.

A discontinuance can only be predicated of some positive act in the proceeding or in consequence of the actor's failure or omission to perform some precedent duty enjoined upon him by law. *Ex parte Doak*, 188 Ala. 406, 66 So. 64.

In an action against several as makers of a note, there was no discontinuance by the taking of default judgment against those defendants who did not appear and proceed to trial against the others. *Long v. Gwin*, 188 Ala. 196, 66 So. 88.

§ 19½. Application for Leave and Proceedings Thereon.

Entry of Order of Dismissal—Withdrawal of Application.—Under Code 1907,

§ 3123, providing that after answer or cross-bill is filed the complainant may, on application to the register in vacation, dismiss the suit, and the register must enter an order of dismissal on the minutes, an application for dismissal of a suit is ineffective until acted upon by the register in entering an order of dismissal upon the minutes, and an applicant may withdraw the application at any time before the order is entered. *Ex parte Johnson*, 194 Ala. 565, 69 So. 603.

§ 24. Setting Aside and Reinstatement of Cause.

Authority of Court — Discontinuance Through Inadvertence.—Where order of discontinuance was through inadvertence entered against defendant, the court, the order not having been made of record, might properly set it aside and allow plaintiff to proceed against defendant. *Porter v. Watkins*, 196 Ala. 333, 71 So. 687.

Effect of Setting Aside.—A "discontinuance" is an abandonment or the chasm or interruption in proceedings occasioned by the failure of plaintiff to continue suit regularly from time to time as he ought; therefore no discontinuance was worked

where the court through inadvertence of counsel ordered an action discontinued as to a defendant but before the order was entered set it aside, counsel having discovered his mistake. *Porter v. Watkins*, 196 Ala. 353, 71 So. 687.

II. INVOLUNTARY.

§ 30. Want of Jurisdiction.

Want of Jurisdiction Appearing on Face of Proceedings.—*Tigrett v. Taylor*, 180 Ala. 296, 60 So. 858. See the title DISMISSAL AND NONSUIT, § 30, vol. 5, p. 140.

§ 34. Discontinuance by Omission or Irregularity in Proceedings.

See ante, "Discontinuance by Omission or Irregularity in Proceedings," § 17½.

§ 37. Disobedience to Order of Court or Other Misconduct.

Where plaintiff on cross-examination refused to answer a proper question which was material to the issues, the court had jurisdiction to grant a nonsuit, in the nature of a dismissal, on defendant's motion, though it might also have punished plaintiff for contempt under Code, §§ 4630, 4632, 6693. *Roy v. Louisville, etc., R. Co.*, 9 Ala. App. 377, 63 So. 772.

Under Code 1907, § 4055, it was not error to refuse a motion insisting that a nonsuit be granted for plaintiff's failure to answer interrogatories fully. *Russell v. Bush*, 196 Ala. 309, 71 So. 397.

§ 38. Parties Entitled to Dismiss.

Controverted Questions of Fact.—Where, in an action against B. and another, it appeared at the close of plaintiff's case that they were not jointly liable, and, though the cross-examination of plaintiff's witnesses supported B.'s claim that the other defendant was liable, there was evidence tending to show that B. was the party liable, and plaintiff thereupon amended by striking the name of the other defendant, B. was not entitled to a discontinuance, as plaintiff was not bound to accept her theory of the case, though supported by the testimony of his own witnesses. *Beitman v. Birmingham Paint, etc., Co.*, 185 Ala. 313, 64 So. 600.

§ 40. Motion for Dismissal or Nonsuit.

§ 41. — Time for Making.

In assumpsit which had been pending for over two years with defendant's knowledge that plaintiff was nonresident, and had given no security for costs, overruling motion to dismiss on ground that it was too late was not error. *Empire Clothing Co. v. Roberts, etc., Shoe Co.* (Ala. App.), 75 So. 634.

§ 48. Setting Aside and Reinstatement of Cause.

Authority of Court.—Where counsel was engaged in the trial of cases in another court when his case was called for trial, and dismissed for want of prosecution, and had endeavored to inform the court of his situation through its clerk, and showed that plaintiff had a meritorious cause of action, the court, in the exercise of a sound discretion, might grant a motion to set aside the dismissal, and restore the case to the docket for trial. *Marx v. Barbour Plumbing, etc., Co.*, 10 Ala. App. 404, 64 So. 645.

Power after Expiration of Term.—The attorneys in an action agreed upon a continuance, but neither attorney had a formal order of continuance entered, and the court, on call of the cause, dismissed it for want of prosecution. Defendant's attorney subsequently agreed orally with plaintiff's attorney that he would have the order of dismissal set aside and the cause reinstated, but the matter was overlooked. At a subsequent term the court, with these facts before it, over the objection of attorneys then representing defendant, set aside the dismissal and restored the cause to the docket. Held, that the court had no authority to take such action, since a court is without power over its final judgments after the close of the term unless to correct clerical errors or omissions, and the case was not within the rule that after a case is put out of court by an order irregularly entered, the party who would profit by the order may put the cause again within the power of the court by appearing at a subsequent term and participating in its litigation. *Ex parte Alabama Fuel, etc., Co.*, 193 Ala. 496, 69 So. 115.

DISORDERLY CONDUCT.

§ 1. Nature and Elements of Offense.

§ 1½. Persons Liable.

§ 5. Evidence.

§ 5½. Trial.

§ 6. — Questions for Jury.

§ 7. — Instructions.

Cross References.

See the title DISORDERLY CONDUCT, vol. 5, p. 148, and references there given. In addition, see ante, CRIMINAL LAW; post, DISORDERLY HOUSE; OBSCENITY.

As to action for abusive and insulting language used to passenger by servant of railroad, see ante, CARRIERS.

§ 1. Nature and Elements of Offense.

Statutory Provision — Intentional Use of Prohibited Language. — Under Code 1907, § 6217, denouncing the offense of using obscene, insulting, or abusive language in the presence or hearing of a woman, the intentional use of obscene, insulting, or abusive language in the presence or hearing of a woman is an offense, though it was used in ordinary conversation, without intent that it should be overheard. *Jordan v. State*, 13 Ala. App. 186, 68 So. 585, cited in notes in Ann. Cas. 1917C, 891, 897, 899.

Prohibited Language Used in Home Overheard by Wife and Mother-in-Law. — It is no defense that accused used the prohibited language in his own house, where it was overheard by his wife and mother-in-law, for they come within Code 1907, § 6217, prohibiting the use of abusive, insulting, or obscene language in the presence or hearing of a woman. *Jordan v. State*, 13 Ala. App. 186, 68 So. 585, cited in notes in Ann. Cas. 1917C, 896, 897.

Natural and Necessary Effect of Language. — If the natural and necessary effect of defendant's language to a woman, under the circumstances, was to insult her, he was within the condemnation of Code 1907, § 6217, though he had in mind an innocent meaning. *Wiley v. State*, 10 Ala. App. 249, 65 So. 204, cited in note in Ann. Cas. 1917C, 891.

§ 1½. Persons Liable.

"Any Person," Girl or Woman. — Code 1907, § 6217, making it a criminal offense

for "any person" to use abusive, insulting, or offensive language in the presence or hearing of any girl or woman, includes a girl or woman, and she may be convicted thereunder. *Daly v. State*, 194 Ala. 29, 69 So. 598, cited in note in Ann. Cas. 1917C, 892, affirming 69 So. 338.

§ 5. Evidence.

Where the prosecutrix was a white woman and the defendant a negro man, and the offense charged was using obscene and insulting language to a woman, evidence that the prosecutrix had been on previous friendly terms with defendant was admissible on the question of the punishment to be imposed in case of conviction. *Talley v. State*, 12 Ala. App. 314, 68 So. 567, cited in note in Ann. Cas. 1917C, 891.

§ 5½. Trial.

§ 6. — Questions for Jury.

See post, "Instructions," § 7.

Whether Language Insulting—Statutory Provisions. — In a prosecution for using insulting language in the presence of a female, the court properly submitted to the jury whether the language was insulting within Code 1907, § 6217, making it an offense to use "abusive, insulting or obscene" language in the presence of any girl or woman. *Banks v. State*, 11 Ala. App. 176, 65 So. 667, cited in note in Ann. Cas. 1917C, 891.

Whether the language of defendant to a woman, when meeting her on a highway, half a mile from any dwelling, "Say, young woman, do you know of any

woman that would let a fellow have a little pussy?" was in the circumstances insulting, within the condemnation of Code 1907, § 6217, is a question for the jury. *Wiley v. State*, 10 Ala. App. 249, 65 So. 204, cited in note in Ann. Cas. 1917C, 891.

Same—Whether Language Was Used.—In a prosecution for using insulting language where accused's remark that he would drink when he damned pleased was overheard by his wife and mother-in-law, the questions whether he in fact used the language, and whether it was insulting within Code 1907, § 6217 prohibiting such language in the presence of a woman, held for the jury. *Jordan*

v. State, 13 Ala. App. 186, 68 So. 585, cited in notes in Ann. Cas. 1910C, 891, 897.

§ 7. — Instructions.

Right to General Charge.—*Finley v. State*, 7 Ala. App. 161, 62 So. 265. See the title DISORDERLY CONDUCT, § 7, vol. 5, p. 152.

Evidence Sustaining Refusal of Affirmative Charge.—Evidence in prosecution for disorderly conduct held to sustain the refusal of the court to give an affirmative charge for the defendant. *Sherrod v. State*, 14 Ala. App. 57, 71 So. 76, judgment reversed on another point in 72 So. 540.

Disorderly House.

See the title DISORDERLY HOUSE, vol. 5, p. 151, and references there given.

Disparagement of Character.

See post, LIBEL AND SLANDER.

Disqualification.

See post, JUDGES; JURY; OFFICERS.

Dissolution.

Of community, see post, HUSBAND AND WIFE. Of corporations, see ante, CORPORATIONS. Of partnership, see post, PARTNERSHIP.

Distance.

See ante, BOUNDARIES; post, EVIDENCE.

Distress for Rent.

See post, LANDLORD AND TENANT.

DISTRICT AND PROSECUTING ATTORNEYS.

- § 1. Appointment or Election, and Qualification and Tenure.
 - § 1 (1) In General.
 - § 1 (2) Tenure and Removal.
- § 2. Deputies, Assistants, and Substitutes.
 - § 2 (1) Appointment.
 - § 2 (3) Compensation and Fees.
- § 3. Compensation and Fees.
- § 4. — In General.
- § 4½. Representation of State or County in General.
- § 5. Powers and Proceedings in General.

Cross References.

See the title DISTRICT AND PROSECUTING ATTORNEYS, vol. 5, p. 156, and references there given.

As to validity of appointment of deputy or special prosecuting attorney, see ante, CRIMINAL LAW.

§ 1. Appointment or Election, and Qualification and Tenure.

§ 1 (1) In General

Circuit Solicitor — Constitutional Provision.—Under Const. 1901, § 167, providing that a solicitor for each judicial circuit or other territorial subdivision shall be elected by the qualified electors of those counties in such circuit or other territorial subdivision in which such solicitor prosecutes criminal cases, the circuit solicitor is not elected solicitor of circuit court, but is elected solicitor of circuit of that territorial jurisdiction, not being a judicial officer of circuit court, nor elected as such, but ministerial officer of territory composing credit. *State v. Black* (Ala.), 74 So. 387.

Appointment of Deputy Circuit Solicitor—Constitutionality of Act. — General Solicitors' Bill, Acts 1915, p. 817, et seq., authorizing appointment of deputy circuit solicitor by circuit solicitor for circuit, was not violative of Const. 1901, § 167, providing that legislature may provide by law for appointment by Governor or election by qualified electors of a county of solicitor for any county; the office of deputy circuit solicitor not being in legal effect a county solicitorship, though the incumbent of the offices are required to perform the same or like service and duties. *State v. Stearns* (Ala.), 76 So. 321.

§ 1 (2) Tenure and Removal.

The circuit solicitor like the circuit judge, is constitutional officer, and his office can not be destroyed, nor an incumbent legislated out of it, except as constitution may authorize, but to require that part only of his duties shall be performed by the county solicitor, a statutory officer, does not directly or indirectly destroy his office. *State v. Black* (Ala.), 74 So. 387.

§ 2. Deputies, Assistants, and Substitutes.

§ 2 (1) Appointment.

Absence of Solicitor—Appointment of Special Officer. — Under Code 1907, § 7787, authorizing the presiding judge, when the regular solicitor is absent, to appoint a competent attorney in his place, the presiding judge, in the absence of the regular solicitor, whether such absence is proper or not, was authorized to appoint a special solicitor. *Mizell v. State*, 184 Ala. 16, 63 So. 1000, cited in note in Ann. Cas. 1918A, 721.

Circuit Solicitor—Appointment of Deputies.—Last proviso in General Solicitors' Bill (Acts 1915, p. 817) attempting to make county solicitor first prosecutor in circuits of one county until 1919, does not nullify preceding proviso authorizing circuit solicitor to appoint assistants or deputy solicitors, the intent being only to except local laws of such a county as

to county solicitors from repeal until January, 1919. *State v. Black* (Ala.), 74 So. 387.

Same—Power to Appoint Assistants — Statute.—Under Acts 1915, p. 823, § 10, providing that in circuits of one county, having more than three judges, and having a county solicitor elected by the qualified electors of the county, such solicitor shall be, until the first Monday after the second Tuesday in January, 1919, the chief prosecuting officer of the county, the county solicitor of Jefferson county has all the right and power to appoint or obtain assistants and assistance which he lawfully had under the provisions of the local laws of the county in force when the bill was passed, September 25, 1915, and may continue to exercise such powers until 1919, and abolishing the courts in which he and his assistants had theretofore prosecuted criminal cases did not take away the powers and rights of his assistants, and did not abolish his office. *State v. Black* (Ala.), 74 So. 387.

Assistants to County Solicitor.—Assistants appointed in his discretion, by county solicitor of Jefferson county, constituting circuit by itself, are not officers of any kind, the law authorizing their appointment fixing no terms and no compensation except such as may be agreed upon between them and the solicitor. *State v. Black* (Ala.), 74 So. 387.

Assistants to Circuit Solicitor—Statute.—Assistants appointed by circuit solicitor under Acts 1915, p. 817, in a circuit of one county, are county officers. *State v. Black* (Ala.), 74 So. 387.

Stenographers — Right to Compensation.—Loc. Acts 1903, p. 677, authorizes the solicitor of Mobile county to appoint a stenographer, Acts 1915, p. 817, providing for a circuit solicitor in each district, declares that if in any circuit composed of only one county there is no circuit solicitor, but there is a county solicitor who is elected at the general election in November, 1914, he shall be and become circuit solicitor of the circuit, on and after the first Monday after the second Tuesday in January, 1917, and shall hold office until the first Monday after the second Tuesday in January, 1919. Sec-

tion 10 of the latter act declares that all general, local, or special laws establishing the office of county solicitor, or the office of solicitor of any court by whatever name called, except circuit solicitors, are repealed, but all provisions of such local act, or acts, etc., applicable to county solicitors, shall be applicable to circuit solicitors of the county where such local acts apply. Held, that though the act of 1915 provides for the appointment of official reporters by the judge of the several circuit courts, and authorizes the judge to direct such reporter to attend the grand jury in its investigations, it did not deprive an official stenographer appointed by the county solicitor of Mobile under the act of 1903, whose duty it was to attend the sessions of the grand jury, of the right to compensation, for though such stenographer was to render services in the grand jury room, the provisions for appointment can not be treated as repealed by the act of 1915, as the official reporter obviously might be unable to attend all the sessions of the grand jury. *Stone v. State* (Ala.), 77 So. 348.

§ 2 (3) Compensation and Fees.

Power of County Solicitor—Employment of Assistance.—Local Acts 1915, p. 23, amending Acts 1900—01, p. 212, § 11, to provide that solicitor of Jefferson county shall have power to employ any assistance he may deem necessary, and that compensation for such assistance shall be paid out of the solicitor's fund of the county, if there is a sufficient amount in the fund, etc., is still in force, and county solicitor of Jefferson county has power, as to which he has discretion, preserved to him until 1919 by general solicitors' act subsequently enacted. *Henry v. State* (Ala.), 76 So. 417.

"Solicitor's Fund."—"Solicitor's fund" of Jefferson county, mentioned in Acts 1900-01, p. 217, § 11, as amended by Loc. Acts 1915, p. 23, providing that the solicitor of Jefferson county shall have power to employ assistance and the expense shall be paid out of solicitor's fund, is made up of fees collected as solicitor's fees on all convictions in criminal case in county, and not merely part of fees

previously appropriated to uses of solicitor. *Henry v. State* (Ala.), 76 So. 417.

§ 3. Compensation and Fees.

§ 4. — In General.

Roden v. Griffin, 179 Ala. 633, 60 So. 925. See the title DISTRICT AND PROSECUTING ATTORNEYS, § 4 (1), vol. 5, p. 157.

§ 4½. Representation of State or County in General.

Circuit Solicitor—Destruction of Office.—Acts 1915, p. 823, § 10, providing that in circuits of one county, having more than three judges, and having a county solicitor elected by the qualified electors of the county, such solicitor shall be, until the first Monday after the second Tuesday in January, 1919, the chief prosecuting officer of the county, thus rendering the circuit solicitor his assistant, is not unconstitutional as destroying the constitutional office of circuit solicitor of Jefferson county, its effect being merely to preserve a state of affairs, which had prevailed for several years, so long as the present terms of the two officers continue, while the constitution does not prohibit the legislature from creating another solicitor to the circuit. *State v. Black* (Ala.), 74 So. 387.

Same—Constitutionality of Act. — If legislature had attempted to confer upon county solicitor of Jefferson county exclusive right and duty to prosecute in circuit court of Jefferson, the only county in the circuit, attempt would have been violative of constitution establishing office of circuit solicitor. *State v. Black* (Ala.), 74 So. 387.

Same—Rights to Prosecute in Circuit Court.—The proviso of Acts 1915, p. 823, § 10, that in circuits of one county having more than three judges, and having a county solicitor elected by the qualified electors, such solicitor, until 1919, shall be the chief prosecuting officer of the county, does not take away the rights of the circuit solicitor of Jefferson county under Code 1907, § 7781, et seq., to prosecute in the circuit court, it making him the assistant prosecutor to the county solicitor. *State v. Black* (Ala.), 74 So. 387.

Courts in Which County Solicitor May Prosecute.—The county solicitor is not by the constitution required to be solicitor for any particular court or courts in the county, but for the territorial subdivision known as the county, and the legislature may assign him duties to perform in any or all of the special courts of the county in which solicitor's duties are to be performed, it being the office and function of statutes and not of the constitution to prescribe the courts in which constitutional or statutory solicitors shall prosecute, and the rights, character, and nature of the office being purely ministerial, subject to the legislature's direction and control. *State v. Black* (Ala.), 74 So. 387.

§ 5. Powers and Proceedings in General.

No principle that attorney's solemn admissions, made in progress of trial of case, are binding on his client, applies, as between state and its solicitor, to confession by latter of defendant's plea of double jeopardy. *Coster v. State* (Ala. App.), 76 So. 475.

District Courts.

See ante, COURTS.

Disturbance of Peace.

See ante, DISORDERLY CONDUCT; post, DISTURBANCE OF PUBLIC ASSEMBLAGE.

DISTURBANCE OF PUBLIC ASSEMBLAGE.

§ 1. Nature and Elements of Offenses.

Cross References.

See the title DISTURBANCE OF PUBLIC ASSEMBLAGE, vol. 5, p. 160, and references there given.

§ 1. Nature and Elements of Offenses.

Disturbance of Worshippers—Intent.—

Where defendant intentionally used language in the presence of an assemblage of worshippers, the natural consequence of which would be to disturb them, he is guilty of disturbing religious worshippers, under Code 1907, § 6768, even though he had no purpose willfully to disturb them. *Ellis v. State*, 10 Ala. App. 252, 65 So. 412.

Same — During Intermission between

Services.—One who disturbed the members of a church while they were eating a basket dinner just outside the church, during a short intermission between the morning and afternoon services, is guilty of disturbing religious worship, under Code 1907, § 6768 since that statute is not limited to disturbance during the actual progress of the services. *Ellis v. State*, 10 Ala. App. 252, 65 So. 412.

Diversion of Waters.

See post, WATERS AND WATERCOURSES.

Dividends.

See ante, CORPORATIONS.

DIVORCE.

I. Nature and Form of Remedy.

§ 2. Constitutional and Statutory Provisions.

II. Grounds.

§ 11. Cruelty.

§ 13. Desertion or Absence.

§ 13 (1) Definition, and Elements of Statutory Grounds.

§ 13 (6½) — Separation by Necessity or at Instance of Libellant.

III. Defenses.

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§ 17. Condonation.

§ 18. — Acts Constituting Condonation.

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IV. Jurisdiction, Proceedings and Relief.

(C) Pleading.

§ 40. Bill, Libel, Complaint, or Petition.

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(D) Evidence.

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(E) Dismissal, Trial or Hearing, and New Trial.

§ 62. Scope of Inquiry and Powers of Court.

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(F) Judgment or Decree.

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§ 69. — Prohibition or Leave to Marry.

§ 70. By Default or Pro Confesso.

§ 72. — Opening or Setting Aside.

§ 73. On Trial of Issues.

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§ 75½. Actions to Vacate or Set Aside.

§ 76. Collateral Attack.

(G) Appeal.

§ 81. Effect of Appeal.

§ 82. Review.

§ 83. Determination and Disposition of Cause.

§ 84. — In General.

V. Alimony, Allowances, and Disposition of Property.

§ 89. Power to Make Allowance or Award.

- § 90. Sufficiency of Allegations and Prayers in Pleadings.
- § 92. Temporary Alimony.
- § 97. — Application and Proceedings Thereon.
- § 98. — Amount.
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- § 100. Allowance for Counsel Fees and Expenses.
- § 101. — Nature and Right in General.
- § 103. — Application and Proceedings Thereon.
- § 104. — Amount.
- § 105. — Modification, Vacation or Setting Aside of Order.
- § 106. Permanent Alimony.
- § 113. — Amount.
 - § 113 (3) Evidence to Determine Amount.
 - § 113 (4) Excessiveness of Sum Allowed.
- § 115. — Modification of Judgment or Decree.
- § 116. Disposition of Property.
- § 117. — Rights in General.
- § 120½. — Judgment or Decree.
- § 122. Enforcement of Order, Judgment or Decree.
- § 123. — In General.
- § 124. — Execution.
- § 129. Appeal.
- § 129½. — Presentation and Reservation in Lower Court of Grounds of Review.

VI. Custody and Support of Children.

- § 138. Grounds for Award of Custody.
- § 140. Order, Judgment, or Decree as to Custody.
- § 140½. Modification of Order, Judgment or Decree as to Custody.
- § 141. Enforcement of Order, Judgment or Decree as to Support.

VII. Operation and Effect of Divorce, and Rights of Divorced Persons.

- § 145. Right to Marry.
- § 146. — In General.

Cross References.

See the title DIVORCE, vol. 5, p. 166, and references there given.

In addition, see ante, APPEAL AND ERROR; COURTS; post, EQUITY; EVIDENCE; HOMESTEAD; HUSBAND AND WIFE; JUDGMENTS; STATUTES; TRUSTS.

As to review of orders, other than final, of a chancery court in divorce proceedings, see ante, APPEAL AND ERROR. As to conflicting jurisdiction of courts of different states involving custody of children, see ante, COURTS. As to multifarious and inconsistent averments in bill for divorce, and amendments thereof, see post, EQUITY. As to decrees pro confesso against defendant not served personally with process, see post, EQUITY. As to admissibility of evidence of letters showing illicit intercourse of defendant, see post, EVIDENCE. As to exemption of homestead from execution issued on divorce decree, see post, HOMESTEAD. As to jurisdiction of chancery courts of the custody of infants, see post, INFANTS. As to collateral attack attempting to annul a divorce decree, other than by appeal,

see post, JUDGMENTS. As to construction of ambiguous divorce decree, see post, JUDGMENTS. As to construction of retrospective and remedial affect of divorce statutes, see post, STATUTES. As to property awarded in divorce decree where in the possession of trustees, see post, TRUSTS.

I. NATURE AND FORM OF REMEDY.

§ 2. Constitutional and Statutory Provisions.

Statute — Construction.—Acts 1915, p. 370, authorizing divorce to a wife when without support from the husband she lives apart from him for five years next preceding the filing of the bill, and has bona fide resided in the state during all of such period, is not remedial in character, but gives legal effect to martial conduct and relations by converting a complete separation into an authorized ground for divorce, and falls within the class of statutes whose retrospective operation is denied, unless its language requires expressly or by unmistakable implication such retrospective operation. *Barrington v. Barrington* (Ala.), 76 So. 81.

Same—Retroactive.—Acts 1915, authorizing divorce from the bonds of matrimony in favor of the wife "when the wife without support from him has lived separate and apart from the bed and board of the husband for five years next preceding the filing of the bill, and she has bona fide resided in this state during all of said period," does not indicate a legislative intendment of a retrospective operation, but authorizes a divorce only upon the lapse of five years from that of the date of its enactment. *Barrington v. Barrington* (Ala.), 76 So. 81.

Same—Retrospective.—Divorce statutes are generally held not to be retrospective. *Barrington v. Barrington* (Ala.), 76 So. 81.

II. GROUNDS.

§ 11. Cruelty.

Sufficiency of Cruelty.—In a final difficulty between husband and wife, the fact that he pushed her away so that she fell against the side of an iron bed and bruised her legs would not of itself constitute sufficient cruelty to justify a divorce. *Jones v. Jones*, 189 Ala. 286, 66 So. 4.

§ 13. Desertion or Absence.

§ 13 (1) Definition, and Elements of Statutory Grounds.

Desertion without Reason and with No Intention to Return.—*Brown v. Brown*, 178 Ala. 121, 59 So. 48. See the title DIVORCE, § 13 (1), vol. 5, p. 173.

Voluntary Abandonment.—To authorize a divorce from a wife for abandonment, her abandonment must have been voluntary, and not caused by the husband's own wrong or ill treatment. *Israel v. Israel*, 185 Ala. 39, 64 So. 67.

Without Consent of Other Party.—To make case of abandonment authorizing divorce, there must be final departure, without consent of other party, without sufficient reason, and without intention to return. *Mayo v. Mayo* (Ala.), 74 So. 971.

§ 13 (6½) — Separation by Necessity or at Instance of Libellant.

Facts Constituting Desertion. — A husband may as effectually abandon his wife by putting her away from him and denying her the privilege of dwelling with him as by going from their former residence and leaving her there, and not permitting her to live with him. *Dabbs v. Dabbs*, 196 Ala. 164, 71 So. 696.

Voluntary Abandonment.—Under Code 1907, § 3793, subd. 3, making voluntary abandonment a ground for divorce, a separation compelled by the husband, after which the wife reared several minor children, would not be a "voluntary" abandonment; and the fact that many years after he had compelled her departure complainant went to the house established by the wife, and there remained with her about a month, and then left without any reason given by her, such association with his wife did not exonerate him from the consequences of his previous conduct, and so reestablish their relations as to render her culpable in any degree. *Dabbs v. Dabbs*, 196 Ala. 164, 71 So. 696.

III. DEFENSES.

§ 16. Provocation.

Provoking Misconduct.—Wife held not entitled to divorce for cruelty, where the evidence showed that her aims in initiating and maintaining the suit were mercenary rather than moral and self-protective, and that she had been guilty of abuse of her husband, and provoking misconduct as a wife. *Jones v. Jones*, 189 Ala. 286, 66 So. 4.

§ 17. Condonation.

§ 18. — Acts Constituting Condonation.

Conditional Condonation. — Where, after separation for husband's cruelty, the wife returned and lived with him for two months upon his promise to treat her properly, which promise was not kept, there was no such condonation as will defeat the allowance of divorce decree to her. *Black v. Black* (Ala.), 74 So. 338.

§ 18½. — Operation and Effect.

Conditioned on Husband's Conduct.—Condonation by wife because of her return to husband upon his promise to accord her proper treatment is always conditioned upon his conduct. *Black v. Black* (Ala.), 74 So. 338.

IV. JURISDICTION, PROCEEDINGS AND RELIEF.

(C) PLEADING.

§ 40. Bill, Libel, Complaint, or Petition.

§ 41. — Form and Requisites in General.

Amendments. — Under Code 1907, § 3126, as to amendments before decree on terms, complainant in divorce had right to amend her bill at any time before final decree. *Barrington v. Barrington* (Ala.), 77 So. 711.

§ 42. — Residence of Parties.

Plaintiff's Residence. — Under Code 1907, § 3802, bill for divorce is bad on general demurrer, where it avers that defendant is a nonresident, but fails to show that complainant had been bona fide resident of state for one year next before filing of bill. *Wright v. Wright* (Ala.), 76 So. 431.

§ 44. — Grounds for Divorce.

Sufficiency.—Complainant's bill for divorce, which merely averred that her husband obtained a certificate that she was crazy so as to get rid of her, will not be dismissed on the ground that she was incapacitated and could not sue. *Blanton v. Blanton*, 191 Ala. 148, 67 So. 1000.

Repetitions in Bill.—Where a bill for divorce fairly apprised the court and defendant of the grievances, it is not subject to demurrer for tautology, though it did not state the facts without repetition, as required by Code 1907, § 3094, requiring bills to contain a clear statement of facts relied on without unnecessary repetition. *Blanton v. Blanton*, 191 Ala. 148, 67 So. 1000.

Abandonment.—Bill, which sets forth sufficient facts to entitle complainant to divorce on grounds of cruelty, under Code 1907, § 3795, may properly aver fact of abandonment, not as distinct grounds of divorce, but in connection with specific averments of cruelty, to which it lends weight. *Wright v. Wright* (Ala.), 76 So. 431.

(D) EVIDENCE.

§ 50. Presumptions and Burden of Proof.

Condonation.—In a suit for divorce on the ground of adultery, the burden of proof is on respondent respecting the issue of condonation. *Waters v. Waters* (Ala.), 76 So. 867.

§ 51. Admissibility.

§ 60. — Cruelty or Other Ill Treatment.

Sufficiency of Evidence. — Evidence showing husband's habits as to use of intoxicants, threats, and violence to the wife and conviction for assault and battery upon her, held sufficient for granting of a divorce decree under Code 1907, § 3795, allowing such decree for husband's cruelty. *Black v. Black* (Ala.), 74 So. 338.

(E) DISMISSAL, TRIAL OR HEARING, AND NEW TRIAL.

§ 62. Scope of Inquiry and Powers of Court.

§ 63. — In General.

Involuntary Dismissal of Former Action.—It is no ground for dismissing a

bill for divorce by a wife that she instituted previous suits on the same grounds, but failed to prosecute them with effect, dismissing her bills. *Jordan v. Jordan*, 184 Ala. 408, 63 So. 1024.

(F) JUDGMENT OR DECREE.

§ 66. Scope and Extent of Relief.

§ 69. — Prohibition or Leave to Marry.

Decree Not Subject to Collateral Attack.—*Ex parte Edwards*, 183 Ala. 659, 62 So. 775, cited in note in *Ann. Cas.* 1915B, 430. See the title *DIVORCE*, § 69, vol. 5, p. 184.

§ 70. By Default or Pro Confesso.

§ 72. — Opening or Setting Aside.

Estoppel to Claim Decree Void.—*Johnson v. Johnson*, 182 Ala. 376, 62 So. 706, cited in note in 51 L. R. A., N. S., 535, overruling *Adams v. Wright*, 129 Ala. 305, 30 So. 574. See the title *DIVORCE*, § 72, vol. 5, p. 185.

Setting Aside—Time.—The circuit court of the tenth judicial district created by Acts 1888-89, p. 17, Act 1907, p. 260, having had chancery jurisdiction conferred upon it by Acts 1894-95, p. 881, could not set aside its divorce decree 3 months after entry, where the record failed to show a proper continuance of the application therefor within the 30-day period in which it was made or a regular continuance from term to term in view of Acts 1888-89, p. 797, § 11, Acts 1898-99, p. 1213, and Chancery Court Practice Rule 81 (Code 1907, p. 1553), giving the right of application for rehearing if made within 30 days, and Acts 1894-95, p. 881, providing that chancery rules have application to equity cases in said court; the general order of continuance of all pending cases being insufficient to prevent the lapse of the application. *Hale v. Kinnaid* (Ala.), 76 So. 954.

§ 73. On Trial of Issues.

Allegations of Bill.—*Phillips v. Phillips*, 176 Ala. 308, 58 So. 252, cited in notes in *Ann. Cas.* 1916B, 880, 914, 915. See the title *DIVORCE*, § 73, vol. 5, p. 185.

§ 75. Bill of Review.

Bill to Set Aside Divorce Decree.—*Johnson v. Johnson*, 182 Ala. 376, 62 So.

706, overruling *Adams v. Wright*, 129 Ala. 305, 30 So. 574. See the title *DIVORCE*, § 75, vol. 5, p. 185.

§ 75½. Actions to Vacate or Set Aside.

Fraud—Collusion—Duress.—*Johnson v. Johnson*, 182 Ala. 376, 62 So. 706, cited in notes in 51 L. R. A., N. S., 535; L. R. A. 1917B, 411, 415, 422, 424, 444, 460, 461, 495. See the title *DIVORCE*, § 75½, vol. 5, p. 185.

§ 76. Collateral Attack.

Decree Not Subject to Collateral Attack, Even if Collusively Attacked.—*Ex parte Edwards*, 183 Ala. 659, 62 So. 775, cited in note in *Ann. Cas.* 1915B, 430. See the title *DIVORCE*, § 76, vol. 5, p. 185.

Nonresidency of Defendant.—*Johnson v. Johnson*, 182 Ala. 376, 62 So. 706, cited in notes in 51 L. R. A., N. S., 535; L. R. A. 1917B, 411, 415, 422, 444, 460, 461, 495, overruling *Adams v. Wright*, 129 Ala. 305, 30 So. 574. See the title *DIVORCE*, § 76, vol. 5, p. 185.

(G) APPEAL.

§ 81. Effect of Appeal.

Precludes Mandamus Action.—Although a decree for alimony as an annual allowance is not final in the sense that it can not be subsequently changed where there was a final decree determining all the rights of the parties to the divorce including the right to both permanent and temporary alimony, an appeal fully perfected by the execution of a supersedeas bond removed the entire proceeding to the appellate court, with the exception of collateral matters not involved in the appeal, and mandamus will not lie to compel the chancellor to allow temporary alimony pending the appeal. *Ex parte Farrell*, 196 Ala. 434, 71 So. 462.

§ 82. Review.

Conflicting Evidence.—Testimony being taken ore tenus before trial judge, findings and decree in divorce suit granting all relief prayed for will not be disturbed; evidence being conflicting upon vital issues. *Hudson v. Hudson* (Ala.), 78 So. 965.

§ 83. Determination and Disposition of Cause.

§ 84. — In General.

Cross-Bills.—On a husband's bill for divorce on the ground of the wife's voluntary abandonment, where a decree for the husband was reversed for failure to prove the ground alleged, the dismissal of the original bill did not strike down the wife's cross-bill, seeking permanent alimony upon the contingency that the divorce should be granted, but the cause will be remanded, to enable the cross-complainant, who had been granted, in view of the decree for husband, the prayer of her bill, with a reference to ascertain the amount to be allowed for alimony and a reasonable solicitor's fee, to amend and to proceed as she might be advised. *Dabbs v. Dabbs*, 196 Ala. 164, 71 So. 696.

V. ALIMONY, ALLOWANCES AND DISPOSITION OF PROPERTY.

§ 89. Power to Make Allowance or Award.

Matter of Right.—Under Code 1907, § 3803, providing that pending suit the court must make an allowance for the support of a wife, out of the estate of the husband suitable to his estate and the condition in life of the parties, the court has no discretion in the matter, but it must as of right award alimony. *Coleman v. Coleman* (Ala.), 73 So. 473.

Collateral Attack — "Preceding."—Where a bill for divorce for voluntary abandonment alleged that complainant had been a "resident of said state for more than three years preceding filing of its (sic) bill," under Code 1907, § 3800, providing that no bill for divorce for voluntary abandonment shall be entertained, unless the party has been a bona fide resident of the state for three years "next before" filing, which must be alleged and proved, the allegation of the bill was sufficient to withstand a collateral attack on the decree; the word "preceding" generally meaning "next before." *Smith v. Gibson*, 191 Ala. 305, 68 So. 143.

§ 90. Sufficiency of Allegations and Prayers in Pleadings.

Proper Averments.—Averments in bill for divorce, pointing out property out of which complainant's demand for alimony may be made, are proper and should not be stricken. *Wright v. Wright* (Ala.), 76 So. 431.

§ 92. Temporary Alimony.

§ 97. — Application and Proceedings Thereon.

Disputed Validity of Marriage.—Ex parte *Edwards*, 183 Ala. 659, 62 So. 775, cited in note in Ann. Cas. 1915B, 430. See the title DIVORCE, § 97 (2), vol. 5, p. 189.

§ 98. — Amount.

Earning Capacity of Husband.—Ex parte *Whitehead*, 179 Ala. 652, 60 So. 924. See the title DIVORCE, § 98, vol. 5, p. 190.

Earning Capacity of Wife.—Ex parte *Edwards*, 183 Ala. 659, 62 So. 775, cited in note in Ann. Cas. 1915B, 430. See the title DIVORCE, § 98, vol. 5, p. 190.

§ 99. — Modification of Order.

Decree Subject to Change.—A decree for alimony pendente lite remains at all times subject to change for good cause shown. *Ford v. Ford* (Ala.), 78 So. 873.

§ 100. Allowance for Counsel Fees and Expenses.

§ 101. — Nature and Right in General.

Discretion of Court.—Attorney's fees are not allowed as a matter of right, since the statute does not specifically provide for an allowance, but the propriety of an allowance must be governed by the good faith in the proceedings. *Coleman v. Coleman* (Ala.), 73 So. 473.

§ 103. — Application and Proceedings Thereon.

Amount Fixed by Register.—The question of the amount of compensation to be awarded for plaintiff's attorneys may properly be referred to the register; such fees being allowable to the wife in her suit for alimony. *Johnson v. Johnson*, 195 Ala. 641, 71 So. 415.

§ 104. — Amount.

In General.—Ex parte Edwards, 183 Ala. 659, 62 So. 775, cited in note in Ann. Cas. 1915B, 430. See the title DIVORCE, § 104, vol. 5, p. 191.

§ 105. — Modification, Vacation or Setting Aside of Order.

Change in Allowance for Counsel Fees.—Ex parte Edwards, 183 Ala. 659, 62 So. 775, cited in note in Ann. Cas. 1915B, 430. See the title DIVORCE, § 105, vol. 5, p. 191.

§ 106. Permanent Alimony.**§ 113. — Amount.****§ 113 (3) Evidence to Determine Amount.**

Basis for Decree.—Where there is evidence that the husband received money for the sale of land, and that his earning power is a given sum, it can not be said that there is no basis for a decree of alimony. *Johnson v. Johnson*, 195 Ala. 641, 71 So. 415.

§ 113 (4) Excessiveness of Sum Allowed.

Amounts Not Excessive.—Where husband, aged 47, owned a farm worth \$1,000, a store worth \$500 and live stock, all unincumbered, and had an income between \$500 and \$1,000 and wife had a small farm given her by her father, award of \$200 annually as alimony held not excessive where the decree was left subject to modification. *Black v. Black* (Ala.), 74 So. 338.

Where a wife, although not entirely free from fault, secured a divorce from her husband for cruelty, and the husband was a healthy man, 48 years old, successful in business, with a personal estate of \$5,000 or more, an award of \$1,200 permanent alimony and \$100 attorney's fees was not excessive. *Farrell v. Farrell*, 196 Ala. 167, 71 So. 661.

§ 115. — Modification of Judgment or Decree.

Control of Court.—Proceedings for the award of alimony should always be kept within control of the court so that proper changes to conform with the circumstances may be made. *Johnson v. Johnson*, 195 Ala. 641, 71 So. 415.

§ 116. Disposition of Property.**§ 117. — Rights in General.**

Restrictions on Title.—Upon awarding the wife a divorce, the chancellor could vest the fee-simple title to a part of the husband's land in the wife as permanent alimony and provide that, if the wife married or died before the death of her infant son, the son should have a life estate in the land and it should revert on his death to his mother. *Coffey v. Cross*, 185 Ala. 86, 64 So. 95.

§ 120½. — Judgment or Decree.

Construction of Decree.—It was adjudged in a divorce suit that complainant be allowed the value of \$5,000 from her husband's real estate, "to be laid off and set apart as hereinafter directed, for the maintenance of herself during her natural life, or until she marries again, and for the support of her said child born of the wedlock to complainant and defendant, and in the event of her death or marriage, the title in said land shall vest in said boy child, * * * and in the event of his death, should he die after the death or marriage of his mother, it shall revert to complainant; said lands being in lieu of any dower interest and distribution she might otherwise have." It appeared in the divorce proceeding that defendant husband, when he married his wife, was living with another woman and continued to do so, and after the decree he recognized her children as his own after his marriage, and such illicit relations were the principal cause of his wife suing for divorce. Complainant, his wife, was a young woman when the divorce was granted and her child was an infant. Held, in view of the situation, that the decree vested in the wife the fee-simple title to the land, upon condition that, if she died or married before her infant son's death, he should enjoy a life estate in the lands, with remainder to her. *Coffey v. Cross*, 185 Ala. 86, 64 So. 95.

§ 122. Enforcement of Order, Judgment or Decree.**§ 123. — In General.**

Enforcement by Writs of Court.—Ex

parte Whitehead, 179 Ala. 652, 60 So. 924. See the title DIVORCE, § 123, vol. 5, p. 194.

§ 134. — Execution.

Arrears in Payment of Alimony.—In view of Code 1907, § 3803, requiring the court in a pending divorce suit to make an allowance for the wife's support out of the husband's estate, where the husband failed to comply with the orders for payment of monthly sums decreed, the court properly rendered judgment, in a proceeding inter partes, for the amount in arrear, and ordered execution to issue for its collection. *Ford v. Ford* (Ala.), 78 So. 873.

§ 139. Appeal.

§ 139½. — Presentation and Reservation in Lower Court of Grounds of Review.

Questions Reserved by Exception.—Where appellant in divorce suit reserved no exceptions to register's report fixing alimony pendente lite and allowance for attorney's fees, and the report was confirmed by the court, the reasonableness of the amounts so ascertained can not be considered on appeal from decrees dealing only with the question of the appropriate remedy for collection of amounts so awarded. *Ford v. Ford* (Ala.), 78 So. 873.

VI. CUSTODY AND SUPPORT OF CHILDREN.

§ 138. Grounds for Award of Custody.

Scope of Inquiry.—In proceedings involving the care, custody, and education of infants, the paramount consideration is the well-being and good of the infant. *Coleman v. Coleman* (Ala.), 73 So. 473.

§ 140. Order, Judgment, or Decree as to Custody.

Permanency of Order.—*Decker v. Decker*, 176 Ala. 299, 58 So. 195, cited in notes in Ann. Cas. 1916B, 880, 914, 915. See the title DIVORCE, § 140, vol. 5, p. 196.

§ 140½. Modification of Order, Judgment or Decree as to Custody.

Decree.—A court of chancery rendering a decree of divorce may modify the provision as to the custody of children as changed conditions may from time to time demand. *Hayes v. Hayes*, 192 Ala. 280, 68 So. 351.

Finality of Decree.—While a decree as to custody of children is not final so as to prevent modification on change of conditions, it is final as to rights of the parties based on the facts and circumstances existing at the time of and prior to its rendition. *Burns v. Shapley* (Ala. App.), 77 So. 447.

Loss of Jurisdiction.—One by removing children from a state in violation of the decree of a chancery court of that state intrusting them to him did not deprive that court of jurisdiction over the parties and the children, so as to prevent it from modifying the decree relative to custody of the children. *Burns v. Shapley* (Ala. App.), 77 So. 447.

§ 141. Enforcement of Order, Judgment or Decree as to Support.

Disobedience of Decree—Contempt.—One by removing children from state in violation of decree of a chancery court of that state intrusting them to his care placed himself in contempt of court. *Burns v. Shapley* (Ala. App.), 77 So. 447.

VII. OPERATION AND EFFECT OF DIVORCE, AND RIGHT OF DIVORCED PERSONS.

§ 145. Right to Marry.

§ 146. — In General.

Second Marriage of Guilty Defendant.—Where the divorce secured by a wife was silent as to husband's right to marry again, marriage by him with G. prior to decree would not be validated by the decree or by subsequent marriage of the divorced wife and his living with G. and the children of such a marriage are not legitimate. *Evans v. Evans* (Ala.), 76 So. 95.

Doctors.

See post, PHYSICIANS AND SURGEONS.

Documents.

See ante, APPEAL AND ERROR; CRIMINAL LAW; post, EVIDENCE.

Dogs.

See ante, ANIMALS.

DOMICILE.

§ 6. Evidence.

§ 7. — Presumptions and Burden of Proof.

Cross References.

See the title DOMICILE, vol. 5, p. 199, and references there given.

§ 6. Evidence.

§ 7. — Presumptions and Burden of Proof.

Domicile Declared in Will—Presumption as to Continuance.—Where testator in his will declared his residence to be in Alabama and the probate court by decree

judicially confirmed that fact, it might be soundly asserted that presumption of continuance of that place as his domicile until he acquired another prevailed to establish his domicile at the time of his death at place claimed in will. *Frederick v. Wilbourne* (Ala.), 73 So. 442.

Donations.

See ante, CHARITIES; post, GIFTS.

DOWER.

II. Inchoate Interest.

(B) Bar, Release, or Forfeiture.

§ 36. Conveyance by Husband after Marriage.

§ 39. Conveyance or Release by Wife.

III. Rights and Remedies of Widow.

§ 43. Dower Consummate before Assignment.

§ 44. — Nature of Interest.

§ 45. — Rights of Widow in General.

§ 46. — Assignability of Interest, and Conveyance or Release.

§ 46 (1) Assignability of Interest.

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§ 52. Actions for Dower.

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§ 57. — Parties.

§ 58. — Pleading.

§ 61. — Judgment or Decree for Dower.

§ 63. Valuation and Selection of Property for Assignment.

§ 65. — Time of Valuation.

§ 73. Award of Gross Sum.

§ 76. Sale of Land for Purpose of Assignment.

§ 78. — Disposition of Proceeds.

Cross References.

See the title DOWER, vol. 5, p. 206, and references there given.

In addition, see post, EXECUTORS AND ADMINISTRATORS.

As to transfer of administration of estate with dower unassigned from probate to chancery court, see ante, COURTS. As to deduction for dower under contract to convey, see post, SPECIFIC PERFORMANCE.

II. INCHOATE INTEREST.

(B) BAR, RELEASE, OR FORFEITURE.

§ 36. Conveyance by Husband after Marriage.

Extent of Right.—A landowner died leaving a widow and children, and the widow held possession of the homestead tract in question until her death without having the estate administered or her dower or homestead set apart. One son, who had conveyed his interest in his father's estate without his wife's relinquishing her dower, died before his

mother. Held, that the fact that the son died before his mother did not affect his widow's rights, and that his conveyance was subject to her right of dower. *Yarbrough v. Yarbrough* (Ala.), 75 So. 932.

§ 39. Conveyance or Release by Wife.

Estoppel to Assert — Joining in Mortgage.—By joining with the heirs of her deceased husband in the execution of a mortgage of decedent's lands after his death, his widow estopped herself, as against the mortgagee, to assert dower or quarantine rights. *Todd v. Interstate Mortgage, etc., Co.*, 196 Ala. 169, 71 So. 661.

III. RIGHTS AND REMEDIES OF WIDOW.

§ 43. Dower Consummate before Assignment.

§ 44. — Nature of Interest.

Mere Chose in Action.—Upshaw *v.* Upshaw, 180 Ala. 204, 60 So. 904. See the title DOWER, § 44, vol. 5, p. 220.

§ 45. — Rights of Widow in General.

Right to Possession.—A widow may retain possession free from payment of rent of dwelling house where her husband most usually resided next before his death, together with the offices and buildings appurtenant thereto, until her dower is assigned. Yarbrough *v.* Yarbrough (Ala.), 75 So. 932.

Failure to Have Dower Assigned—Effect on Ownership of Fee.—Failure to have dower assigned and permitting widow to retain possession of homestead without more does not deprive owner of fee in land. Yarbrough *v.* Yarbrough (Ala.), 75 So. 932.

§ 46. — Assignability of Interest, and Conveyance or Release.

§ 46 (1) Assignability of Interest.

In Equity.—Wilson *v.* Roebuck, 180 Ala. 288, 60 So. 870. See the title DOWER, § 46 (1), vol. 5, p. 220.

§ 46 (2) Rights of Assignee.

In ejectment by an heir, plaintiff was not precluded on theory that defendant held under a conveyance from widow of plaintiff's father, who had a dowerable interest in the land which was assigned by her deed. Landers *v.* Hayes, 196 Ala. 533, 72 So. 106.

Effect of Fraud.—Wilson *v.* Roebuck, 180 Ala. 288, 60 So. 870. See the title DOWER, § 46 (2), vol. 5, p. 221.

§ 52. Actions for Dower.

§ 53. — Nature and Form of Remedy.

Unassigned Dower an Equity.—Wilson *v.* Roebuck, 180 Ala. 288, 60 So. 870. See the title DOWER, § 53, vol. 5, p. 224.

Exception in Deed — Effect.—That an exception of the grantors' interest in dower to be selected by the widow used the term "selected" did not preclude the grantors from resorting to the legal method of having the dower area ascer-

tained for the widow. Robertson *v.* Robertson, 191 Ala. 297, 68 So. 52.

Where a widow fails to secure an assignment of her dower, heirs, unless precluded by their acts, may sue in equity to have such dower assigned. Robertson *v.* Robertson, 191 Ala. 297, 68 So. 52.

§ 54. — Right of Action and Defenses.

Death of Widow—Right of Heirs.—

Where heirs, in granting lands descended, excepted their reversionary interest in such part as should be selected as dower by widow, her death did not bar suit by them to determine the area to which she would be entitled if alive, in order to ascertain the extent of their exception. Robertson *v.* Robertson, 197 Ala. 433, 73 So. 13.

§ 56. — Limitations and Laches.

Ten Years' Limitation.—§ 3837, Code 1907.—Vaughn *v.* Vaughn, 180 Ala. 212, 60 So. 872. See the title DOWER, § 56 (1), vol. 5, p. 226.

Action after Twenty Years Where Right Recognized.—Vaughn *v.* Vaughn, 180 Ala. 212, 60 So. 872. See the title DOWER, § 56 (1), vol. 5, p. 227.

What Law Governs.—Where the death of intestate occurred in 1896, the dower rights of his widow and the methods for their assertion and effectuation were controlled by the Code of 1896 and the present statute of limitations in respect to the assignment of dower (Code 1907, § 3837) was inapplicable. Robertson *v.* Robertson, 191 Ala. 297, 68 So. 52.

That heirs had delayed nearly 18 years before suing to have the widow's dower assigned did not bar their right to relief. Robertson *v.* Robertson, 191 Ala. 297, 68 So. 52.

A bill seeking assignment of a widow's dower held not barred on the ground that it asserted merely a contractual right under deeds executed by complainants, though not filed until nearly 18 years after the death of intestate. Robertson *v.* Robertson, 191 Ala. 297, 68 So. 52.

§ 57. — Parties.

Necessary Party — Heir.—Vaughn *v.* Vaughn, 180 Ala. 212, 60 So. 872. See the title DOWER, § 57, vol. 5, p. 227.

§ 58. — Pleading.

Sufficiency of Cross-Bill for Dower and

Partition.—*Vaughn v. Vaughn*, 180 Ala. 212, 60 So. 872. See the title DOWER, § 58 (1), vol. 5, p. 228.

Requisites of Bill Where Land Partitioned between Heir and Cotenant.—*Vaughn v. Vaughn*, 180 Ala. 212, 60 So. 872. See the title DOWER, § 58 (1), vol. 5, p. 228.

§ 61. — Judgment or Decree for Dower.

Dower in Lands Held in Common.—*Vaughn v. Vaughn*, 180 Ala. 212, 60 So. 872. See the title DOWER, § 61, vol. 5, p. 230.

§ 63. Valuation and Selection of Property for Assignment.

§ 65. — Time of Valuation.

Under Code 1907, § 3836, providing that the widow is dowable of the value of the land at the time of the voluntary or involuntary alienation thereof from the death of the husband, where petitioner's husband who conveyed his interest in his

deceased's father's estate without his wife's relinquishment died before his mother, petitioner's right of dower will be decreed to date from death of her mother-in-law; dower not having been assigned to first widow. *Yarbrough v. Yarbrough* (Ala.), 75 So. 932.

§ 73. Award of Gross Sum.

A widow should be given as her dower a life estate in one-third part in acreage and value of the lands of which her husband died possessed, and not be given money in lieu thereof, unless the land can not be allotted her. *Hollins v. Watkins*, 189 Ala. 292, 66 So. 29.

§ 76. Sale of Land for Purpose of Assignment.

§ 78. — Disposition of Proceeds.

Double Dower — Parties.—*Upshaw v. Upshaw*, 180 Ala. 204, 60 So. 804. See the title DOWER, § 78, vol. 5, p. 234.

Drains.

See the title DRAINS, vol. 5, p. 238, and references there given.

Drawing Jurors.

See post, JURY.

DRUGGISTS.

Cross References.

As to sales by druggists on Sunday, see post, SUNDAY.

Liability for Selling Wrong Material —Contributory Negligence. —Plaintiff, a dairyman of long experience and skill in the art of bovine healing, applied to defendant, a druggist, for Epsom salts, and was given common salt instead. Plaintiff, though easily able to distinguish between the two by mere ocular examination, administered to a sick cow two	pounds of the common salt on the theory that it was Epsom salts, from which the cow died. Held, that plaintiff was guilty of contributory negligence, and could not recover damages against the druggist. <i>Gorman-Gammill Drug Co. v. Watkins</i> , 185 Ala. 653, 64 So. 350, cited in note in L. R. A. 1916B, 1109.
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Drunkards.

See the title DRUNKARDS, vol. 5, p. 239, and references there given.

Due Course of Law.

See ante, CONSTITUTIONAL LAW.

Dueling.

See the title DUELING, vol. 5, p. 241, and references there given.

Due Process of Law.

See ante, CONSTITUTIONAL LAW.

Duplicity.

See ante, CRIMINAL LAW; post, INDICTMENT AND INFORMATION; PLEADING.

Dying Declarations.

See ante, CRIMINAL LAW; post, HOMICIDE.

EASEMENTS.

I. Creation, Existence, and Termination.

- § 2. Easements Appurtenant or in Gross.
- § 3. Prescription.
- § 4. — In General.
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 - § 10 (1) In General.
 - § 10 (2) Sufficiency of Words of Conveyance in General.
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- § 23. Evidence.

II. Extent of Right, Use, and Obstruction.

- § 32. Removal of Obstruction.
- § 33. Actions for Establishment and Protection of Easements.

Cross References.

See the title EASEMENTS, vol. 5, p. 244, and references there given.
In addition, see ante, ADJOINING LANDOWNERS; ADVERSE POSSESSION; post, PLEADING.

I. CREATION, EXISTENCE, AND TERMINATION.

§ 2. Easements Appurtenant or in Gross.

Where a landowner granted a parcel to an adjacent proprietor, the deed of conveyance reciting that it was covenanted by the grantee, her heirs, legal representatives, and assigns, and was made a covenant running with the land, that no structure should be erected within 47½ feet of the street, and that a violation of the covenant should immediately work a reversion to the grantors, their heirs and assigns, provided that, should the residence of the grantors be altered, then this obligation should be by such change in the location, modified so as to allow the grantee to make similar improvements, an easement appurtenant to the land retained by the owner was created; such right not being in gross or personal to the grantor. *Weil v. Hill*, 193 Ala. 407, 69 So. 438.

§ 3. Prescription.

§ 4. — In General.

Creation of Private Right of Way by Dedication.—Dedication can properly be

made only to the public use and a private right of way can not be created by dedication. *Hill v. Wing*, 193 Ala. 312, 69 So. 445.

Right of Way—Requisites.—Where a right of way or other easement is claimed by private persons by prescription, the use and enjoyment must have been adverse to the owner of the estate from whom the easement is claimed, under a claim of right, exclusive, continuous, and uninterrupted, and with the actual or presumed knowledge of such owner. *Hill v. Wing*, 193 Ala. 312, 69 So. 445.

§ 7. — Adverse Character of Use.

User which is merely permissive, or which exists by the toleration of the owner, and in subordination to and in recognition of an implied license from him, will not mature into a prescriptive right, but is revocable at pleasure. *Hill v. Wing*, 193 Ala. 312, 69 So. 445.

§ 10. Express Grant.

§ 10 (1) In General.

Creation—Words of Inheritance.—Un-

der Code 1907, § 3396, declaring that words of inheritance are not necessary to a fee, an easement may be created by a conveyance, though no words of inheritance are expressed. *Weil v. Hill*, 193 Ala. 407, 69 So. 438.

Limitations on Particular Description.

—A deed otherwise conveying with certainty a quarter section does not indicate an intention to convey only the part west of a creek, by provision that, if the grantee shall at any time build a mill on the creek, the grantor agrees to give him an easement on the east side thereof, so as to secure ingress and egress, where the grantor owns other land on the east side. *Hall v. Long* (Ala.), 74 So. 56.

Construction of Deed—Private Lane.

A deed granting perpetual use of a private lane must be construed in light of the facts and circumstances attending its execution and in the light of the use to which the lane has since been put by all the parties to the deed for more than ten years. *Thomas v. Vanderslice* (Ala.), 77 So. 367.

§ 10 (2) Sufficiency of Words of Conveyance in General.

Construction of Deed — "Lands."

Where the intent to convey an easement is manifest, the employment of terms that would otherwise describe corporeal property will not suffice to defeat purpose of grant, or render instrument void as grant of easement and the term "lands" may, and often does, when consistent with the manifest intent of the parties, comprehend an easement as distinguished from the fee in the soil. *Alabama Corn Mills Co. v. Mobile Docks Co.* (Ala.), 75 So. 574.

Same—Express Purpose of Right of Way.—A conveyance of a certain strip of land 100 feet wide across a square of land described, with the expressed purpose of giving railroad track facilities into and from property first conveyed, did not convey any definite part of the square, but vested in the grantees an easement or right of way for railroad purposes 100 feet in width over the square named. *Alabama Corn Mills Co. v. Mobile Docks Co.* (Ala.), 75 So. 574.

§ 10 (3) Certainty.

Location Fixed by Court of Equity.

An easement or right of way over definitely described tract of land may be effectively granted, and its particular location on tract fixed through the aid of a court of equity, even though the grant does not define boundaries of way intended to be so granted. *Alabama Corn Mills Co. v. Mobile Docks Co.* (Ala.), 75 So. 574.

Construction of Deed — Indefiniteness or Uncertainty.

—Where a conveyance manifests a major intent to grant an easement of access over a definitely described tract of land, and in an effort to effect its paramount purpose an obvious failure to efficiently define the particular location of the easement is made, no such conflict in manifested intention, or in clauses of the instrument, is instituted as would justify a court in pronouncing the conveyance void for indefiniteness or uncertainty. *Alabama Corn Mills Co. v. Mobile Docks Co.* (Ala.), 75 So. 574.

§ 13. Implication.

§ 16. — Ways of Necessity.

Complainant, whose lot fronting on D. avenue ran back at right angles with D. avenue and parallel with P. street, and formed the end of a private alley fronting on P. street and bounded on each side by defendant's property, in the absence of any valid conveyance, had no right to use the alley as a "way of necessity," which is a way of strict necessity, and may not be created by the party claiming the way, and can not exist through the land of another, where one can get to his property through his own land, and to create which it is not enough that the way sought is more convenient than another already existing way. *Hill v. Wing*, 193 Ala. 312, 69 So. 445.

§ 22½. Adverse Possession.

Where land was originally a private alley, the rights of adjoining landowners therein can be alienated or lost by an adverse holding for the statutory period with knowledge of such claim of the party whose rights were affected. *Roden v. Capehart*, 195 Ala. 29, 70 So. 756.

§ 23. Evidence.

Right of Way—Adverse User.—In an action to enjoin obstruction to an alley abutting on the side of complainant's lot, evidence held not to show adverse user, so as to ripen into right against defendant, through whose premises the alley ran. *Hill v. Wing*, 193 Ala. 312, 69 So. 445.

Burden of Proof—Agreement in Deed.—In a suit to restrain defendant from building on his lot beyond a certain line, where plaintiff relied on an agreement contained in a deed to defendant, held, that plaintiff has the burden of showing facts creating a right in the nature of an easement over defendant's land. *Weil v. Hill*, 193 Ala. 407, 69 So. 438.

Same—Latent Ambiguity. — One contending for latent ambiguity in a deed granting an easement east of a creek, because of the grantor owning no other land east thereof, other than part of that apparently granted, has the burden of proof of such nonownership. *Hall v. Long* (Ala.), 74 So. 56.

II. EXTENT OF RIGHT, USE, AND OBSTRUCTION.

§ 32. Removal of Obstruction.

Compelling Removal of Obstruction.—Where grant of perpetual use of lane on grantor's land made no mention of existing gate, but for ten years grantee did not treat gate otherwise than as proper accessory to prevent trespassing, and grantor never used it to obstruct use of grantee or others, nor claimed right to do so, grantee could not compel its removal by grantor. *Thomas v. Vanderslice* (Ala.), 77 So. 367.

Private Lane — Removal of Obstruction by Plaintiff—Resistance.—Even if, when grantee was given perpetual use of lane on grantor's property, he was also

given right to remove gates therein, his remedy, upon grantor's refusal to remove them, was to remove them himself, rather than a bill in equity, unless his attempt was resisted by grantor. *Thomas v. Vanderslice* (Ala.), 77 So. 367.

§ 33. Actions for Establishment and Protection of Easements.

Effect of Conditions in Grant. — A grantor of a small parcel of land imposed a condition in the grant which, by estoppel, created an easement in other lands owned by the grantee. This easement was appurtenant to lands retained by the grantor. The conveyance provided that the covenant creating the easement should be considered as a condition, and upon breach the land conveyed should revert. Thereafter the grantor conveyed the property. Held, that though he subsequently executed a quitclaim to the grantee, thus precluding entry for breach of the covenant, his grantee might enforce compliance with the easement in a court of equity. *Weil v. Hill*, 193 Ala. 407, 69 So. 438.

Injunction for Obstructing Way.—Complainant, who owned a lot fronting on D. avenue and running back at right angles therewith and parallel with P. street, and forming the end of a private alley to P. street and running through property owned by defendant, who had no record title thereto, or easement therein, and whose use thereof had been merely permissive, as against defendant, having no paper title thereto, but whose predecessor had owned the fee, and whose deeds had conveyed and warranted to him the use of the alley, had no right or title which defendant might trespass against, and hence could not, on the ground of inconvenience or a depreciation in the value of her lot, enjoin his acts as a trespass. *Hill v. Wing*, 193 Ala. 312, 69 So. 445.

Ejection.

See ante, CARRIERS; post, LANDLORD AND TENANT.

EJECTMENT.

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- § 6. Title to Support Action.
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- § 94½. Evidence as to Damages, Rents or Profits.
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Cross References.

See the title EJECTMENT, vol. 5, p. 256, and references there given.

In addition, see post, FORCIBLE ENTRY AND DETAINER; LANDLORD AND TENANT; LIMITATION OF ACTIONS.

I. RIGHT OF ACTION AND DEFENSES.

§ 4. Property Which May Be Subject of Action.

Standing Timber.—*Mt. Vernon Lumber Co. v. Shepard*, 180 Ala. 148, 60 So. 825. See the title EJECTMENT, § 4, vol. 5, p. 261.

§ 6. Title to Support Action.

§ 7. — In General.

§ 7 (1) In General.

Legal Title.—In ejectment, the legal

title must prevail. *McArthur v. Brue*, 190 Ala. 563, 67 So. 249.

In statutory real action, as legal title only is involved, plaintiff can recover only on a superior legal title, and defendant can defeat a recovery only by legal defenses and the equities of the parties can not be asserted or regarded. *Blair v. Blair* (Ala.), 74 So. 947.

Description in Conveyance.—Where a conveyance definitely describes a tract or plot of land, it can not in a court of law be the basis of a right to recover a

different tract not therein described., *Mc-Millan v. Aiken*, 189 Ala. 330, 66 So. 624.

Unsatisfied Mortgage by Ancestor.—Plaintiff can not maintain ejectment, where a mortgage given by his ancestor has never been satisfied, whether or not the mortgage has been regularly foreclosed and a deed made to the purchaser, through whom defendant claims. *Loper v. Dickey*, 190 Ala. 554, 67 So. 255.

After the expiration of the time limited for the removal of timber by plaintiffs' contract of purchase, it can not maintain ejectment therefor. *Mt. Vernon Lumber Co. v. Shepard*, 190 Ala. 574, 67 So. 286.

§ 7 (2) Necessity of Title or Interest by Plaintiff.

All of Plaintiffs.—In ejectment by husband and wife, where it appeared that the wife alone was entitled to possession of the land, it was error to refuse the defendant his requested general affirmative charge, since, as ejectment is a possessory action, the right to possession at the time suit is instituted by coplaintiffs must be in all of them, which rule has not been changed by Code 1907, § 3839. *Salter v. Fox*, 191 Ala. 34, 67 So. 1006.

§ 7 (3) Sufficiency of Title in General.

Strength of Own Title.—*Hale v. Chandler*, 180 Ala. 391, 61 So. 885. See the title EJECTMENT, § 7 (3), vol. 5, p. 263.

In statutory ejectment, plaintiff must recover on strength of own title, not on weakness of defendant's. *Pettit v. Gibson* (Ala.), 77 So. 703; *Haley v. Miller*, 193 Ala. 482, 69 So. 564.

In the absence of estoppel, plaintiffs in ejectment must recover on the strength of their own title and not the weakness of defendant's title. *Reynolds v. Trawick* (Ala.), 78 So. 827; *Burnett v. Roman*, 192 Ala. 188, 68 So. 353.

Title at Commencement and Trial of Action.—To recover in ejectment, or the corresponding statutory real action, plaintiff must show title at the commencement of the suit and up to the time of the trial; and if he voluntarily parts with title pending the action he can not have judgment. *Roman v. Lentz*, 194 Ala. 610, 69 So. 827.

Possession.—In statutory real action,

possession of land is prima facie evidence of title, and is sufficient to support recovery against all who do not show prior possession or better title. *Blair v. Blair* (Ala.), 74 So. 947.

In a statutory real action the showing by plaintiff of possession in her grantors at the time of conveyance was sufficient to support the action in the absence of showing by defendant of possession of the land in himself prior to the deed to plaintiff, in which event plaintiff would have been required to show that her grantors had the legal title, and that it therefore passed to her by the deed. *Blair v. Blair* (Ala.), 74 So. 947.

Title by Adverse Possession.—Where plaintiff in ejectment had no paper title to the land in controversy, and the defendant held under color of title which was older than the plaintiff's, and showed title from the government into one with whom plaintiff did not connect himself, the plaintiff could recover only by proof of title by adverse possession. *Warten v. Weatherford*, 191 Ala. 31, 67 So. 667.

Right of Action and Defenses.—*Ward v. Moore*, 180 Ala. 403, 61 So. 302. See the title EJECTMENT, § 7 (3), vol. 5, p. 264.

Conveyance Executed While Land Adversely Held.—Plaintiff, suing in its own name, can not recover if any conveyance in its chain of title prior to the enactment of Code 1907, § 3839, was executed while the land was adversely held. *First Nat. Bank v. Johnson*, 190 Ala. 566, 67 So. 234.

§ 8. — Adverse Possession.

One claiming prior possession under color of title can recover in ejectment against a trespasser, but when defendant, not a trespasser, holds under color of title, and shows title out of the government in a party with whom plaintiff does not connect himself, plaintiff can not recover merely on strength of previous possession under color of title. *Nance v. Walker* (Ala.), 74 So. 339.

Where defendants showed no title against remainder, except that acquired by adverse possession against preceding life estate given to same persons, and ten years had not elapsed since termination of life estate, they could not recover in

ejectment. *Kidd v. Cruse* (Ala.), 76 So. 59.

Where the common ancestor was in possession under claim of title and on a vendor's lien foreclosure plaintiff's ancestor acquired the right of such common ancestor, it was sufficient to support a common-law action of ejectment as against defendants claiming under the same common ancestor until they show a better right. *Perolio v. Woodward Iron Co.*, 197 Ala. 197, 73 So. 197.

§ 11. — Equitable Title.

The legal title must prevail in ejectment: there being no question of right of possession as against such title. *Nolen v. Powell* (Ala.), 64 So. 566.

Where a trustee, in a deed of trust to convey on the grantor's death property to a beneficiary, made no conveyance to the beneficiary, but attempted to exercise a power to sell to pay debts, the beneficiary could not maintain ejectment against the trustee's purchaser because the beneficiary was without title necessary to maintain ejectment. *Stewart v. Cross*, 184 Ala. 166, 63 So. 956.

§ 13. — Title from Common Source.

In ejectment, where both parties claim from a common source of title, neither party can deny the title of such source, nor need title be traced beyond such source. *Perolio v. Woodward Iron Co.*, 197 Ala. 197, 73 So. 197; *Davis v. Brandon* (Ala.), 75 So. 908.

Prior Conveyance to Plaintiff's Grantor by Defendant's Remote Grantor. — Instruction in ejectment that, if heirs of former owner conveyed to plaintiff's grantor before their deed to defendant's grantor, defendant's grantor acquired no title, and could not convey any, was proper. *Carter v. Tennessee Coal, etc., R. Co.*, 180 Ala. 367, 61 So. 65.

A foreign corporation, not complying with the law, can not pass title to a grantee to authorize him to maintain ejectment against a title holder, whose title also passed through the foreign corporation. *Alabama White Marble Co. v. Eureka White Marble Quarries*, 190 Ala. 595, 67 So. 505.

§ 14. Prior Possession of Plaintiff.

Plaintiff in ejectment, who does not

show title either by deed or adverse possession, can recover only by showing prior possession in some one of his grantors. *Hicks v. Burgess*, 185 Ala. 584, 64 So. 290.

As against persons merely shown to be in possession, plaintiff in ejectment, claiming title by deed from N., who is claimed to have inherited the property from L., is not entitled to recover; he never having had possession, and it not appearing that L. ever had or claimed title or possession, or that N. ever had title or possession. *Holder v. Bain*, 185 Ala. 590, 64 So. 292.

Necessity as against Trespasser.—A plaintiff in ejectment or in statutory ejectment may recover against a trespasser on proof of prior possession, though not in actual possession when the trespasser entered. *Birmingham Fuel Co. v. Boshell*, 190 Ala. 597, 67 So. 403.

One who had prior possession of land under color of title could recover in ejectment against one subsequently entering as a trespasser, and not under color of title, though she was not in possession when such other party took possession, unless she had abandoned the land with an intention not to return. *Vidmer v. Lloyd*, 184 Ala. 153, 63 So. 943.

Color of title depending upon conveyance of persons who had no actual title and no possession will not give plaintiff in ejectment constructive possession. *Hicks v. Burgess*, 185 Ala. 584, 64 So. 290.

§ 15. Right of Plaintiff to Possession.

To recover in ejectment, or the corresponding statutory real action, plaintiff must show his right to possession of the land at the commencement of the suit and up to the time of the trial. *Roman v. Lentz*, 194 Ala. 610, 69 So. 827.

§ 16. Ouster or Disseisin, or Other Acts of Defendant.

Ouster.—Plaintiffs in ejectment must show that they or one of their predecessors in the title was ousted from possession by the defendant. *Stewart Bros. v. Ransom* (Ala.), 76 So. 70.

§ 19. Defenses.

§ 20. — In General.

Where the person through whom de-

defendants claimed title only had a life estate, and died before ejectment was brought by the reversioners, defendants' title had terminated, so that they could not defend against plaintiffs' title. *Nolen v. Powell* (Ala.), 64 So. 566.

§ 21. — Adverse Possession.

In common-law ejectment the plaintiff's right of recovery is dependent on a legal title in a person in whom a demise is laid, and is not defeated by proof that defendant was in adverse possession of the land at the time another person in whom a demise was laid conveyed to plaintiff. *Perolio v. Woodward Iron Co.*, 197 Ala. 197, 73 So. 197.

§ 22. — Title or Right of Possession of Third Person.

§ 22 (1) In General.

A defendant can not defeat a recovery by plaintiff in ejectment or in the statutory ejectment by proving possession by a third person prior to the possession of plaintiff where he does not connect himself with the prior possession. *Birmingham Fuel Co. v. Boshell*, 190 Ala. 597, 67 So. 403.

§ 22 (2) Right to Show Outstanding Title.

Defendants Entering in Good Faith under Color of Title.—There being evidence that defendants in ejectment entered on the land in good faith, under color of title, as purchasers from parties in possession, they have a right to set up an outstanding title to defeat the action. *Swindall v. Ford*, 184 Ala. 137, 63 So. 631.

If defendant in ejectment acquired possession peaceably in good faith under color of title from a grantor then in possession, she could offer evidence of an outstanding title in a third person, with which she did not connect herself, unless plaintiffs established title by adverse possession. *Reynolds v. Trawick* (Ala.), 78 So. 827.

Trespasser.—One who entered upon the land in controversy under a deed which did not give him even color of title thereto is a mere trespasser and can not show an outstanding title in his grantor by adverse possession to defeat ejectment. *Southern Iron, etc., Co. v. Stowers*, 189 Ala. 314, 66 So. 677.

§ 22 (3) What Constitutes Outstanding Title in General.

Stockholder in Corporation Having Right of Possession.—*Hunnicut v. Head*, 179 Ala. 567, 60 So. 831. See the title EJECTMENT, § 22 (3), vol. 5, p. 278.

§ 23. — Equitable Defenses in General.

In General.—*Cranford Mercantile Co. v. Anderton*, 179 Ala. 573, 60 So. 874. See the title EJECTMENT, § 23 (1), vol. 5, p. 281.

What Constitutes Equitable Defense.—

In ejectment, a defense that defendant's predecessor obtained an equity in the land by an attempted purchase from the estate of which he was administrator and paying the consideration therefor is not available. *Snow v. Bray* (Ala.), 73 So. 542.

§ 27. Abatement on Death of Party.

Under Code 1907, §§ 2496, 2497, and 2499, actions to try title or to recover possession of lands on the death of the plaintiff survives in favor of the heirs, as well as the personal representative. *State v. Pearce*, 14 Ala. App. 628, 71 So. 636.

An action by several plaintiffs in ejectment or in nature thereof does not abate on death of one of plaintiffs, but may be revived on suggestion of death and proceed in name of survivor. *Southern R. Co. v. Hayes* (Ala.), 73 So. 945.

§ 28. Successive Actions.

Plaintiff in Second Action Proving Only Prior Possession.—*Hale v. Chandler*, 180 Ala. 391, 61 So. 885. See the title EJECTMENT, § 28, vol. 5, p. 283.

II. JURISDICTION, PARTIES, PROCESS AND INCIDENTAL PROCEEDINGS.

§ 32. Parties Plaintiff.

§ 35. — Joinder.

While each may separately maintain ejectment, the heirs and personal representatives of a deceased owner can not join in a single action of ejectment. *Randolph v. Hubbert*, 190 Ala. 610, 67 So. 416.

III. PLEADING AND EVIDENCE.

§ 43. Declaration, Complaint, or Petition.

§ 45. — Description of Property.

Where, in ejectment complaint, the de-

scription of the property sued for is too uncertain to be made the basis for a judgment, no recovery can be had. *Wilder v. Campbell*, 197 Ala. 179, 72 So. 385.

Description by Name, Quantity and Tract.—*Singleton v. Jackson*, 177 Ala. 123, 59 So. 45. See the title EJECTMENT, § 45, vol. 5, p. 287.

Description—Held Sufficient.—A complaint in ejectment for land described held sufficient as to description, within the rule that, when the complaint gives sufficient data from which a definite description of the lands may be obtained, as for instance by a survey, and enables the sheriff to definitely know the land so that he may place plaintiff in possession in the event of a recovery, it is sufficient. *Jones v. Wild*, 186 Ala. 540, 65 So. 349.

Description Held Insufficient.—Where the complaint in ejectment described the land involved as 25 feet, more or less, on the east side of a specified lot, without giving its boundaries or otherwise describing the strip, the use of the words "more or less" made the complaint fatally defective, as the sheriff could not definitely locate the strip, and hence the general charge requested by defendant was improperly refused. *Roden v. Capehart*, 185 Ala. 579, 64 So. 590.

§ 48. **Plea, Answer, and Disclaimer.**

§ 49. — **Form and Requisites in General.**

In a common-law action of ejectment, the plea of not guilty is equivalent to the consent rule, which requires the defendant, as a condition to controverting the lessor's title, to admit the truth of the fictitious averments of lease, entry, and ouster. *Perolio v. Woodward Iron Co.*, 197 Ala. 197, 73 So. 197.

Several or Inconsistent Defenses.—*Howard v. Martin*, 181 Ala. 613, 62 So. 99; *Jeffreys v. Jeffreys*, 183 Ala. 617, 62 So. 797. See the title EJECTMENT, § 49, vol. 5, p. 289.

§ 51. — **Disclaimer.**

Effect of Disclaimer of Possession.—Where defendant disclaimed possession, such plea admitted plaintiff's title with a denial of defendant's possession and no question of title was ligatable. *Wade v. Gilmer*, 186 Ala. 524, 64 So. 611.

Suggestion as to Boundary Dispute.—Under Code 1907, § 3843, defendant in ejectment may set up a plea of disclaimer and suggest to the court that the suit arose over a disputed boundary line. *Roden v. Capchart*, 195 Ala. 29, 70 So. 756.

In ejectment held that, under Code 1907, § 3843, relating to disclaimer, suggestion to the court that boundary dispute is involved should point out the true boundary line. *Smith v. Bachus*, 195 Ala. 8, 70 So. 261.

Disclaimer as to Portions of Premises.—*Howard v. Martin*, 181 Ala. 613, 62 So. 99. See the title EJECTMENT, § 51, vol. 5, p. 291.

Disclaimer of Mineral Rights.—Where defendant in ejectment disclaimed the mineral rights because they were reserved by his grantor, and plaintiff made no claim to the minerals apart from his claim to the surface, possession of which was awarded to defendant, plaintiff was not entitled to judgment for the mineral rights disclaimed by defendant. *Martin v. Howard*, 193 Ala. 477, 68 So. 982.

§ 55. **Amended and Supplemental Pleadings.**

The court may permit defendant to withdraw his plea of not guilty and file a disclaimer with suggestion that the issue is a disputed boundary. *Oliver v. Oliver*, 187 Ala. 340, 65 So. 373.

Amendment of Disclaimer.—Code 1907, § 5367, providing that amendments adding matter which could have been included in the pleading shall be allowed while the cause is in progress without costs or delay, unless injustice will be done to the opposite party, authorizes the amendment of a disclaimer in ejectment at the trial just before the case is submitted to the jury, though a disclaimer is not strictly pleading. *Martin v. Howard*, 193 Ala. 477, 68 So. 982.

Amendment as to Description.—In ejectment plaintiff is during trial properly allowed under Code 1907, § 5367, to amend his complaint so as to more specifically describe the land in suit. *Roden v. Capchart*, 195 Ala. 29, 70 So. 756.

§ 56½. **Motions for Judgment on Pleadings.**

Defendant's disclaimer in ejectment

suit, filed as permitted by Code 1907, § 3843, was an admission of plaintiff's title, with denial of defendant's possession, and where issue is not joined on this plea, plaintiff is entitled to judgment. *Pennington v. Mixon* (Ala.), 74 So. 238.

§ 57. Issues, Proof, and Variance.

§ 58. — Issues in General.

Under Code 1907, § 3843, where defendant in ejectment disclaimed and suggested a disputed boundary line, plaintiff having contested the disclaimer, the only issues are the location of such line, and plaintiff's affirmance of defendant's possession. *Roden v. Capehart*, 195 Ala. 29, 70 So. 756.

Where, in ejectment, defendant disclaimed possession and pleaded that the real matter in controversy was the location of a boundary line, the only litigable question was the place where the boundary line was located. *Wade v. Gilmer*, 186 Ala. 524, 64 So. 611.

Where, in ejectment, defendant disclaimed possession and suggested that the suit was over a disputed boundary line, and plaintiff joined issue, the sole question presented was defendant's possession vel non of the land sued for. *Wade v. Gilmer*, 186 Ala. 524, 64 So. 611.

Plea of Not Guilty.—In ejectment a plea of not guilty as to the lands lying west of a certain line raised every issue, except that of "since last continuance." *Smith v. Bachus*, 195 Ala. 8, 70 So. 261.

§ 59. — Necessity of Proof of Title Pleaded.

No issue of title or adverse possession is triable in ejectment, where defendant files disclaimer and suggests a boundary dispute as permitted by Code 1907, § 3843. *Pennington v. Mixon* (Ala.), 74 So. 238.

§ 61. — Evidence Admissible under Pleadings.

Defendant in ejectment has the option to set up matter appropriate to a special plea of puis darrein continuance by such plea, or to present the same matter under the general issue. *Roman v. Lentz*, 194 Ala. 610, 69 So. 827; *Burnett v. Roman*, 192 Ala. 188, 68 So. 353.

§ 63. Presumptions and Burden of Proof.

§ 63 (½) In General.

Remaindermen suing in ejectment after

the death of the life tenant, to establish their prima facie right to recover, must show the death of the life tenant, that they were the remaindermen created by the deed, and that the grantor was in possession of the lands when the deed was made, or show a regular chain of title to them from a grantor in possession or from the government. *Smith v. Bachus*, 195 Ala. 8, 70 So. 261.

Where several demises of the land are laid in the complaint in ejectment, each lessor is presumed to have consented to the action and to the use of his or her title by the nominal plaintiff. *Perolio v. Woodward Iron Co.*, 197 Ala. 197, 73 So. 197.

As to Exception in Deed.—Plaintiff in ejectment, who had purchased an entire tract except a part previously conveyed to another, must prove the extent of the exception since he must recover on the strength of his own title and not on the weakness of defendants. *Southern Iron, etc., Co. v. Stowers*, 189 Ala. 314, 66 So. 677.

The burden is on plaintiff in ejectment, never in actual possession, to show the land is within the description in his deed, and not on defendants, who entered under color of title, to show it was within the exception. *Swindall v. Ford*, 184 Ala. 137, 63 So. 651.

§ 63 (2) Title.

Plaintiff Must Show Title.—Plaintiff, in ejectment, must show that he has the legal title to the land sued for. *Jones v. Wild*, 186 Ala. 540, 65 So. 349.

To show a prima facie right of recovery plaintiff must introduce a regular chain of title back to some grantor in possession, or to the government. *Ashurst v. Arnold-Henegar-Doyle Co.* (Ala.), 78 So. 386.

Where one brings ejectment to recover land which he has purchased on execution sale, he has the burden of showing that the defendant in the execution had title to the land. *Prestwood v. Horn*, 193 Ala. 450, 70 So. 134.

Where the plaintiff in ejectment relies upon a conveyance from another, there must be evidence that at the time of the conveyance the grantor had the legal title.

McMillan v. Aiken, 189 Ala. 330, 66 So. 624.

Same—By Remaindermen.—To maintain ejectment after the death of a life tenant, remaindermen must show title by introducing the deed creating the remainder. *Smith v. Bachus*, 195 Ala. 8, 70 So. 261.

Same—Degree of Proof.—In ejectment plaintiff need not prove title beyond reasonable doubt. *Landers v. Hayes*, 196 Ala. 533, 72 So. 106.

Presumption in Aid of Title.—Where, in ejectment, there was evidence that in 1858 a patentee obtained a patent from the United States government, that in 1861 a third person conveyed by warranty deed the land under which one of the parties showed title, and the evidence show that the patentee and the third person and his grantee were the only persons in possession, the court must presume that the patentee executed a deed to the third person, so as to form a complete chain of title. *Birmingham Fuel Co. v. Boshell*, 190 Ala. 597, 67 So. 403.

Prima Facie Evidence of Title.—In ejectment proof by plaintiff that she was the only child of a decedent, who was the sole heir of the admitted owner of the land, deceased, made a prima facie case, and, where defendant relied upon a break in the transmission of the title by descent, the burden was on him to show it. *Landers v. Hayes*, 196 Ala. 533, 72 So. 106.

Same—Possession.—Although possession is prima facie evidence of title in ejectment and may be sufficient to support recovery, yet when it is shown that the true title is in another, the intentment in favor of the possession ceases. *Stewart Bros. v. Ransom* (Ala.), 76 So. 70.

Adverse Possession.—*Carter v. Tennessee Coal, etc., R. Co.*, 180 Ala. 367, 61 So. 65. See the title EJECTMENT, § 63 (2), vol. 5, p. 296.

§ 63 (3) Possession or Right to Possession.

In ejectment, where plaintiff relied upon the prior possession of his grantors, the burden of proving such possession was upon him. *Hicks v. Burgess*, 185 Ala. 584, 64 So. 290.

§ 64. Admissibility of Evidence.

§ 65. — In General.

Evidence Regarding Land Not in Controversy.—*Hunnicut v. Head*, 179 Ala. 567, 60 So. 831. See the title EJECTMENT, § 65, vol. 5, p. 297.

§ 66. — Identity and Description of Property.

In ejectment for land embraced in "River Margin" granted city's predecessor by Act Cong. May 26, 1824, evidence as to the location of store-houses, corner stones, and trees, tending legitimately to locate land, and testimony that land was part of "River Margin," were competent. *Hughes v. Tuscaloosa*, 197 Ala. 592, 73 So. 90.

In statutory ejectment, plaintiff's evidence, tending to show that what were designated as lots 1 and 2 in block B on map known as T. addition to town of Mountainboro, were taxed, known, dealt with, and held by parties as lots 1 and 2 in block B, in such town, was admissible to identify property. *Thrasher v. Royster* (Ala.), 78 So. 222.

§ 67. — Title and Right to Possession.

§ 67 (1) In General.

Admission by Grantor before Conveyance.—In ejectment by heirs against adverse possessor, it was proper for plaintiffs to show declarations of one of defendant's grantors inconsistent with any claim of rights by such grantor hostile to the title of the heirs, etc., of plaintiffs' ancestor. *Street v. Shaddix*, 197 Ala. 446, 73 So. 73.

Prior Possession of Vendor.—It being possession, but of which, when plaintiff received from F. a deed including it, S. was in possession, whether S. entered by oral permission of F., or, succeeding to the possession of M., was in possession before F. bought of C., which possession of M. and S., if S. succeeded to M.'s possession, might have given title by adverse possession, defendant, notwithstanding F. testified for plaintiff that S. entered by permission of F., was entitled to introduce testimony that S. did not so enter, but, before F.'s purchase, succeeded to M.'s possession, and that during the possession of M. and S. no one but them claimed to own the land; the credibility

of all the witnesses being for the jury. *Swindall v. Ford*, 184 Ala. 137, 63 So. 651.

Newspaper Advertisements.—In ejectment, where both parties claimed from a common grantor, defendant under a sale from the executor of the common grantor, it was error to permit plaintiff to introduce in evidence newspaper advertisements of the executor's sale, purporting to show that the land in controversy was excepted. *Kyle v. Jordan*, 187 Ala. 355, 65 So. 522.

Relevant Evidence.—In ejectment against person claiming under a deed from plaintiff, evidence as to value of the land held relevant on the question of fraud. *Butler v. Hill*, 190 Ala. 576, 67 So. 260.

Immaterial Evidence.—In ejectment, where defendants claimed under a deed of plaintiff's grantee executed in August, 1910, evidence that such grantee was in possession in March, 1911, was immaterial. *Gilley v. Denman*, 185 Ala. 561, 64 So. 97.

That one under whom plaintiff claimed, who had no color of title, undertook to convey part of the premises other than that part in controversy, was immaterial. *Haley v. Miller*, 193 Ala. 482, 69 So. 564.

Rejection Held Harmless.—Evidence offered by plaintiffs in ejectment of acts of ownership of persons from whom they asserted no title, does not benefit them, and its rejection works no injury. *Stewart Bros. v. Ransom* (Ala.), 76 So. 70.

Admission Held Reversible Error.—In ejectment, admitting testimony by plaintiff's brother and sister that they claim no interest in the property is reversible error. *Snow v. Bray* (Ala.), 73 So. 542.

§ 67 (2) Grant, Conveyance, or Deed.

In General.—*Jeffreys v. Jeffreys*, 183 Ala. 617, 62 So. 797; *Ashford v. McKee*, 183 Ala. 620, 62 So. 879. See the title EJECTMENT, § 67 (2), vol. 5, p. 301.

Deeds in General.—In ejectment a deed describing a large body of land in such a way that any uncertainty in the description was capable of being made certain by monuments designated therein was admissible. *Mulder v. Stokes*, 184 Ala. 195, 63 So. 563.

Where the cross-examination of defendant in ejectment, who had filed a dis-

claimer with suggestion that the issue was a disputed boundary line, showed that he bought the land from a third person, there was no error in subsequently admitting the deed from the third person. *Oliver v. Oliver*, 187 Ala. 340, 65 So. 373.

In ejectment raising the question of boundary where there was no evidence amounting in law to adverse possession by the predecessors in title of defendant whose own title was obtained in 1906, defendant's deed which only showed that the boundary was certain land which unquestionably belonged to plaintiff held properly excluded. *Jones v. Wild*, 186 Ala. 540, 65 So. 349.

Commissioner's Deed.—In statutory ejectment, that lands are embraced in petition for sale for division between joint owners, and in report of sale by commissioner, in absence of order of sale and order of confirmation, does not authorize introduction of commissioner's deed to plaintiff in evidence over due objection. *Pettit v. Gibson* (Ala.), 77 So. 703.

Conveyance Establishing Common Source.—A defendant in ejectment may, to show that he and plaintiff claimed through a common source, introduce in evidence conveyances under which plaintiff claims, establishing the common source. *Birmingham Fuel Co. v. Boshell*, *Boshell*, 190 Ala. 597, 67 So. 403.

Where defendant in ejectment denies that he claims from the common source, plaintiff may show that he does so claim by introducing in evidence deeds connecting him with the common source, though the evidence proves that defendant's title is worthless. *Birmingham Fuel Co. v. Boshell*, 190 Ala. 597, 67 So. 403.

§ 67 (5) Mortgage.

In ejectment a mortgage given by the grantee of a patentee to the guardian of defendant's ancestor in title was admissible, where a deed from the grantee of the patentee recited the giving of a mortgage to such guardian. *Lyon Co. v. Crane* (Ala.), 75 So. 366.

§ 67 (6) Fraudulent Conveyances.

In ejectment between grantees and the grantor's wife, who claimed under her homestead rights, evidence that deed was executed to hinder, delay, or defraud

grantor's creditors is immaterial. *Love v. Lee* (Ala.), 75 So. 24.

§ 69. Weight and Sufficiency of Evidence.

§ 72. — Title and Right to Possession.

§ 72 (1) In General.

In General.—*Ashford v. McKee*, 183 Ala. 620, 62 So. 879. See the title EJECTMENT, § 72 (1), vol. 5, p. 304.

Prima Facie Case.—Where plaintiff in ejectment shows possession of his grantors, and deeds from them to him conveying the strip in dispute, he makes out a prima facie case against any one not showing superior title. *Kilpatrick v. Trotter*, 185 Ala. 546, 64 So. 589.

A defendant suing in ejectment makes out a prima facie case by showing that her husband was grantee of a grantor in possession of the land under claim of ownership, and the husband's possession until his death and conveyance to the widow by the husband's heirs. *Tidwell v. McCluskey*, 191 Ala. 38, 67 So. 673.

A person's possession of land under a bona fide claim of ownership at his death is prima facie proof of title to such land and presumptively vests the legal title in his heirs. *Perryman v. Wright*, 189 Ala. 351, 66 So. 648.

In statutory ejectment evidence as to prior actual possession by plaintiff held insufficient to make prima facie case. *West v. Chandler* (Ala.), 77 So. 674.

In suit in nature of ejectment, evidence of title held sufficient to establish prima facie right of recovery in plaintiff. *Ashurst v. Arnold-Hlenegar-Doyle Co.* (Ala.), 78 So. 386.

Proof of Prior Constructive Possession — Statutory Provisions. — The rule that proof of prior constructive possession authorizes recovery in statutory ejectment when supported by the paramount legal title was not changed by the broadening of the form of the complaint effected by Code 1896, § 1530, to permit an allegation either of prior possession or of legal title. *Veitch v. Hard* (Ala.), 75 So. 405.

§ 72 (3) Descent or Devise.

Where plaintiff in statutory ejectment showed he was one of the heirs at law of his parents, and had been excluded from

the common inheritance by his defendant brother, he made a prima facie showing of his tenancy in common, throwing the burden on defendant to bring forward evidence of a conveyance to him to justify such exclusion. *McCleery v. McCleery* (Ala.), 75 So. 316.

Where plaintiff in ejectment claimed title through a widow, alleged to have acquired title under the homestead laws on the death of her husband, defendant's evidence that the husband bequeathed the land to those under whom defendant claimed, and that the widow never dis-sented therefrom or disputed the title of the devisees, but treated them as the owners of the fee pursuant to the will, showed title in defendant. *Wylie v. Flowers*, 191 Ala. 36, 67 So. 980.

§ 73. — Possession and Ouster.

In ejectment, evidence held insufficient to show that plaintiff's grantors had ever had possession. *Hicks v. Burgess*, 185 Ala. 584, 64 So. 290.

IV. TRIAL, JUDGMENT, ENFORCEMENT OF JUDGMENT, AND REVIEW.

§ 80. Direction of Verdict.

When Proper.—In ejectment an affirmative charge for defendant was warranted where evidence showed that plaintiff had no right or title superior to that shown through regular course to be in defendant. *Rosebrook v. Martin* (Ala.) 76 So. 950.

Where defendant in ejectment offers no evidence, and plaintiffs show that the person under whom they claimed as heirs was in possession under a bona fide claim of ownership at his death, affirmative instructions should have been given for plaintiffs. *Perryman v. Wright*, 189 Ala. 351, 66 So. 648.

When Improper.—Where evidence in ejectment does not clearly show that part of a lot was included in the description in the complaint, or was held by defendants, general affirmative charge for plaintiffs was error. *Reynolds v. Trawick* (Ala.), 78 So. 827.

In ejectment by several plaintiffs who claimed as children of life tenant and as remaindermen, when there was evidence that one of them was not the life tenant's

child, it was error to give general affirmative charge, since all the plaintiffs in ejectment must recover. *Reynolds v. Trawick* (Ala.), 78 So. 827.

Same—Conflicting Evidence.—Where the evidence was conflicting as to the possession of the land in dispute, the general affirmative charge was properly refused. *Mulder v. Stokes*, 184 Ala. 195, 63 So. 563.

Where the evidence was in dispute as to whether the deed under which plaintiff claimed was ever delivered, it was error to give the affirmative charge for plaintiff; but the case was for the jury. *Justice v. Hopkins*, 185 Ala. 553, 64 So. 555.

Description in Complaint of Land Other than Claimed.—*Hunnicut v. Head*, 179 Ala. 567, 60 So. 831. See the title EJECTMENT, § 80, vol. 5, p. 308.

§ 81. Instructions.

Adverse Possession.—Where, in statutory ejectment, defendant relied on adverse possession of ten years under color of title, a requested charge which did not hypothesize adverse possession by defendant at the time of the execution of a mortgage relied on by plaintiff was properly refused. *Ballard v. Bank*, 187 Ala. 335, 65 So. 356.

Color of Title.—In ejectment, where plaintiff without paper title attempted unsuccessfully to show title by adverse possession, defendant was entitled to the general charge covering so much of the land as his prior color of title and possession related to. *Warter v. Weatherford*, 191 Ala. 31, 67 So. 667.

Disputed Boundaries.—In ejectment where the rights of the parties depended on the location of the line between their coterminous properties, it was not error to charge the jury to find for defendant if they found the boundary to be as claimed by him, although there was formal suggestion of a disputed boundary line under the provisions of Code 1907, § 3843. *Martin v. Howard*, 193 Ala. 477, 68 So. 982.

Instruction Properly Refused.—In ejectment, a request to charge that, if defendant's grantor was not in actual possession when he deeded the land to defendant, the jury should find for plaintiff

was properly refused, since defendant's grantor on the day he made such deed may not have been in possession, and yet defendant on the next day, the land being vacant, may have entered and taken possession as a purchaser, in which event the fact that his grantor was not in possession would be immaterial. *Riley v. Fletcher*, 185 Ala. 570, 64 So. 85.

Misleading Instructions—Burden of Proof.—In ejectment against a person who, plaintiffs claimed, held under a deed from the husband of their ancestor made after her death, where there was evidence tending to show that she was in possession under color of title at the time of her death, an instruction that the burden was on plaintiffs to prove that their ancestor held the legal title, and that certain deeds to her did not prove that she had such legal title, should have been refused as misleading, since her possession under color of title was sufficient to enable her to recover against one not showing a superior title, and to enable her husband to take a life interest in the land, and the deeds in connection with such possession showed such a title. *Vidmer v. Lloyd*, 184 Ala. 153, 63 So. 943.

Instructions Improperly Refused.—In ejectment, instruction that, if defendant entered and claimed under deeds from the husband of plaintiff's ancestor, who had no rights except through his wife, he was estopped to deny such ancestor's title held improperly refused. *Vidmer v. Lloyd*, 184 Ala. 153, 63 So. 943.

Same—Application to Evidence.—In ejectment against a person claiming under an alleged deed from plaintiff, where there was evidence tending to show that plaintiff's consent to the execution of a deed to defendant, instead of a will in his favor, was induced by fraudulent misrepresentations, and, under the evidence, the perfection and effectuation of this change was, if affected with fraud, a necessary result of a wrong caused by the concurrence of misconduct of defendant and the justice of the peace who took plaintiff's acknowledgment of the deed, it being asserted by plaintiff that she neither signed nor authorized the signing of the deed, instructions that the justice's certificate, in the absence of proof of fraud, was suffi-

cient proof of the voluntary execution of the deed and raised a presumption of its validity, it could only be impeached by proof of a fraudulent combination between defendant and the justice, and that it raised a presumption of validity which could only be rebutted by clear proof of fraud, duress, or imposition practiced on plaintiff, in which the justice and defendant participated, were erroneously refused. *Butler v. Hill*, 190 Ala. 576, 67 So. 260.

Where there was evidence that defendant claimed under deeds from the husband of plaintiff's ancestor, an instruction to find for plaintiffs if the parties claimed from a common source, if plaintiffs acquired title by descent and devise, and if defendant purchased from such husband, held improperly refused. *Vidmer v. Lloyd*, 184 Ala. 153, 63 So. 943.

§ 82. Verdict and Findings.

§ 82 (1) Requisites and Sufficiency in General.

Where the complaint in ejectment and the disclaimer defined properly the land in controversy, a verdict responding to that issue is certain and definite. *Martin v. Howard*, 193 Ala. 477, 68 So. 982.

§ 82 (3) Designation or Description of Property.

In General.—*Rowe v. Goetchius*, 180 Ala. 381, 61 So. 330. See the title EJECTMENT, § 82 (3), vol. 5, p. 311.

Verdict in ejectment, describing boundary as commencing at stake set by a certain man, can not be said to be so unserviceable as to effect an otherwise sufficient verdict. *Pennington v. Mixon* (Ala.), 74 So. 238.

Verdict Held Insufficient.—*Rowe v. Goetchius*, 180 Ala. 381, 61 So. 330. See the title EJECTMENT, § 82 (3), vol. 5, p. 312.

§ 82 (5) Responsiveness to Issues.

Verdict in ejectment, allowing recovery of certain lands, held not to define the boundary line, which was the sole issue involved, defendant having disclaimed possession and suggested a boundary dispute as permitted by Code 1907, § 3843. *Pennington v. Mixon* (Ala.), 74 So. 238.

A verdict in ejectment on the statutory

suggestion of disputed boundary which merely designates a named surveyor's line as the true boundary does not sufficiently respond to the issue; but a verdict which also finds for defendant on his disclaimer supports a judgment in his favor in the absence of any objection by plaintiff. *Oliver v. Oliver*, 187 Ala. 340, 65 So. 373.

§ 83. Judgment.

§ 84. — Form and Requisites in General.

Description of Property Held Insufficient.—While in ejectment involving a disputed boundary a verdict designating the true boundary line by the name of the surveyor does not respond to the issue, where in ejectment to recover land described as the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of a government section, defendant pleaded not guilty as to the land lying west of a line claimed by him to be the true line, and the verdict found for plaintiff for "all of the land sued for, to wit, S. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$," and further found that the C. and C. survey was the true line, a judgment that plaintiffs recover the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ was not erroneous, though that part of the judgment declaring the C. & C. line to be the true line was indefinite and afforded no sufficient guide to the sheriff in the premises. *Smith v. Bachus*, 195 Ala. 8, 70 So. 261.

In an ejectment for 80 acres of land described in § 12, there was a verdict for the plaintiff "for the land sued for, to wit," and then specifically describing land in other sections, and a judgment following the verdict, for the land sued for. Held, that although a verdict merely for the land sued for, or as described in the complaint, and a judgment containing a similar recital, would be upheld by reference to the complaint, the phrase "to wit" generally means to particularize what is too general in the preceding sentence, and to render clear and of certain application what might otherwise be doubtful or obscure, to call attention to more particular specification of what has preceded, so that the verdict was a finding for the land specifically described

therein and not for that described in the complaint, and a judgment following the verdict was without support in the complaint and invalid. *Spears v. Wise*, 187 Ala. 346, 65 So. 786.

Description Held Sufficient.—Judgment in statutory ejectment, which referred to a count of the complaint, and specifically described the property as set forth in such count, which count sought recovery for "part of lots known as lots 1 and 2 in block B, in the town of Mountainboro, which lies south of the line between the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{2}$ of § 20, township 10, range 5 east, and the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of § 20, township 10 range 5 east," was not insufficient in its description of the land. *Thrasher v. Royster* (Ala.), 78 So. 222.

§ 86. — Operation and Effect.

At Common Law.—*Hale v. Chandler*, 180 Ala. 391, 61 So. 885. See the title EJECTMENT, § 86, vol. 5, p. 314.

§ 87. Execution and Enforcement of Judgment.

§ 88. — In General.

Injunction to Restrain. — *Johnson v. Johnson*, 182 Ala. 376, 62 So. 706. See the title EJECTMENT, § 88, vol. 5, p. 315.

§ 92. Costs.

Where defendant in ejectment in which

there was no controversy as to the minerals apart from the surface amended his disclaimer at the trial so as to include the minerals under the surface claimed by him because such minerals were reserved by his grantor, plaintiff is not entitled to judgment for costs, where the delay in making the amendment did not result in any additional costs. *Martin v. Howard*, 193 Ala. 477, 68 So. 982.

The only effect of successfully contesting a disclaimer in ejectment is to impose costs and damages on the unsuccessful disclaimant. *Wade v. Gilmer*, 186 Ala. 524, 64 So. 611.

V. DAMAGES, MESNE PROFITS, IMPROVEMENTS, AND TAXES.

§ 94 $\frac{1}{2}$. Evidence as to Damages, Rents or Profits.

Rental Value.—In ejectment jury could look to proof as to character and value of the land as an aid in determining its rental value, as to which there was direct evidence also. *Landers v. Hayes*, 196 Ala. 533, 72 So. 106.

§ 100. Set-Off of Improvements or Taxes against Damages or Mesne Profits.

Statutory Suggestion Necessary Precedent to Judgment Over.—*Singleton v. Jackson*, 177 Ala. 123, 59 So. 45. See the title EJECTMENT, § 100, vol. 5, p. 323.

ELECTION OF REMEDIES.

- § 1. Nature and Grounds in General.
- § 2. Inconsistency of Alternative Remedies.
- § 4. Necessity for Election.
- § 11. Operation and Effect.

Cross References.

See the title ELECTION OF REMEDIES, vol. 5, p. 325, and references there given.

§ 1. Nature and Grounds in General.

Application of Principle—Two Inconsistent Remedies.—To make a case for the application of the principle by which a party concludes himself by an election between remedies, he must have actually at command two inconsistent remedies. *Todd v. Interstate Mortg., etc., Co.*, 196 Ala. 169, 71 So. 661.

§ 2. Inconsistency of Alternative Remedies.

Acts Constituting Election—Right to Attack. — In an action by a creditor against a debtor, whose voluntary conveyance of land to four of his children for life, with remainder to their children, was void as to the creditor, but valid as to every one else, J., one of the grantees, executed a bond which the debtor was required to furnish as a condition of a continuance. Judgment having been recovered after the debtor's death, and an execution returned unsatisfied, the creditor, instead of proceeding in equity to subject the land to the payment of the judgment, issued execution against the obligors on the bond, and purchased the land at the sale. Though the debtor had children other than the grantees, the creditor claimed through J. an undivided one-fourth interest in the land. Held, that the cred-

itor had elected not to avoid the debtor's conveyance, and hence acquired only the life interest of J., as she could not claim both under and against such conveyance. *McCurdy v. Kenan*, 185 Ala. 183, 64 So. 578.

Waiver of Mortgage Lien—Right in Detinue.—That a chattel mortgagee sued the mortgagor at law on the mortgage debt and levied on his interest in the property but without satisfaction of the debt, held not a waiver of the mortgage lien, nor a defense to the mortgagee's right to recover the property in detinue. *Logan v. Smith Bros. & Co.*, 9 Ala. App. 459, 63 So. 766, certiorari denied in *Ex parte Logan*, 185 Ala. 525, 64 So. 570.

§ 4. Necessity for Election.

Actions Arising from Breach of Contract.—When party repudiates a contract, injured party may elect to pursue one of the several remedies; but, as these remedies carry a different measure of relief, they can not be concurrently pursued. *Mutual Loan Soc. v. Stowe* (Ala. App.), 73 So. 202.

§ 11. Operation and Effect.

Election Irrevocable. — Election made between inconsistent rights can not be revoked. *Alexander v. Mobile Auto Co.* (Ala.), 76 So. 944.

ELECTIONS.

III. Election Districts or Precincts and Officers.

§ 16. Defects in Appointment, Ineligibility, or Disqualification of Officers.

IV. Qualification of Voters.

§ 24. Payment of Taxes.

V. Registration of Voters.

§ 28. Necessity of Registration.

§ 31½. Time for Registration.

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§ 33½a. Right to Vote of Persons Not Registered.

IX. Contests.

§ 61. Nature and Form of Remedy.

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§ 79½. — Re-Examination of Ballots and Recount.

§ 81. Review.

Cross References.

See the title ELECTIONS, vol. 5, p. 334, and references there given.

As to amendment setting up new grounds of contest to petition in a stock law election contest, see ante, ANIMALS. As to reviewability on mandamus of decision of governor or petition for election for removal of county seat, see post, MANDAMUS.

III. ELECTION DISTRICTS OR PRECINCTS AND OFFICERS.

§ 16. Defects in Appointment, Ineligibility, or Disqualification of Officers.

The incompetency of a clerk and an inspector officiating at an election is not a ground for contesting the election, where it does not affect the result. *State v. Thomas*, 181 Ala. 665, 62 So. 504. See the title ELECTIONS, § 16, vol. 5, p. 337.

IV. QUALIFICATION OF VOTERS.

§ 24. Payment of Taxes.

Registration—Estoppel from Claiming Poll Tax Exemption.—The acceptance of

a voter by the registrars as one qualified for registration is an ascertainment that he is 21 years of age, and, although he had not reached his majority at the time of registration, yet if he votes he is estopped from claiming exemption for payment of poll taxes. *Shepherd v. Sartain*, 185 Ala. 439, 64 So. 57.

Same—Refusal to Accept—Excuses for Nonpayment.—The refusal of the collector to accept payment of a poll tax when tendered does not excuse nonpayment; the voter being bound, if necessary to protect his legal rights, by coercive legal process. *Shepherd v. Sartain*, 185 Ala. 439, 64 So. 57.

Poll Taxes—Absence from State.—The

poll tax levied upon male inhabitants of the state by Const. 1901, § 194, and Code 1907, § 2074, does not cease upon a temporary absence from the state, and hence a voter subject to payment of the poll tax, who leaves the state for any length of time without acquiring a legal residence in a foreign state, must pay poll taxes accruing during the period of his absence as a prerequisite to legally voting. *Shepherd v. Sartain*, 185 Ala. 439, 64 So. 57.

Same—Place of Payment.—In view of Const. 1901, § 259, and Code 1907, § 1769, providing that all poll taxes shall be applied to the support of the public schools in the counties where collected, a poll tax must be paid in the county in which the voter legally resides at the time it is due. *Shepherd v. Sartain*, 185 Ala. 439, 64 So. 57.

Same—Payment by Another.—Evidence that a voter sent the amount of his poll tax to be paid by another is no evidence of payment. *Shepherd v. Sartain*, 185 Ala. 439, 64 So. 57.

Same—What Voters Must Show under Code 1907, § 2061.—Under Code 1907, § 2061, subd. 6, exempting from poll tax all persons permanently disabled whose taxable property does not exceed \$500, the voter exhibiting the disability must show that the disability began before the tax became due and that his taxable property did not exceed \$500 at that time. *Shepherd v. Sartain*, 185 Ala. 439, 64 So. 57.

Same—Excuse for Nonpayment.—The failure of a voter to pay a poll tax is not excused by reason of the collector's advice or any one's advice that such tax is not due. *Shepherd v. Sartain*, 185 Ala. 439, 64 So. 57.

V. REGISTRATION OF VOTERS.

§ 28. Necessity of Registration.

Change of Residence from One County to Another.—Under Const. 1901, § 187, providing that the board of registrars in each county shall file a complete list of all persons registered, and Code 1907, §§ 316, and 320, respectively, declaring that no person registered as an elector shall again be required to register unless his place of residence is changed, and that

any elector who has changed his place of residence shall be registered on application on production of his certificate, a registered voter, who changes his legal residence from one county to another, must register in the county of his new residence in order to entitle him to vote therein. *Shepherd v. Sartain*, 185 Ala. 439, 64 So. 57.

Return from Foreign Residence—New Qualifications Necessary.—When a registered voter, who abandoned his residence in the state and acquired a legal residence in a foreign state, returns, he can not again vote in the state until he has qualified by a new period of residence and a new registration as prescribed by law for an original registration. *Shepherd v. Sartain*, 185 Ala. 439, 64 So. 57.

§ 31½. Time for Registration.

Under Registration Law (Acts 1915, p. 244, § 15), a qualified citizen can be registered as a voter between November 15th and January 5th, and registration after January 5th is forbidden. *State v. Herring*, 196 Ala. 455, 71 So. 679; *State v. Davison*, 196 Ala. 453, 71 So. 678.

§ 33½. Conclusiveness and Effect in General.

The registration books and lists prepared and kept by the county board of registrars are conclusive as to the fact of the registration of those voters whose names affirmatively appear. *Shepherd v. Sartain*, 185 Ala. 439, 64 So. 57.

§ 33½a. Right to Vote of Persons Not Registered.

The registration books and lists are conclusive that voters, whose names do not appear thereon, are not registered voters and not entitled to vote unless their registration is evidenced by certificate issued as provided by law. *Shepherd v. Sartain*, 185 Ala. 439, 64 So. 57.

IX. CONTESTS.

§ 61. Nature and Form of Remedy.

Wholly Statutory.—*Scheuing v. State*, 177 Ala. 162, 59 So. 160. See the title ELECTIONS, § 61, vol. 5, p. 160.

§ 62. Constitutional and Statutory Provisions.

Laws 1911, p. 195, amending Code 1907,

§ 470, so as to give the circuit court jurisdiction over an election contest as to the office of sheriff, and repealing conflicting laws and going into effect immediately, enacted pending a sheriff election contest before the judge of probate as authorized by Code 1907, § 471, terminates the contest, notwithstanding Const. 1901, § 95, providing that, after suit has been commenced on any "cause of action," the legislature may not take away such cause of action or destroy any existing defense, since a "cause of action" comes into existence when there is an invasion of a legal right without justification or sufficient excuse, while an "action" is a means of redress of the legal wrong described by the words "cause of action" and a "cause of action" within the constitution comprehends only causes of action arising out of the violation of vested rights, and does not include the right to a public office; a "public office" being a personal public trust created for the benefit of the state without any element of property. *Scheuing v. State*, 177 Ala. 162, 59 So. 160.

§ 63. Grounds.

Acts 1911, p. 348, § 18, provides that it shall be unlawful for any candidate for office in a city governed by commissioners under the act to give or promise to any person any office, position, employment, or benefit for influencing or obtaining political support or for any candidate to furnish hacks, automobiles, or other vehicles to bring voters to the polls on election day, and that any violation of the act shall be a misdemeanor punishable by a fine, and shall be ground for removal from office. Section 25, p. 351, makes it unlawful for any candidate for commissioner or any other person in his behalf to agree to hire or pay any person to solicit votes at the polls on election day or to solicit votes for any commissioner, and that any person violating the section shall be guilty of a misdemeanor and punishable by a fine, and the candidate violating the section shall be disqualified for and rendered ineligible for the office sought. Held, that violation of either of such provisions by a candidate for the office of commis-

sioner of a city was not ground for a contest to the benefit of the opponent of the commissioner elected and so charged. *Watters v. Lyons*, 188 Ala. 525, 66 So. 436.

§ 65. Persons Entitled to Bring Proceedings.

Where the canvassing board denied the election of a federal office holder to a state office, the court can not, as a condition precedent to considering his contest, require him to file a declaration of his purpose to vacate his federal office if successful. *Shepherd v. Sartain*, 185 Ala. 439, 64 So. 57.

§ 66. Jurisdiction.

Scheuing v. State, 177 Ala. 162, 59 So. 160. See the title ELECTIONS, § 66, vol. 5, p. 346.

§ 74. Evidence.

§ 74½. — Presumptions and Burden of Proof.

Registration Books and Lists.—The registration books and lists prepared and kept by the county board of registrars are presumptive evidence of the qualifications of voters whose names appear thereon. *Shepherd v. Sartain*, 185 Ala. 439, 64 So. 57.

Change of Legal Residence.—Where a voter moves away from an existing domicile and acquires a home in another place, it will be presumed that he has changed his legal residence. *Shepherd v. Sartain*, 185 Ala. 439, 64 So. 57.

Invalidity of Vote.—The burden of showing invalidity of a vote received by the election managers is upon him who assails it. *Shepherd v. Sartain*, 185 Ala. 439, 64 So. 57.

Poll Tax Records—Presumption of Tax Payment.—Where the general tax record showing poll tax payments kept by tax collectors prior to the enactment of the statute requiring separate poll tax records does not affirmatively show that a voter has paid his poll tax, it will be presumed that such tax has not been paid. *Shepherd v. Sartain*, 185 Ala. 439, 64 So. 57.

Presumption of Age from Registration.—Nothing appearing to the contrary, it will be presumed, where the records

only show that a voter registered as 45 years of age in a stated year, that he became 45 at the earliest day consistent with the record recitals, as, if he registered as 45 in July, it will be presumed that he reached that age before October of the previous year. *Shepherd v. Sartain*, 185 Ala. 439, 64 So. 57.

Duplicated Poll Tax — Omitted Payment.—Where the records show the payment by a voter of his poll taxes for a series of years with a single exception and also the payment of two taxes for one year, it will be presumed that one of the duplicated payments was intended for the omitted year, and it will be treated as paid. *Shepherd v. Sartain*, 185 Ala. 439, 64 So. 57.

Registration—Presumption of Age of Voter.—Where the records only show that a voter registered as 21 in a stated year, it will be presumed that he came of age and registered after the 1st day of October of that year if the registration books are judicially known to have been open thereafter. *Shepherd v. Sartain*, 185 Ala. 439, 64 So. 57.

Poll Tax Receipt Stubs Not Showing Payment.—Where poll tax receipt stubs kept by the tax collectors for each year, as required by Code 1907, § 2075, are presumptive evidence of the facts recited by them, and, where they do not show that a voter has paid his poll tax, it will be presumed that such tax has not been paid. *Shepherd v. Sartain*, 185 Ala. 439, 64 So. 57.

§ 75. — Admissibility in General.

Where in a stock law election contest no witness claimed his privilege to refuse to testify as to how he voted, held error to exclude question inquiring of witnesses whether they voted for or against the stock law. *Dennis v. Chilton County*, 192 Ala. 146, 68 So. 889.

§ 76. — Weight and Sufficiency.

The reception of a vote by the elec-

tion managers establishes its validity prima facie. *Shepherd v. Sartain*, 185 Ala. 439, 64 So. 57.

Certificate of Probate Judge.—The certificate of the probate judge as to whether the registration records and poll tax records show registration or payment of poll taxes is prima facie evidence. *Shepherd v. Sartain*, 185 Ala. 439, 64 So. 57.

§ 78. Scope of Inquiry and Powers of Court or Board.

§ 79½. — Re-Examination of Ballots and Recount.

Under Code 1907, § 473, providing that in all election contests the judge or chancellor may examine the ballots so far as he deems necessary, the trial judge may examine the ballots before the evidence is all in, and without waiting for evidence of the legality of ballots shown by the records to be only prima facie illegal; the only persons possibly injured being the voters whose right to secrecy might be violated. *Shepherd v. Sartain*, 185 Ala. 439, 64 So. 57.

§ 81. Review.

Finding on Viva Voce Testimony.—In an election contest case, a finding of the trial court on viva voce testimony will not be disturbed on appeal unless so manifestly against the weight of the evidence that a judge at nisi prius would set aside a verdict of the jury rendered on the same testimony. *Shepherd v. Sartain*, 185 Ala. 439, 64 So. 57.

Permanent Disability—Abuse of Statute.—The ascertainment of the existence of a permanent disability, excusing a voter from payment of poll taxes, is a question peculiarly for the trial court, and its conclusion will not be disturbed unless it appears that the exemption statute has been abused. *Shepherd v. Sartain*, 185 Ala. 439, 64 So. 57.

ELECTRICITY.

- § 1. Statutory and Municipal Regulations.
- § 1½. Electric Companies.
- § 1½a. — Franchises and Privileges in General.
- § 3. Supply of Electricity, Power, or Light.
- § 4. Injuries Incident to Production or Use.
- § 6. — Care Required in General.
 - § 6 (1) In General.
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- § 7. — Licensees and Trespassers.
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 - § 8 (1) In General.
 - § 8 (2) Insulation of Wires.
 - § 8 (2½) Prevention of Contact between Different Wires or Conductors.
 - § 8 (3) Inspection and Knowledge of Defects or Dangers.
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- § 9. — Companies and Persons Liable.
- § 10. — Contributory Negligence.
 - § 10 (1) In General.
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- § 11. — Actions.
 - § 11 (1) Pleading.
 - § 11 (2) Presumptions and Burden of Proof.
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 - § 11 (4½) Questions for Jury—In General.
 - § 11 (4½a) — Insulation of Wires.
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 - § 11 (7) — Contributory Negligence.
 - § 11 (8) Instructions and Verdict and Findings.

Cross References.

See the title **ELECTRICITY**, vol. 5, p. 354, and references there given.
In addition, see post, **TRIAL**.

§ 1. Statutory and Municipal Regulations.

Insulation of Arc Lights.—A municipality may, within its police power, enact ordinances requiring the insulation of the metal portion of arc lights, provided they are reasonable regulations. *Briggs v. Birmingham R., etc., Co.*, 188 Ala. 262, 66 So. 95.

Ordinance Requiring Maintenance of Guard Wires.—*Birmingham R., etc., Co.*

v. Cockrum, 179 Ala. 372, 60 So. 304, cited in notes in 52 L. R. A., N. S., 597, 605. See the title **ELECTRICITY**, § 1, vol. 5, p. 355.

§ 1½. Electric Companies.

§ 1½a. — Franchises and Privileges in General.

A foreign corporation organized to produce and supply to the public light, heat, power, and any other thing to

which electricity or other form of energy is now, or may hereafter be applied, has authority to construct, maintain, and operate utilities, plants, and machinery to generate electricity by means of water power artificially created, and to transmit electric power so generated. *Alabama Interstate Power Co. v. Mt. Vernon-Woodberry Cotton Duck Co.*, 186 Ala. 622, 65 So. 287.

§ 3. Supply of Electricity, Power, or Light.

Duties and Liabilities in General.—

It is the duty of a company duly chartered to furnish electric current for domestic consumption, within a reasonable time after due application and compliance with its reasonable regulations, to extend its lines and furnish service, failing which it is liable to the applicant for proximate pecuniary loss. *Birmingham R., etc., Co. v. Littleton (Ala.)*, 77 So. 565.

Public service electric corporations are obliged to treat all members of the public which they hold themselves out as serving fairly and without discrimination. *Birmingham R., etc., Co. v. Littleton (Ala.)*, 77 So. 565.

The duty of a public service electric corporation to serve the public fairly and without discrimination exists independent of statute. *Birmingham R., etc., Co. v. Littleton (Ala.)*, 77 So. 565.

The duty of a public service electric corporation to serve fairly and without discrimination arises independent of contract with municipality or with the individual. *Birmingham R., etc., Co. v. Littleton (Ala.)*, 77 So. 565.

Demand of Service.—To entitle an applicant to receive electric current from a public service corporation he must ask service at a proper time and place, in proper form and in proper manner. *Birmingham R., etc., Co. v. Littleton (Ala.)*, 77 So. 565.

Prepayment for Service.—An electric power and light company is not bound to furnish current to an applicant in the absence of performance by him of conditions precedent which it may establish, such as tendering prepayment for service. *Birmingham R., etc., Co. v. Littleton (Ala.)*, 77 So. 565.

Damages.—Applicant for electric service to whom service was wrongfully denied could recover cost of wiring his dwelling for reception of the current. *Birmingham R., etc., Co. v. Littleton (Ala.)*, 77 So. 565.

If an electric service company after due application and compliance with regulations wrongfully fails to render service, the prospective customer is entitled to damage for his inconvenience and annoyance by being denied the service. *Birmingham R., etc., Co. v. Littleton (Ala.)*, 77 So. 565.

Reduction in Rates.—An electric lighting company made a ten-year contract with a customer providing that, if it should reduce the general rates for light in the city, the rates in the contract should be reduced in proportion to such reduction. Subsequent reductions were made, and the rate charged the customer accordingly reduced, but it contended for a still lower rate on the ground that, because a few of the larger business concerns in the city received a special rate to the particular contract users. Held, that such was not the case, since "general" and "special" are antonyms, "general" meaning, pertaining to the majority, common to the greatest number, while "special" means pertaining to one or more individuals as distinguished from the class to which they belong. *Steele-Smith Dry Goods Co. v. Birmingham R., etc., Co. (Ala. App.)*, 73 So. 215.

Pleading.—In an action for failure to serve an applicant entitled to electric service, he must allege that defendant was engaged in public service; that he was one whom defendant was bound to serve; that he had performed all reasonable conditions precedent entitling him to that service; that the defendant wrongly refused to furnish the services; and that the plaintiff had thereby been damaged. *Birmingham R., etc., Co. v. Littleton (Ala.)*, 77 So. 565.

In an action for failure to furnish electricity as provided by contract, a complaint failing to aver that the contract was in writing, or that it was executed on plaintiff's part, is subject to demurrer on the ground that it states no con-

sideration. *Birmingham R., etc., Co. v. Littleton (Ala.)*, 77 So. 565.

Complaint that defendant was under contract with plaintiff to furnish electricity and that plaintiff has complied with all the terms thereof, is insufficient, the obligation not necessarily arising out of contract, so that plaintiff should have alleged demand and performance on his part. *Birmingham R., etc., Co. v. Littleton (Ala.)*, 77 So. 565.

Questions for Jury—Existence of Contract.—Whether there was a valid existing contract by which defendant agreed to furnish electric current to plaintiff, held for the jury. *Birmingham R., etc., Co. v. Littleton (Ala.)*, 77 So. 565.

Same — Rescission of Contract.—Whether a contract between plaintiff and defendant by which defendant agreed to furnish electric service was rescinded, held for the jury. *Birmingham R., etc., Co. v. Littleton (Ala.)*, 77 So. 565.

§ 4. Injuries Incident to Production or Use.

§ 6. — Care Required in General.

§ 6 (1) In General.

The degree of care resting upon a municipality operating electric street lights, as to means of transmitting its electric current over public thoroughfares, is high and exacting, commensurate with the very dangerous agency employed. *Bloom v. Cullman*, 197 Ala. 490, 73 So. 85.

§ 6 (2) Dependent on Location of Wires.

Commensurate with Danger. — *Birmingham R., etc., Co. v. Canfield*, 177 Ala. 422, 59 So. 217. See the title *ELECTRICITY*, § 6 (2), vol. 5, p. 356.

§ 7. — Licensees and Trespassers.

In action by a telephone lineman for injuries from contact with defendant electric company's wires, where the only theories upon which defendant's negligence could be grounded were (1) negligence in placing wires or in allowing them to sag, and (2) maintaining them without proper insulation, the doctrine relating to trespassers and licensees had no application. *Dwight Mfg. Co. v. Word (Ala.)*, 75 So. 979.

§ 8. — Defects, Acts, or Omissions Causing Injury.

§ 8 (1) In General.

Charging wire, with knowledge that the telephone company's employees might come in contact with it, is not a breach of duty, unless the wire is improperly located in an improper condition as to insulation. *Dwight Mfg. Co. v. Word (Ala.)*, 75 So. 979.

§ 8 (2) Insulation of Wires.

It is the duty of electric company conveying current of high potential to use reasonable care to keep same properly insulated, wherever it may be reasonably anticipated that persons, pursuing business or pleasure, may come in contact therewith. *Dwight Mfg. Co. v. Word (Ala.)*, 75 So. 979.

That it may be expensive to place proper insulation upon electric wires is no excuse for failure to do so. *Dwight Mfg. Co. v. Word (Ala.)*, 75 So. 979.

§ 8 (2½) Prevention of Contact between Different Wires or Conductors.

If a telephone company erects its wires in dangerous proximity to an electric company's wires, the latter need not remove its wires to safe distance. *Dwight Mfg. Co. v. Word (Ala.)*, 75 So. 979.

If an electric company acquiesces in dangerous proximity of telephone wires to its own, it must keep its wires in such condition as to insure safety to those exposed to immediate contact therewith. *Dwight Mfg. Co. v. Word (Ala.)*, 75 So. 979.

With respect to third persons who may be injured by contact of telephone wires with electric wires, it is the duty of both companies to remedy the dangerous condition, no matter which one primarily caused it. *Dwight Mfg. Co. v. Word (Ala.)*, 75 So. 979.

In an action by a telephone lineman for injuries from contact with defendant electric company's wire, if defendant negligently permitted its wires to sag down on those of the telephone company it was liable. *Dwight Mfg. Co. v. Word (Ala.)*, 75 So. 979.

§ 8 (3) Inspection and Knowledge of Defects or Dangers.

An electric company maintaining dangerous wire through a tree is charged with knowledge that swaying of limbs is likely to abrade the insulation, requiring frequent inspection. *Dwight Mfg. Co. v. Word* (Ala.), 75 So. 979.

Depending on the nearness of a tree with respect to human beings, electric company maintaining dangerous wire through or near the tree is bound to anticipate that persons may lawfully climb tree. *Dwight Mfg. Co. v. Word* (Ala.), 75 So. 979.

§ 8 (4) Proximate Cause of Injury.

A light and power company was liable for breaking a plate glass window while installing a light, if the damage was the proximate result of its negligence or that of its servants within the scope of their duties, not contributed to by negligence of plaintiff or its servants. *Birmingham R., etc., Co. v. Dry Cleaning Co.* (Ala. App.), 77 So. 922.

§ 9. — Companies and Persons Liable.

Danger of Contact between Wires of Different Parties.—*Birmingham R., etc., Co. v. Cockrum*, 179 Ala. 372, 60 So. 304, cited in notes in *Ann. Cas.* 1918C, 919, 921. See the title *ELECTRICITY*, § 9, vol. 5, p. 357.

§ 10. — Contributory Negligence.

§ 10 (1) In General.

Whether a pedestrian's act in touching a chain for lowering an electric light was contributory negligence depended on whether, under all the circumstances, it was the act of a reasonably prudent man. *Bloom v. Cullman*, 197 Ala. 490, 73 So. 85.

Duty to Know and Avoid Danger.—Telephone lineman injured by contact with defendant electric company's wires was negligent although he did not know that he could come in contact with wires, and that they would injure him, where he failed to exercise ordinary care to discover and avoid danger. *Dwight Mfg. Co. v. Word* (Ala.), 75 So. 979.

If a pedestrian on a public street, warned or having reason to know that a chain used to lower a municipal elec-

tric light was charged with electricity from feed wires, carelessly touched the chain, he was negligent barring recovery for his death. *Bloom v. Cullman*, 197 Ala. 490, 73 So. 85.

Unnecessarily Touching Live Wire.—*Decatur Light, etc., Co. v. Newsom*, 179 Ala. 127, 59 So. 615. See the title *ELECTRICITY*, § 10 (1), vol. 5, p. 357.

If a pedestrian on a public street undertook to improve an electric light by shaking the chain, not knowing the chain was charged with electricity, and having no knowledge that would deter a reasonably prudent man from touching it, or if he had recently done so, or had seen others do so in safety, his touching the chain was not negligence barring recovery for his death. *Bloom v. Cullman*, 197 Ala. 490, 73 So. 85.

Defense—Wanton or Willful Injury.—In an action for death of plaintiff's intestate from contact with live wire, contributory negligence is no defense to a count of the complaint charging wanton or willful injury. *Birmingham R., etc., Co. v. Jackson* (Ala.), 73 So. 627.

§ 10 (2) Reliance on Care of Owner of Wire.

One using the streets of a city is entitled to assume that an electric light company had complied with the ordinance requiring the insulation of the exposed portions of arc lights, and hence is not guilty of contributory negligence because of bringing a high metal engine into a place where it accidentally came in contact with an uninsulated arc light through which a deadly current of electricity passed. *Briggs v. Birmingham R., etc., Co.*, 188 Ala. 262, 66 So. 95.

§ 10 (3) Precautions against Injury.

Conduct after Being Warned.—Where a servant of a cement company, while putting up steel handrails, having been warned by the chief electrician of the cement company that if he touched certain power wires with the steel pieces it would kill him, as there were 22,000 volts on the line, in reversing a section of the handrail that it might be properly put in place, touched the power line, and was killed, he was guilty of contributory negligence, relieving the power company

from liability for his death. *Dorough v. Alabama Power Co. (Ala.)*, 76 So. 963.

§ 11. — Actions.

§ 11 (1) Pleading.

Stating Cause of Action for Negligence. — *Birmingham R., etc., Co. v. Cockrum*, 179 Ala. 372, 60 So. 304. See the title ELECTRICITY, § 11 (1), vol. 5, p. 357.

Wanton Injury.—Where, in an action for death of plaintiff's intestate by contact with a heavily charged electric wire, permitted by defendant's servants to remain hanging in the street, a count of the complaint alleged that decedent's death was caused by the wanton or willful conduct of defendant, its agents or servants, as "aforesaid," such allegation did not change the count to one in trespass, charging actual participation by defendant in the act complained of; it not being an independent charge, but merely ascribing such act to have been done "as aforesaid," referring the allegation to the facts particularized in the former part of the count. *Birmingham R., etc., Co. v. Jackson*, 9 Ala. App. 588, 63 So. 782.

Negligence in Leaving Live Wire Exposed.—In action against a light and power company, a count of the complaint setting up simple negligence of defendant, by its servants acting in the line or scope of their employment, in leaving a live wire exposed on the public streets of a city, with which plaintiff's intestate came into contact and was killed, held not subject to the demurrer interposed. *Birmingham R., etc., Co. v. Jackson (Ala.)*, 73 So. 627.

Liability on Account of Pole in Sidewalk.—*Barranco v. Birmingham R., etc., Co.*, 178 Ala. 647, 59 So. 467. See the title ELECTRICITY, § 11 (1), vol. 5, p. 357.

Liability for Maintaining Adjacent Line.—Where plaintiff's intestate was found dead, his body lying across a broken electric light wire, counts of the complaint against defendant telegraph company charging that it, with knowledge or notice of the proximate location of the electric light wires, negligently constructed or maintained a guy

wire attached to one of its poles in such dangerous proximity to one of the electric light wires that by vibration of the wires from natural causes the guy wire came in contact with and fused the light wire, causing it to fall and be down on the surface of the street, and further charging that the light company maintained poles and lighting wires in line with those of defendant company, and defendant, with knowledge of the facts, negligently erected and maintained one of its poles in such close proximity to the light wires that the latter came in contact with and vibrated against one of defendant's poles, thereby causing the heavily charged wire to break and fall to the earth, stated a good cause of action, and were not demurrable. *Western Union Tel. Co. v. Jones*, 190 Ala. 70, 66 So. 691.

Liability for Proximity of Wires of Different Companies.—In an action by a telephone lineman for injuries from contact with defendant electric company's wires, the count based upon the dangerous proximity of the electric wires to those of the telephone company was deficient and subject to demurrer in the absence of an averment that defendant "placed" and maintained its wire in the dangerous proximity complained of. *Dwight Mfg. Co. v. Word (Ala.)*, 75 So. 979.

Contributory Negligence.—In action by telephone lineman for injuries from contact with defendant electric company's wire, defendant's plea of contributory negligence, reciting that the wires of the telephone company were strung about two feet below the wire of defendant, and plaintiff negligently came in contact with defendant's wire or wires by climbing a tree and going above the wires of the telephone company for a distance of about two feet, and negligently came in contact with the wires of defendant, which were in open view to plaintiff, and were known by him to be strung along said tree at the time, was sufficient under the facts shown by the complaint. *Dwight Mfg. Co. v. Word (Ala.)*, 75 So. 979.

Variance.—In an action by a telephone lineman for injuries from contact with

defendant electric company's wires, a count charging that defendant negligently allowed its wire to sag down among the wires of the telephone company was not supported by proof that defendant's wires sagged down to twelve or more inches above the telephone wires, "among" meaning in the midst of or mingled with. *Dwight Mfg. Co. v. Word* (Ala.), 75 So. 979.

§ 11 (2) Presumptions and Burden of Proof.

Negligence.—Where a person, while turning an electric light on or off, received a shock, whereby he was killed, the doctrine of *res ipsa loquitur* applied. *Athens v. Miller*, 190 Ala. 82, 66 So. 702.

Where a pedestrian in a public street is electrocuted by contact with electric current passing from feed wires to street light communicated to a chain used to raise and lower the light, through some defect in the mechanism owned and controlled by the city, the rule of *res ipsa loquitur* applies. *Bloom v. Cullman*, 197 Ala. 490, 73 So. 85.

Contributory Negligence.—In an action for death of plaintiff's intestate by electric shock from municipal street light, the burden of proving contributory negligence rested upon the city. *Bloom v. Cullman*, 197 Ala. 490, 75 So. 85.

Where plaintiff's intestate was found dead in a public street in a city, his body lying across a broken wire of an electric light company, the doctrine of *res ipsa loquitur* could not be applied against him to raise a presumption of negligence in his coming in contact with the wire, or otherwise contributing to his own death. *Western Union Tel. Co. v. Jones*, 190 Ala. 70, 66 So. 691.

§ 11 (3) Admissibility of Evidence.

Materiality.—*Birmingham R., etc., Co. v. Cockrum*, 179 Ala. 372, 60 So. 304. See the title *ELECTRICITY*, § 11 (3), vol. 5, p. 358.

Negligence of Power Company.—*Birmingham R., etc., Co. v. Cockrum*, 179 Ala. 372, 60 So. 304. See the title *ELECTRICITY*, § 11 (4), vol. 5, p. 358.

Variance.—*Birmingham R., etc., Co. v. Cockrum*, 179 Ala. 372, 60 So. 304. See

the title *ELECTRICITY*, § 11 (4), vol. 5, p. 358.

§ 11 (4½) Questions for Jury—In General.

In an action for death of plaintiff's intestate by coming in contact with a broken electric light wire lying in the street, evidence held insufficient to entitle plaintiff to go to the jury on the negligence of defendant telegraph company in maintaining its line between heavily charged electric light wires, or in maintaining a guy wire, but to entitle plaintiff to go to the jury on the telegraph company's negligence in knowingly maintaining one of its poles in such proximity to one of the light wires that such wire could come in contact with the pole by mere vibration, causing the light wire to break and fall into the street. *Western Union Tel. Co. v. Jones*, 190 Ala. 70, 66 So. 691, cited in note in *Ann. Cas.* 1918C, 919.

Whether a light and power company whose servants broke a plate glass window while installing a light during a storm was answerable as for negligence, held for the jury. *Birmingham R., etc., Co. v. Dry Cleaning Co.* (Ala. App.), 77 So. 922.

§ 11 (4½a) — Insulation of Wires.

In an action for the wrongful death of an engineer in charge of a concrete mixer who was killed by a current of electricity from defendant's arc light, which touched the top of the mixer as it was being moved, the question whether the negligence of the defendant in not insulating the exposed portions of the light as required by ordinance was the proximate cause of such death held, under the evidence, for the jury. *Briggs v. Birmingham R., etc., Co.*, 188 Ala. 262, 66 So. 95.

§ 11 (4½b) — Injuries from Broken or Sagging Wires.

In action against telegraph company for death from light company's live wire, broken off by contact with telegraph company's pole erected near the wire, evidence of the death from the live wire, that for some time the pole had been charred where the vibrating wire would flash and make an arc with it, and that

such wire would, as result of such arcing, break in two, held to carry to the jury the question whether the light wire broke from coming into contact with the pole, and thereby caused death of plaintiff's intestate. *Western Union Tel. Co. v. Jones* (Ala.), 73 So. 470.

§ 11 (5) Prevention of Contact between Different Wires or Conductors.

Question for Jury.—*Birmingham R., etc., Co. v. Canfield*, 177 Ala. 422, 59 So. 217. See the title **ELECTRICITY**, § 11 (5), vol. 5, p. 359.

§ 11 (7) Contributory Negligence.

In action against light and power company for death of plaintiff's intestate, the evidence being conflicting whether intestate came in contact with the live wire while walking along the street in the customary manner, or whether he voluntarily and without cause went to and took hold of the wire, the issue of contributory negligence was for the jury. *Birmingham R., etc., Co. v. Jackson* (Ala.), 73 So. 627.

Whether a pedestrian electrocuted by contact with chain used to lower electric street light operated by city was negligent barring recovery by his personal representative held a question for the jury. *Bloom v. Cullman*, 197 Ala. 490, 73 So. 85.

§ 11 (8) Instructions and Verdict and Findings.

Instructions. — In action against a light and power company, an oral charge defining "wantonness" as "where a person knowingly commits a matter that is wrong" was not open to the objection of failure to charge a knowledge of the sit-

uation where such exception formed a part of a sentence concluding "a person does it * * * with that absolute disregard of the consequences of the act after he has had knowledge of the conditions." *Birmingham R., etc., Co. v. Jackson* (Ala.), 73 So. 627.

Where plaintiffs' intestate was killed by contact with a heavily charged electric wire belonging to defendant, and an action for his death was tried on the issues of wantonness and simple negligence, in which willfulness did not enter, the negligence or wanton act counted on having reference to defendant's leaving the wire exposed and hanging in the street subsequent to its having been broken and becoming detached from its fastening, and not on an averment or proof of negligence or wanton act as to stringing or fastening the wire to prevent its falling into the street, the court erred in refusing to charge that defendant was entitled to a reasonable time after the wire fell to repair or remove it, and if intestate's injury occurred before the expiration of such time, plaintiff could not recover. *Birmingham R., etc., Co. v. Jackson*, 9 Ala. App. 588, 63 So. 782.

In an action for alleged negligent breaking of plate glass window by light company's employees, requested charge that if plaintiff's employees, knowing it to be dangerous, left the place while an awning was down, plaintiff could not recover, was faulty, as pretermittting consideration whether it was the duty of plaintiff's employees to raise the awning. *Birmingham R., etc., Co. v. Dry Cleaning Co.* (Ala. App.), 77 So. 922.

EMBEZZLEMENT.

- § 2. Statutory Provisions.
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Cross References.

See the title EMBEZZLEMENT, vol. 5, p. 360, and references there given.

In addition, see ante, BANKS AND BANKING; CRIMINAL LAW; CORPORATIONS; post, INDICTMENT AND INFORMATION; LARCENY; MASTER AND SERVANT; PRINCIPAL AND AGENT; OFFICERS; WITNESSES.

As to embezzlement by officers of bank generally, see ante, BANKS AND BANKING. As to review of rulings on demurrer to indictment charging embezzlement, see ante, CRIMINAL LAW. As to limitations on prosecutions for embezzlement, see ante, CRIMINAL LAW. As to embezzlement of property of the state in hands of public officers, as trustees of the state, see post, OFFICERS. As to examination of bank examiner in a prosecution for embezzlement of funds of bank, see post, WITNESSES.

§ 2. Statutory Provisions.

Officers and Agents of Bank.—Code 1907, § 6830, declaring offense of embez-

zlement of funds of a bank by an officer, agent, clerk, or servant thereof, is not repealed by Acts 1911, pp. 86, 87, §§ 45, 46,

declaring punishment for various offenses by banker or officer, director, agent or employee of bank; each statute being directed against a distinct, separate offense, entirely different in character, and there being ample field for operation of both. *Kramer v. State* (Ala. App.), 75 So. 185.

§ 3. Element of Offenses.

§ 5. — Intent.

Fraudulent Intent.—Under Code 1907, § 6838, relating to embezzlement by public officers, and declaring a public officer who knowingly converts to his own use or permits another to use any revenue of the state or any county thereof or any money paid into his office or received by him in his official capacity may be convicted as if he had stolen it, a fraudulent intent is not an essential ingredient of the crime. *Ex parte Cowart* (Ala.), 78 So. 879.

§ 6½. — Nature of Property.

Proceeds of checks which belong to state are subject of embezzlement. *Ex parte Cowart* (Ala.), 77 So. 349.

§ 7. — Ownership of Property.

Agent or Bailee of Owner.—The offense of embezzlement by an agent, as defined by Code 1907, § 6828, is complete if the defendant, as agent, embezzled property belonging to some one other than defendant, which came into his hands by virtue of his employment, even though the principal was not the owner of the property, but only the agent or bailee of the owner. *Barr v. State*, 10 Ala. App. 111, 65 So. 197, cited in note in *L. R. A.*, 1916A, 651.

Voluntary Association.—An unincorporated voluntary association of persons, though not a legal entity, and not capable of suing or being sued in their common name, may yet as individuals jointly own personal property and jointly have an agent, bailee, or trustee with respect to that common property. *Peters v. State*, 12 Ala. App. 133, 67 So. 723.

§ 8. — Possession or Custody of Property.

Possession of Deposits.—An officer of a bank charged with the duty of receiving money deposited, on behalf of the

bank, if he appropriated a deposit was guilty of embezzlement, since his possession was in fact possession of the bank. *Kramer v. State* (Ala. App.), 78 So. 719.

§ 9. Capacity or Character in Which Property Is Received or Held.

By Virtue of Office or Employment.—*Gleason v. State*, 6 Ala. App. 49, 60 So. 518. See post, "Embezzlement by Particular Classes of Persons," § 11. See the title EMBEZZLEMENT, § 9, vol. 5, p. 363.

By Virtue of Agency.—*Barr v. State*, 7 Ala. App. 96, 61 So. 40. See the title EMBEZZLEMENT, § 9, vol. 5, p. 363.

By Member of Sunday School.—Under Code 1907, § 6831, that defendant, who embezzled funds of a Sunday school, was a member of the school, would not be a defense if the school gave the possession of the funds to him as agent. *Peters v. State*, 12 Ala. App. 133, 67 So. 723.

§ 10. — Conversion or Appropriation of Property.

§ 10 (1) In General.

Unauthorized Exercise of Ownership.—So far as a conversion is concerned as an element, the unauthorized exercise of right of ownership over the personal goods and chattels of another, to the exclusion of the owner's right, constitutes an embezzlement. *Freeman v. State*, 10 Ala. App. 120, 64 So. 514.

§ 10 (2) By Public Officers or Employees.

Embezzlement as Trustee.—A state officer, converting money coming into his hands by virtue of his office, is guilty of embezzlement as a trustee, although not expressly authorized to receive such money. *Cowart v. State* (Ala. App.), 75 So. 711.

Embezzlement as Bailee.—A state officer, converting money received by him to be held for a specific purpose, or to be delivered to another officer for state use will be guilty of embezzlement as a bailee although having no right to receive such money. *Cowart v. State* (Ala. App.), 75 So. 711, affirmed as to this point and reversed as to others in 77 So. 349.

By State Immigration Commissioner.

—Where state immigration commissioner converted money paid him by landowners for advertisements in a hand-book published by the state, he was guilty of embezzlement as a bailee of the state, since Code 1907, § 831, subd. 3, required landowners to pay the expenses of such advertisements, and § 829 provided for the commissioner's compensation in another manner, and § 828 made the commissioner liable to removal by the state, and publishers of such book were paid out of the state treasury, thus making the commissioner the bailee of the state, and not of the landowners. *Cowart v. State* (Ala. App.), 75 So. 711.

§ 11. Embezzlement by Particular Classes of Persons.

§ 12. — Servants, Clerks and Employees in General.

A mere servant or employee of a company who converts money or property coming into his possession by virtue of his employment is not guilty of embezzlement under Code 1907, § 8828, providing that any officer, agent, or clerk of an incorporated company who embezzles or fraudulently converts, etc., money or property which has come into his possession by virtue of his office or employment must be punished on conviction as if he had stolen it, since only persons holding positions of trust and authority are covered by the statute. *Mehaffey v. State* (Ala. App.), 75 So. 647.

• § 13. — Agents.

Proof Establishing Agency.—The elements of the offense of embezzlement by an agent as defined by Code 1907, § 8828, are established by proof that at the time named in the indictment the defendant was the agent of the named principal, employed to transact business for it, and that he fraudulently converted to his own use money of his principal which came into his possession by virtue of his employment. *Barr v. State*, 10 Ala. App. 111, 65 So. 197, cited in note in L. R. A., 1916A, 651.

"Agent" and "Servant."—Under Code 1907, § 8828, with reference to embezzlement by an "officer, agent or clerk," the

word "agent" is used in its popular sense, and the use of the word "servant" in the alternative with agent rendered the whole count bad on demurrer. *Ex parte State* (Ala.), 76 So. 445.

§ 15. — Corporate Officers or Employees.

Assistant Bank Cashier.—Under Code 1907, § 6830, defining and providing punishment for embezzlement by officers of a bank, one charged, as "assistant cashier," with such crime, is estopped to deny that there was such de jure office, and that he was such de jure or de facto officer, where he accepted election as such from the directors, and so held himself out to the public for eight years, and the state is not required to prove the existence of such office by the by-laws of the bank. *Ex parte State* (Ala.), 77 So. 353.

§ 16. — Public Officers or Employees.

The clerks of the convict department within Code 1907, § 6485, authorizing the appointment of three clerks of the department, charged with the duty of keeping the books and records pertaining to state and county convicts, and such other duties as may be required by the board of inspectors, are "officers" of the state, within § 6838, as amended by Acts 1907, p. 162, punishing embezzlement by public officers. *Lacy v. State*, 13 Ala. App. 212, 68 So. 706.

Immigration Commissioner. — Code 1907, § 6831, providing for punishment for embezzlement by "a bailee or other agent or trustee" of money or property deposited with him, "or which may have come into his possession by virtue of any bailment for any purpose," included embezzlement by immigration commissioner of state funds. *Cowart v. State* (Ala. App.), 75 So. 711.

§ 17. Defenses.

See post, "Persons Liable," § 17½.

Criminal Act of Principal.—It is no defense to a prosecution for embezzlement by an agent that the money embezzled was the proceeds of a sale made by the defendant as agent for a foreign corporation which had not been authorized to do business in the state and whose acts

and contracts were void and criminal under Code 1907, §§ 3642, 3644, 3645, 3653, 6628, 6629. Since such corporation does not forfeit the right to the property by so engaging in business. *Barr v. State*, 10 Ala. App. 111, 65 So. 197, cited in note in *L. R. A.* 1916A, 651.

Embezzlement by Justice of the Peace.—In prosecution of a justice for embezzling fines, defendant could show that fees were due him in cases where state had failed to convict equal to amount of his appropriations and that he had so applied the money. *Corbin v. State* (Ala. App.), 74 So. 729.

§ 17½. Persons Liable.

Benefit to Accused.—If money deposited in a bank was embezzled by others with the assistance and connivance of defendant, the mere fact that he did not receive the fruits of the crime did not exculpate him. *Kramer v. State* (Ala. App.), 78 So. 719.

§ 19. Indictment or Information.

§ 20. — Requisites and Sufficiency in General.

See post, INDICTMENT AND INFORMATION.

Statutory Form.—The form of indictment prescribed for embezzlement by Code 1907, § 7161, form 49, applies only to officers of incorporated banks. *Mehaffey v. State* (Ala. App.), 75 So. 647.

Description of Person.—The first count of an indictment for embezzlement, charging that defendant, being at the time servant, agent, or employee of a corporation, embezzled, etc., and the second count, charging that defendant, being at the time the clerk, agent, or servant of the company, embezzled, etc., were fatally defective, since two of the alternatives in the first and one in the second did not describe a person within the embezzlement statute (Code 1907, § 6828). *Mehaffey v. State* (Ala. App.), 75 So. 647.

§ 23. — Value of Property.

Exactness.—Under Code 1907, § 6843, an indictment charging the embezzlement of about \$15 is sufficient. *Peters v. State*, 12 Ala. App. 133, 67 So. 723.

§ 24. — Ownership of Property.

Sufficient Charge.—Under Code 1907, § 7147, an indictment charging that defendant was the agent, bailee, or trustee of a named Sunday school is sufficient. *Peters v. State*, 12 Ala. App. 133, 67 So. 723.

An indictment held not subject to the objection that it fails to allege that the money embezzled belonged to or was owned by the Sunday school named. *Peters v. State*, 12 Ala. App. 133, 67 So. 723.

Voluntary Association.—Under Code 1907, § 7147, providing that in an indictment for embezzlement it is sufficient to lay the ownership of the property in a voluntary association by giving its common name, without setting out the individuals composing it, an indictment charging that defendant was the agent, bailee, or trustee of a named Sunday school, is sufficient. *Peters v. State*, 12 Ala. App. 133, 67 So. 723.

§ 26. — Capacity or Character in Which Property Was Received or Held.

As Agent or Clerk.—*Gleason v. State*, 6 Ala. App. 49, 60 So. 518. See the title EMBEZZLEMENT, § 26, vol. 5, p. 369.

Agent of Corporation.—Under Code 1907, § 6828, providing that any officer, agent, or clerk of an incorporated company, who embezzles any money which has come into his possession by virtue of his office or employment, must be punished on conviction as if he had stolen it, and indictment charging that defendant, who was at the time "the agent or servant" of telegraph company, a corporation, did embezzle, etc., was fatally defective, by reason of the alternative averment "or servant," since an indictment by unequivocal averments must charge every essential element of the offense, while that defendant is an officer, agent, or clerk of an incorporated company is one of the essential elements of the offense sought to be charged. *Collins v. State* (Ala. App.), 76 So. 413.

§ 29. — Issues, Proof and Variance.

Agent of Sunday School.—Evidence showing that defendant obtained the possession of funds of a Sunday school from its superintendent, and not the

school, held a variance, where the indictment charged embezzlement by an agent of the Sunday school. *Peters v. State*, 12 Ala. App. 133, 67 So. 723.

Agent of Superintendent.—Where, under an indictment for embezzlement by the agent, bailee, or trustee of a Sunday school, the evidence showed that on resignation of the treasurer the superintendent took the money turned in and gave it to defendant, who was the secretary, to hold until a treasurer was appointed, and it was converted before any action by the Sunday school, constitutes a fatal variance, as defendant was the agent of the superintendent. *Peters v. State*, 12 Ala. App. 133, 67 So. 723.

Proof of Other Offenses.—One who is indicted under Code 1907, § 6828, for the embezzlement of money which came into his hands by virtue of his employment as an agent of a corporation, may be convicted if the evidence establishes the material elements of that offense, even though it might also establish the offense of embezzlement by a bailee as defined by Code 1907, § 6831. *Barr v. State*, 10 Ala. App. 111, 65 So. 197, cited in note in *L. R. A.* 1916A, 651.

Sufficiency of Proof.—Before a justice can be convicted of embezzlement under Code 1907, § 6838, all material elements of the offense must be alleged and proven, namely, that defendant was a notary public and ex officio justice of the peace, that he received money in his official capacity, and he knowingly converted it, and that the conversion was unlawful. *Corbin v. State* (Ala. App.), 74 So. 729.

Name of Corporation.—Variance between the indictment and proof as to name of the corporation, property of which was charged to have been embezzled, is fatal. *Speaker v. State* (Ala. App.), 75 So. 178.

"Officer"—"Employee."—Indictment under Code 1907, § 6830, declaring the offense of embezzlement of funds of a bank by officer, agent, clerk, or servant thereof, charging defendant as officer, when he was merely employee, he can not be convicted thereunder. *Kramer v. State* (Ala. App.), 75 So. 185.

§ 33. Weight and Sufficiency of Evidence.

Intent—Agent.—To sustain conviction of embezzlement by an agent it must be shown beyond a reasonable doubt that accused was the agent charged with receiving money or property of his principal, that he did receive it in the course of his employment, and that, knowing it was not his own, he converted to his own use or the use of another than the true owner. *Kramer v. State* (Ala. App.), 78 So. 719.

§ 34. Trial.

§ 35. — Questions for Jury.

Fraudulent Conversion by Employee.—Where the jury could find from the state's evidence that accused was the agent or in the employment of another, that a barrel of turpentine came into his possession by virtue of his employment, and that he fraudulently converted it, it was the court's duty to submit the question of his guilt to the jury. *Freeman v. State*, 10 Ala. App. 120, 64 So. 514.

Embezzlement of Fines by Justice.—The fact that a justice accused of embezzling fines did not make settlement as required, by law, although a strong circumstance upon the question of his guilt, was for the jury's consideration. *Corbin v. State* (Ala. App.), 74 So. 729.

Bank Officer.—Evidence held to present jury question whether accused was guilty of embezzlement of money deposited with him as an officer of the bank. *Kramer v. State* (Ala. App.), 78 So. 719.

§ 36. — Instructions.

See ante, CRIMINAL LAW.

§ 36 (1) In General.

Conformity to Evidence and Issues.—In a prosecution for embezzlement, where there was evidence tending to connect another as an accomplice, the defendant's requested charges that unless there was evidence showing to a moral certainty that he did not account for money received from a third person he was not guilty, and that the jury must find that the money paid by such third person was neither accounted for by defendant to such accomplice or to the state, were properly refused. *Lacy v.*

State, 13 Ala. App. 267, 69 So. 244.

§ 36 (2) Intent.

Subsequent Intent.—Barr v. State, 7 Ala. App. 96, 61 So. 40, cited in note in L. R. A. 1916A, 651. See the title EMBEZZLEMENT, § 36 (2), vol. 5, p. 375.

Fraudulent Intent.—In prosecution under Code 1907, § 6831, for embezzlement as bailee or trustee of the state, charge that if defendant knowingly used money belonging to the state he would be guilty was erroneous, as omitting the essential ingredient of fraudulent intent. Ex parte Cowart (Ala.), 78 So. 879.

§ 36 (3) Conversion or Appropriation of Property.

Actual Delivery of Money.—In a prosecution for embezzlement of funds of a Sunday school, an instruction that the jury must believe beyond a reasonable doubt that the Sunday school as a body

placed the money in defendant's hands is properly refused, as misleading the jury to think that it was necessary to a conviction that they believe that the Sunday school physically placed the money in defendant's hands. Peters v. State, 12 Ala. App. 133, 67 So. 723.

Duplicity, Larceny and Conversion. — On a trial for embezzlement, an instruction that defendant must be tried on the evidence, and the evidence alone, and that unless the evidence, and the evidence alone, satisfied the jury beyond all reasonable doubt that defendant knowingly converted certain money, he could not be convicted, was properly refused, where the indictment charged a larceny as well as a conversion of the money, as it would have restricted the basis for a conviction to the conversion of the funds. Ex parte Lacy, 195 Ala. 668, 70 So. 272.

Emblements.

See ante, CROPS; post, MORTGAGES; VENDOR AND PURCHASER.

Embracery.

See the title EMBRACERY, vol. 5, p. 376.

Emergency.

See ante, CARRIERS; post, MASTER AND SERVANT; NEGLIGENCE; RAILROADS; STREET RAILROADS.

EMINENT DOMAIN.

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See the title EMINENT DOMAIN, vol. 5, p. 381, and references there given.

In addition, see ante, APPEAL AND ERROR; CONSTITUTIONAL LAW; post, RAILROADS; STREET RAILROADS; TELEGRAPHS AND TELEPHONES.

I. NATURE, EXTENT, AND DELEGATION OF POWER.

§ 1. Nature and Source of Power.

The power of eminent domain is an attribute of the sovereignty of the state, and is absolute except as restrained by the constitution. *Alabama Interstate Power Co. v. Mt. Vernon-Woodberry Cotton Duck Co.*, 186 Ala. 622, 65 So. 287.

§ 2. Distinction between Eminent Domain and Other Powers.

§ 2 (8) Regulations Relating to Highways and Streets.

Forcing Private Owners to Work Animals on Road.—*Toone v. State*, 178 Ala. 70, 59 So. 665. See the title EMINENT DOMAIN, § 2 (2), vol. 5, p. 382.

Police Power—Trees Interfering with Sewer.—Cutting down by city of trees interfering with its sewage system was an exercise of its police power, and not an exercise of power of eminent domain, within Const. 1901, § 235. *Birmingham v. Graves (Ala.)*, 76 So. 395.

§ 2 (3) Regulations Relating to Railroads.

What Constitutes Entry for Survey.—Code 1907, § 3493, authorizing railroads, etc., to enter land to make preliminary surveys, etc., is based on the sovereign power to take, injure, or destroy the property of others through its appropriation and devotion to a public use. *Dancy v. Alabama Power Co. (Ala.)*, 73 So. 901.

§ 3. Constitutional Provisions.

Equal Protection of Laws—Legislative Classification.—A statute conferring the power of eminent domain is not invalid

as creating an illegal discrimination between members of the same class, merely because it does not permit the condemnation of rights and property of cotton factories necessary for their operation. *Alabama Interstate Power Co. v. Mt. Vernon-Woodberry Cotton Duck Co.*, 186 Ala. 622, 65 So. 287.

Authority of Legislature.—Const. 1901, § 23, prohibiting abridgment of the right of eminent domain, or such construction as to prevent the legislature from taking the property of corporations and subjecting them to public use in the same manner as the property of individuals, did not deprive the legislature of power to enact Code 1907, § 3867, exempting property already devoted to public use from condemnation except when actually necessary. *Louisville, etc., R. Co. v. Western Union Tel. Co.*, 195 Ala. 124, 71 So. 118.

§ 5. Delegation of Power.

§ 6. — Construction and Operation of Legislative Acts in General.

Powers of Unincorporated Partnerships.—Under Code 1907, § 3485, providing that mining, manufacturing, power and quarrying companies may acquire lands by condemnation for certain purposes, the power of eminent domain can not be exercised by an unincorporated partnership. *Sloss-Sheffield Steel, etc., Co. v. O'Rear (Ala.)*, 76 So. 57.

Grounds of Attack on Statute.—The validity of a statute conferring the power of eminent domain for the taking of property for a public use and prescribing compensation therefor may be attacked only

on the ground that the statute on its face is too indefinite or uncertain to be administered, or that it illegally discriminates between members of the same class. *Alabama Interstate Power Co. v. Mt. Vernon-Woodberry Cotton Duck Co.*, 186 Ala. 622, 65 So. 287.

How Construed.—Statutes delegating power of eminent domain must be strictly construed in favor of owner of property. *Ensign Yellow Pine Co. v. Hohenberg (Ala.)*, 75 So. 897.

"Mode" of Proceeding — Construction of Statute.—Since the rule of strict construction is applicable, Code 1907, § 3860, relating to eminent domain does not grant the right to condemn, but only prescribes the "mode" of proceeding, where the right to condemn has been in fact conferred or delegated. *Sloss-Sheffield Steel, etc., Co. v. O'Rear (Ala.)*, 76 So. 57.

§ 7. — To Private Corporations.

Dam and Power Sites—Validity of Statute.—Code 1907, § 3627 et seq., authorizing corporations to condemn dam and power sites for water power, but declaring that they may not condemn a private residence, nor the outhouses, gardens, or orchards within the curtilage, for a substation site or for rights of way for transmission lines, and shall have no power to condemn lands, hydraulic structures, water, or water rights of any cotton factory at any point on the same water course in actual and prior use by it for the operation of its plant, but may condemn the lands, hydraulic structures, water rights of such cotton factory in excess of what is in use or may be used at normal stages for the operation of its plant, is not invalid on the ground of indefiniteness for failing to define or describe the subjects which may be condemned. *Alabama Interstate Power Co. v. Mt. Vernon-Woodberry Cotton Duck Co.*, 186 Ala. 622, 65 So. 287.

What May Be Condemned—Statutes.—The subjects of condemnation specified by Code 1907, § 3627 et seq., empowering corporations to condemn dam and power sites for the production of water power, are all properties or easements within the classes or characters of subjects of ownership, which the state may make

subject to appropriation for a public use. *Alabama Interstate Power Co. v. Mt. Vernon-Woodberry Cotton Duck Co.*, 186 Ala. 622, 65 So. 287.

Exercise of Power by Foreign Corporations.—The state may authorize a foreign corporation lawfully empowered to promote a public use to exercise the power of eminent domain, and may confer the right to take the property of a corporation already condemned under the power of eminent domain. *Alabama Interstate Power Co. v. Mt. Vernon-Woodberry Cotton Duck Co.*, 186 Ala. 622, 65 So. 287.

Class Legislation.—It is within the discretion of the legislature to say who may exercise the power of eminent domain, and hence Code 1907, § 3485, confining its exercise to corporations, is not unconstitutional. *Sloss-Sheffield Steel, etc., Co. v. O'Rear (Ala.)*, 76 So. 57.

§ 11. Particular Uses or Purposes.

§ 15½. — Production and Supply of Electric Power or Light.

Where the object of a corporation seeking to condemn a dam and lands is to acquire water power for the generation of electricity for distribution to the public for light, heat, and power, the use for which the property is sought to be taken is public. *Alabama Interstate Power Co. v. Mt. Vernon-Woodberry Cotton Duck Co.*, 186 Ala. 622, 65 So. 287.

§ 18. Property Subject to Appropriation.

§ 18½. — In General.

Under Code 1907, § 3860, allowing a domestic corporation proposing to condemn "lands" to apply to the probate court for an order of condemnation, the tracks of a street railroad company, laid upon certain streets by the city's permission, and in which the company acquired no property rights, held not comprehended within the broadest sense of the term "lands." *Ex parte Montgomery Light, etc., Co.*, 187 Ala. 376, 65 So. 403.

§ 19. — Property Previously Devoted to Public Use.

§ 19 (1) In General.

What "Actual" Means.—*Western Union Tel. Co. v. South, etc., R. Co.*, 184 Ala. 66, 62 So. 788, cited in note in *Ann. Cas.*

1917B, 691. See the title EMINENT DOMAIN, § 19 (1), vol. 5, p. 390.

Defining "Specific." — *Western Union Tel. Co. v. South, etc., R. Co.*, 184 Ala. 66, 62 So. 788. See the title EMINENT DOMAIN, § 19 (1), vol. 5, p. 390.

Land of Public Service Corporation. — *Western Union Tel. Co. v. South, etc., R. Co.*, 184 Ala. 66, 62 So. 788. See the title EMINENT DOMAIN, § 19 (1), vol. 5, p. 390.

Railroad Crossing — Statutory Provisions. — Under Const. 1901, § 242, allowing every railroad to cross the tracks of any other railroad, and Code 1907, § 3885, allowing any railroad proposing to cross any other railroad to acquire an easement for such purpose, a taking merely for a crossing is distinguished from a taking generally under § 3867, providing that property already condemned or devoted to a public use shall not be re-condemned to another and different character of use, unless there is actual necessity therefor, and unless the original use will not thereby be materially interfered with. *Mobile, etc., R. Co. v. Louisville, etc., R. Co.*, 192 Ala. 136, 68 So. 905.

Same—Reasonable Necessity. — Such right of crossing is subject to those general regulations and restraints inhering in the exercise of the right of eminent domain, and depends upon a reasonable necessity therefor, and, where such necessity is shown, the crossing must be so located and constructed as not to inflict any unnecessary injury upon the road crossed; but the crossing is not required to do no injury whatever, or to select the place and mode which will least injure the railroad crossed and such right to cross is not confined to the main tracks of the other road, but applies to its lateral and spur tracks and switches, and one crossing, or even several, does not necessarily exhaust the general right to cross. *Mobile, etc., R. Co. v. Louisville, etc., R. Co.*, 192 Ala. 136, 68 So. 905.

§ 19 (8) Locating Railroad or Street Railroad on Land or Right of Way of Another Railroad or Street Railroad.

The legislature may authorize the use,

under certain conditions, of the track of one street railroad by another. *Ex parte Montgomery Light, etc., Co.*, 187 Ala. 376, 65 So. 403.

§ 19 (3) Locating Telegraph or Telephone Line on Land or Right of Way of Railroad.

Sufficient Necessity to Acquire Right. — *Western Union Tel. Co. v. South, etc., R. Co.*, 184 Ala. 66, 62 So. 788, cited in notes in Ann. Cas. 1917B, 691, 693. See the title EMINENT DOMAIN, § 19 (3), vol. 5, p. 391.

Construction of Statute—"Actual" — "Specific." — Code 1907, § 3867, providing that property already devoted to public use shall not be taken for a different character of use, unless an actual necessity for the specific land or portion thereof shall be alleged and proven, does not authorize a telegraph company to condemn an easement for its lines along the unused portion of a railroad right of way, merely because it is more convenient to do so, or because the easement can be secured at less cost, since "actual," as used in the statute, means real, as distinguished from apparent, constructive, or imputed, and "specific" means tending to specify, or to make particular, definite, limited or precise. *Louisville, etc., R. Co. v. Western Union Tel. Co.*, 195 Ala. 124, 71 So. 118.

Same — Limitation of Right. — Code 1896, §§ 1244, 1246, which gave any telegraph company the right to construct its lines along a railroad right of way, and authorized it to condemn an easement for that purpose, were omitted from the Code of 1907 and thereby repealed. An act approved in 1903 (Laws 1903, p. 374), now codified in part as Code 1907, § 3867, provided that, if the property sought to be condemned had already been devoted to public use, it should not be taken for another and different character of public use, unless an actual necessity for the specific land shall be shown, and unless it be shown that the different use will not materially interfere with the public use to which such property is already devoted. Held, that these changes in the statutes indicated an intention to limit the right of a telegraph company to

condemn an easement along a railroad right of way to the cases provided for by Code 1907, § 3867. *Louisville, etc., R. Co. v. Western Union Tel. Co.*, 195 Ala. 124, 71 So. 118.

§ 22. Exercise of Delegated Power.

§ 23. — In General.

Temporary Rights—Statute.—The right conferred by Code 1907, § 3493, authorizing corporations possessing the right to condemn property to enter thereon for examinations and surveys necessary for the selection of the most advantageous routes and sites, is necessarily incident to and preliminary of authorized proceedings to condemn, and the right is not conditioned on any other contingency than that the corporations mentioned shall have in contemplation proceedings to condemn. *Alabama Interstate Power Co. v. Mt. Vernon-Woodberry Cotton Duck Co.*, 186 Ala. 622, 65 So. 287.

What Corporations Entitled under Code 1907, § 3493.—The right conferred by Code 1907, § 3493, to make preliminary examinations and surveys by corporations entitled to condemn land, is applicable to a corporation organized to generate and transmit electricity for light, heat and power, with the right to condemn property to create water power for the generation of electricity. *Alabama Interstate Power Co. v. Mt. Vernon-Woodberry Cotton Duck Co.*, 186 Ala. 622, 65 So. 287.

§ 24½. — Extent of Appropriation.

There is no statutory authority for proceeding by lumber company to condemn, for term of years only, right of way for railroad over lands of another; Code 1907, § 3860, authorizing an application to take lands, or to acquire an interest or easement therein. *Ensign Yellow Pine Co. v. Hohenberg (Ala.)*, 75 So. 897.

§ 29. Determination of Questions as to Validity of Exercise of Power.

§ 30. — Jurisdiction of Courts in General.

The court in which a proceeding to condemn land for a public use is insti-

tuted must determine whether the statutory conditions exist and whether the particular subject sought to be condemned is within the exceptions made in the statute, and, when its jurisdiction is invoked by petition sufficient or insufficient, no other authority may interpose to stay or defeat it. *Alabama Interstate Power Co. v. Mt. Vernon-Woodberry Cotton Duck Co.*, 186 Ala. 622, 65 So. 287.

§ 31. — Conclusiveness and Effect of Legislative Action.

Where the use for which property is sought to be taken under the power of eminent domain is public, the judgment of the legislature on the question of the expediency of authorizing the exercise of the power is conclusive and will not be considered by the courts; the policy of a statute being no concern of the courts. *Alabama Interstate Power Co. v. Mt. Vernon-Woodberry Cotton Duck Co.*, 186 Ala. 622, 65 So. 287.

II. COMPENSATION.

(A) NECESSITY AND SUFFICIENCY IN GENERAL.

§ 32. Necessity of Making Compensation in General.

Acquisition of Property — Effect. — The condemnation of property or easements presupposes deprivation of the owner, and compensation must be awarded him for the loss of his property together with the inconvenience attending condemnation. *Alabama Interstate Power Co. v. Mt. Vernon-Woodberry Cotton Duck Co.*, 186 Ala. 622, 65 So. 287.

Just compensation is constitutional prerequisite to condemnation of private property by individuals or corporations. *Ensign Yellow Pine Co. v. Hohenberg (Ala.)*, 75 So. 897.

Property Taken by City—Nature of Use.—Under Const. 1901, § 235, with reference to compensation for property taken for public use, recovery is confined to instances where municipality is engaged in construction or enlargement of its works, highways, or improvements. *Birmingham v. Graves (Ala.)*, 76 So. 395.

§ 34. Sufficiency of Statutory Provisions for Compensation.

Code 1907, § 1361, requiring an ordinance describing a proposed street improvement, § 1362, providing for the publication of the ordinance, § 1364, providing for objections by the owner, and § 1381, authorizing the filing of objections to an assessment for street improvements, sufficiently protect an owner against any deprivation of any right guaranteed by Const. 1901, § 235, providing that municipal corporations, invested with privilege of taking property for public use, shall make just compensation, for the legislature has inherent power to prescribe a reasonable estoppel after an owner has an opportunity to contest the proceedings and an assessment, but fails to do so. *Ex parte Gudenrath*, 194 Ala. 568, 69 So. 629.

§ 35. Necessity of Payment before Taking.

§ 36. — In General.

Railroad Crossing — Taking of Property—Statutes. — Under Const. 1901, § 242, following Const. 1875, art. 14, § 21, allowing any railroad to cross any other railroad crossing, held taking of property, which under other constitutional provisions requires payment of just compensation before taking. *Mobile, etc., R. Co. v. Louisville, etc., R. Co.*, 192 Ala. 136, 68 So. 905.

What Constitutes Entry for Survey.— Such statute, in view of Const. 1901, §§ 23, 235, requiring corporations authorized to condemn to make compensation for property before its taking, injury, or destruction, must be construed as not authorizing the taking, injury, or destruction of property in the exercise of the power of eminent domain, but as authorizing only a preliminary examination and survey, with only such damage as is necessarily inflicted by the entry and movement of surveyors over the land and in the efficient use of their instruments, which may include the tramping down of herbage and the minimum of injury to growing crops, but can in no event rightfully include the injury or destruction of any form or character or

amount of growing trees or timber; the terms "examinations" and "surveys," as employed in the statute, having only the ordinary significance contributed to them by the lexicographers. *Dancy v. Alabama Power Co. (Ala.)*, 73 So. 901.

Entry by or with Animals or Vehicles.

—Under Code 1907, § 3493, authorizing certain corporations to enter land for preliminary survey "by their officers, agents and servants," such rights of entry, etc., are to be exercised by persons only, not by or with animals or vehicles. *Dancy v. Alabama Power Co. (Ala.)*, 73 So. 901.

(B) TAKING OR INJURING PROPERTY AS GROUND FOR COMPENSATION.

§ 44. Nature of Injury to Property Not Taken.

§ 45½. — Proper or Improper Construction or Operation of Works.

Rights of Action—Foreseen Injuries.

Pursuant to state and national authority, complainant erected a dam in a river which caused the backing up of waters. Const. § 235, requires in condemnation proceedings compensation for the property taken, injured, or destroyed, to be paid before the taking, injury, or destruction. Defendants asserted that the dam created a pool of water constituting a nuisance which injured their property and made the locality unhealthful. Held, that while defendants could not recover unless they were damaged in health or property as a result of the maintenance of the dam, they might in such case recover if the damages were the result of complainant's negligence, or if the injuries were the proximate result of the construction of the dam and could have been foreseen at the time of the construction. *Hamilton v. Alabama Power Co.*, 195 Ala. 438, 70 So. 737.

Smoke, Noises, Obstruction of Traffic

—Possession of Street. — Under Const. art. 235, requiring in condemnation proceedings compensation for the property taken, injured, or destroyed by the construction or enlargement of its works, ways, etc., to be paid before the taking, abutting owner not shown to be in pos

session of the fee of a street upon which a road lays its track could not recover for damages from its operation by reason of smoke, noises, and obstruction of traffic. *Sudduth v. Central, etc., R. Co.*, 197 Ala. 393, 73 So. 28.

Consequential Damages—Decay of Vegetable Matter. — Consequential damages to persons caused by decay of vegetable matter submerged by construction of a dam involve no injury to property, protected by Const. 1901, § 235, providing for compensation for property taken, injured or destroyed in construction of public works. *Burnett v. Alabama Power Co. (Ala.)*, 74 So. 459.

Same—Nuisance. — Where a dam was constructed by defendant in the aid of navigation under the authority of the government, and in strict compliance with the plans and specifications of the government under Act Cong. March 4, 1907, c. 2912, 34 Stat. 1288, which did not require the land to be cleared, the defendant, as the agent of the government, was relieved from liability for a nuisance, caused by decay of vegetable matter submerged, and is not liable for consequential damages except to property, since there can be no recovery for damages, or relief from consequences, incidentally resulting from acts or things, performed or conducted in a proper manner under legal authority, and which but for such legislation would constitute a nuisance, and the sovereign controls navigable streams, and the riparian owner acquires rights subject to such control and right of sovereign to make reasonable improvements, which may be delegated, and unless some constitutional right is invaded, there can be no liability for consequential damages. *Burnett v. Alabama Power Co. (Ala.)*, 74 So. 459.

§ 47. Elements of Compensation for Injuries to Property Not Taken.

§ 50. — Occupation or Use of Street or Other Highway.

The construction of a commercial steam railroad in a public street, though under municipal authority, imposes a burden in excess of that imposed by the original dedication to public use, inter-

feres with the proprietary right of an adjoining owner owning the ultimate fee in the soil, and is an exercise of eminent domain, for which compensation must be made before the injury is done. *South, etc., R. Co. v. Davis*, 185 Ala. 193, 64 So. 606.

§ 51. — Alteration of Grade of Street or Other Highway.

Injury to Abutting Property—Liability. — Under the constitution and statutes, a city had no authority to improve a street by changing the grade thereof to the injury of abutting property, without first making just compensation to the owners thereof. *North Alabama Tract. Co. v. Hays*, 184 Ala. 592, 64 So. 39.

Proximate Cause—Liability. — Where a city elevated the grade of a street 59 feet wide from sidewalk to sidewalk and, as required to do by an ordinance, a street railroad company raised its track and the earth for 18 inches on either side to conform to the newly established grade, the change for 25 feet on either side of the track being made by the city and not by the railroad company, the company was not liable to abutting owners for injuries to their property resulting from the interference with the accessibility thereof and overflows thereof in wet seasons, as what it did could not have been the proximate cause of the injury. *North Alabama Tract. Co. v. Hays*, 184 Ala. 592, 64 So. 39.

§ 54½. — Danger of Personal Injury.

Where a right of way for transmission of electricity is condemned, the owner may recover actual depreciation to his remaining land caused by the presence of the right of way; but mere fears of the people from the presence of the right of way can not be made a basis on which to predicate depreciation or effect the amount of the recovery. *Alabama Power Co. v. Keystone Lime Co.*, 191 Ala. 58, 67 So. 833.

§ 58. Appropriation to New or Additional Use.

§ 59. — Streets or Other Highways.

Electric Railways — Double Track on City Street.—*Birmingham R., etc., Co. v. Smyer*, 181 Ala. 121, 61 So. 354, cited

in note in Ann. Cas. 1918B, 872. See the title EMINENT DOMAIN, § 59 (3), vol. 5, p. 409.

Inconvenience in Loading and Unloading Goods.—Birmingham R., etc., Co. v. Smyer, 181 Ala. 121, 61 So. 354, cited in note in Ann. Cas. 1918B, 872. See the title EMINENT DOMAIN, § 59 (3), vol. 5, p. 409.

§ 60. Corporations and Persons Liable for Compensation.

Where a dam, which aided navigation, was constructed under the authority of the government, the owner stands in the shoes of the government and is not liable for consequential damages, except to property resulting from the conditions caused by the construction, and is not guilty of negligence in backing up the water. *Hamilton v. Alabama Power Co.*, 195 Ala. 438, 70 So. 737.

(C) MEASURE AND AMOUNT.

§ 63. Time with Reference to Which Compensation to Be Made.

Compensation to be paid by the railroad for land condemned must be fixed by the valuation of the property as of the date of the petition for condemnation. *Smith v. Jeffcoat*, 196 Ala. 96, 71 So. 717.

§ 63½. Nature and Extent of Right Taken.

Though condemnation of right of way, by Code 1907, § 3882, vests in applicant easement proposed to be acquired for uses and purposes stated in application, and for no others, thus leaving fee in owner, in ordinary case of application to condemn easement, not limited to term of years, rule is to award owner value of entire fee at time of taking. *Ensign Yellow Pine Co. v. Hohenberg (Ala.)*, 75 So. 897.

§ 64. Taking Entire Tract or Piece of Property.

§ 64½. — Value of Land.

Owner Retaining Rights.—Where an owner, after condemnation, retains substantial rights in the property taken, he can not recover the value as compensa-

tion. *Alabama Power Co. v. Carden*, 189 Ala. 384, 66 So. 596.

Actual Value.—Where land is taken under the right of eminent domain, the owner is entitled to the actual value of the land taken. *Alabama Power Co. v. Keystone Lime Co.*, 191 Ala. 58, 67 So. 833; *Alabama Power Co. v. Carden*, 189 Ala. 384, 66 So. 596.

Market Value. — Where land taken for the impounding of water by a dam will be so submerged as to preclude any reasonable use thereof by the owner, the measure of the compensation for the area taken is the market value thereof at the time of the taking. *Alabama Power Co. v. Carden*, 189 Ala. 384, 66 So. 596.

Same—Partial Use.—Where land taken for the impounding of water by a dam will be submerged on occasions of flood only, so that the owner may use the property to his own advantage, the measure of the compensation for the area taken is the value of that area before and after condemnation. *Alabama Power Co. v. Carden*, 189 Ala. 384, 66 So. 596.

§ 67. Taking Part of Tract or Property.

§ 68. — In General.

An owner whose land is taken for public use is entitled to be compensated for the value of the property taken at the time of condemnation and for the diminished value at that time of his other property legally related to that taken, because of the appropriation of that taken. *Alabama Power Co. v. Carden*, 189 Ala. 384, 66 So. 596.

§ 70. — Injuries to Part Not Taken.

Where land is taken under the right of eminent domain, the owner is entitled to the direct and certain damages resulting to his other land. *Alabama Power Co. v. Keystone Lime Co.*, 191 Ala. 58, 67 So. 833.

§ 71. Injuries to Property Not Taken.

§ 71½. — Measure of Compensation in General.

The measure of compensation for the taking of land for the impounding of water by a dam does not embrace any loss growing out of the imaginary fears

on the part of the community that the taking will cause sickness in the community and thereby cause reduction of market value of property. *Alabama Power Co. v. Carden*, 189 Ala. 384, 66 So. 596.

§ 72. — Depreciation of Value.

Offsetting Benefits — Property Merely Injured. — Where property is wholly taken or destroyed by a municipality in carrying out a public improvement, the measure of damages is the market value of the property, with no deduction on account of either general or special benefits, or increase in value to the remaining property from the improvement. *Huntsville v. Goodenrath*, 13 Ala. App. 579, 68 So. 676.

Difference in Value before and After Taking. — When suit is brought for resulting damages to property under Const. 1901, § 235, as distinguished from taking the property, plaintiff may recover difference in value of his land before and after doing of the work. *Louisville, etc., R. Co. v. Orr (Ala.)*, 76 So. 961.

§ 73. Deduction or Set-Off of Benefits.

§ 74. — In General.

§ 74 (1) In General.

Allowance for Special Benefits. — Where plaintiff claims that property has been damaged from the construction of a public highway upon which the lot abuts, the special benefits from the work must be set off against the damages. *Birmingham v. Kennedy*, 9 Ala. App. 541, 63 So. 770.

Province of Jury. — Where, in condemnation proceedings, the owner demands recovery for injuries to his remaining land, the jury must set off any benefit that may accrue against any resulting damages. *Alabama Power Co. v. Keystone Lime Co.*, 191 Ala. 58, 67 So. 833.

Nature and Character of Improvements. — In action for resulting damages to land not taken, the nature and character of improvements made must be taken into consideration as an element of enhancement of value. *Louisville, etc., R. Co. v. Orr (Ala.)*, 76 So. 961.

Enhancement of Value. — When suit is

brought for resulting damages to property under Const. 1901, § 235, if the value was thereby enhanced he can not recover. *Louisville, etc., R. Co. v. Orr (Ala.)*, 76 So. 961.

Property Wholly Taken or Destroyed.

—Measure of damages for property wholly taken or destroyed held the market value without deduction for benefits to remaining property. *Huntsville v. Goodenrath*, 13 Ala. App. 579, 68 So. 676, certiorari denied in *Ex parte Gudenrath*, 194 Ala. 568, 69 So. 629.

§ 74 (3) Alteration of Grade of Street.

What is Admissible to Show Enhanced Value. — In action for resulting damages to land by improvements by railroad, while fact that street was graded and improved by changes made, instead of being muddy and impassable as it had been before, could be considered as enhancing value, erection of depot and double-tracking of rails could not be so considered. *Louisville, etc., R. Co. v. Orr (Ala.)*, 76 So. 961.

Erection of Other Improvements. — Where railroad caused street to be graded, placing plaintiff's lot above street level with consequent damage, erection of station or other improvements in locality could not be considered as enhancing value of property if not an integral part of improvement. *Louisville, etc., R. Co. v. Orr (Ala.)*, 76 So. 961.

§ 74½. Limited Estates or Interests in Property.

Where a power company, condemning a right of way for the erection and maintenance of instrumentalities for transmission of electricity, acquired only the surface, and any mineral interests remained in the owner, the owner could only recover the value of the surface, unaffected by the value of mineral interest. *Alabama Power Co. v. Keystone Lime Co.*, 191 Ala. 58, 67 So. 833.

(D) PERSONS ENTITLED AND PAYMENT.

§ 76. Persons Entitled.

§ 78½. — Landlord or Tenant.

One who acquires a leasehold right in land, against which condemnation pro-

ceedings have been filed, takes it subject to the rights of the condemning parties, and can have no compensation for the alleged interest in the land. *Smith v. Jeffcoat*, 196 Ala. 96, 71 So. 717.

III. PROCEEDINGS TO TAKE PROPERTY AND ASSESS COMPENSATION.

§ 80. Statutory Provisions and Remedies.

To Condemn Land for State Purposes.

—*State v. Still*, 178 Ala. 442, 59 So. 628. See the title EMINENT DOMAIN, § 80, vol. 5, p. 416.

Failing to Prescribe Method—Validity of Statute.—Code 1907, § 3627 et seq., authorizing the condemnation of dam and power sites for water power, including the right to condemn the lands, hydraulic structures, and the water rights of any cotton factory, in excess of what is actually in use or may be used at normal stages of the stream for the operation of its plant, is not invalid for failing to prescribe a method for ascertaining the excess of water power of a cotton mill above its requirements which is subjected to condemnation; but the excess may be disclosed by experts, so that the court can give effect to the statutory rights. *Alabama Interstate Power Co. v. Mt. Vernon-Woodberry Cotton Duck Co.*, 186 Ala. 622, 65 So. 287.

§ 93. Appearance and Representation by Attorney.

State v. Still, 178 Ala. 442, 59 So. 628. See the title EMINENT DOMAIN, § 93, vol. 5, p. 419.

§ 95. Pleading.

§ 96. — Petition or Complaint.

Showing Public Purpose and Necessity.

—In telegraph company's petition to condemn land under Code 1907, § 3867, relative to condemnation of property already devoted to public use, where amended petition failed to allege any fact tending to bring case within section, which, as construed, requires real necessity for condemnation, demurrer to petition was properly sustained. *Western Union Tel. Co. v. Louisville, etc., R. Co.* (Ala.), 74 So. 946.

§ 97½. — Amendments.

The application of a lumber company to probate court to condemn right of way for its railroad was subject to proper amendment in circuit court. *Ensign Yellow Pine Co. v. Hohenberg* (Ala.), 75 So. 897.

§ 98. Evidence as to Right to Take.

In a proceeding by a railroad to condemn a right of way across the tracks of another railroad so as to reach the south side of a new pier, evidence held to show that such crossing was a matter of reasonable necessity; that a switch and spur instead of a crossing were not reasonably practicable in respect to economy and convenience of operation, and that actual or threatened injury to the rolling stock of defendant from the jarring incident to crossing, from special injury to locomotive pilots from loose rails, from danger of collisions, and the burden of keeping a lookout and resulting interference with schedules was not such as to deny the right of condemnation for the crossing. *Mobile, etc., R. Co. v. Louisville, etc., R. Co.*, 192 Ala. 136, 68 So. 905.

§ 100. Evidence as to Compensation.

§ 102½. — Benefits.

In action for resulting damages to land by improvements by railroad, evidence on increase in value by erection of depot and double-tracking held inadmissible. *Louisville, etc., R. Co. v. Orr* (Ala.), 76 So. 961.

§ 103. Mode of Assessment of Compensation.

§ 104. — Trial by Jury.

Under Code 1907, § 3875, allowing any of the parties to appeal from the order of condemnation to the circuit court or court of like jurisdiction, and a trial de novo on appeal from a final order of condemnation, and § 3878, providing that if the petition to condemn was denied and the superior court on appeal determines that it should have been granted, it shall proceed to have the damages assessed by a jury, and in view of the previous eminent domain statutes (Code 1886, §§ 3209-3216; Code 1896, §§ 1717-1720) as

construed, the county circuit court, on proceeding by a railroad to condemn a crossing over the tracks of another railroad, properly determined the petitioner's right to condemn without the intervention of a jury. *Mobile, etc., R. Co. v. Louisville, etc., R. Co.*, 192 Ala. 136, 68 So. 905.

§ 112. Assessment by Commissioners, Appraisers, or Viewers.

§ 112½. — Appointment and Removal.

Under Code 1907, §§ 3861, 3866, 3869-3871, providing that, where there are several tracts of land within one county, of which parts are proposed to be taken, the applicant may enjoin them in separate paragraphs in the same application, and where there are several distinct tracts owned by different persons embraced in the same application, the owners of each may have a separate hearing as to the right to condemn, and providing for commissioners to assess separately the damages and compensation to which the several owners are entitled, the better practice requires the appointment of but one commission to assess compensation where separate tracts of the same owner are sought to be taken, for confusion may otherwise ensue as to consequential injury to land not taken. *Alabama Power Co. v. Adams*, 191 Ala. 54, 67 So. 838.

§ 117½. Conclusiveness and Effect of Award or Judgment in General.

If possession of plaintiff, which defendant invaded and attempted to justify under a probate decree in eminent domain, was acquired prior to filing the condemnation proceedings and plaintiff was not a party, he was not bound by the decree and was not divested of whatever title he had. *Smith v. Jeffcoat*, 196 Ala. 96, 71 So. 717.

§ 121. Appeal.

§ 123. — Appellate Jurisdiction.

Under Code 1907, § 3860, providing that any domestic corporation proposing to take lands, or to acquire an interest or easement therein, if there be no other prescribed procedure, may apply to the probate court of the county in which such lands are situate for an order condemning

lands, and § 3875, giving an appeal from the order to the circuit or city court and a trial de novo, held essential to the jurisdiction of the city court that the petition make out a case for relief, so that prohibition would lie if it did not. *Ex parte Montgomery Light, etc., Co.*, 187 Ala. 376, 65 So. 403.

§ 125. — Right of Review.

Where the party condemning takes possession of the property and pays the award, he is estopped from objecting thereto and waives his right of appeal. *Russell v. Bush*, 196 Ala. 309, 71 So. 397.

§ 125½. — Presentation and Reservation in Lower Court of Grounds of Review.

On appeal from a decree in condemnation proceedings, the supreme court can be expected to pass only on questions raised in the court below. *Louisville, etc., R. Co. v. Western Union Tel. Co.*, 195 Ala. 124, 71 So. 118.

IV. REMEDIES OF OWNERS OF PROPERTY.

§ 132. Nature and Grounds in General.

In entering for the reasonable assertion of rights conferred by the statute and a decree of the probate court condemning land in pursuance thereof, defendant, as the duly authorized agent of the railroad, which condemned the land, was not guilty of a trespass. *Smith v. Jeffcoat*, 196 Ala. 96, 71 So. 717.

§ 136. Recovery of Damages.

Land Taken without Grant or Condemnation.—Where land is taken and appropriated by a railroad company without grant or condemnation, whether with or without the owner's knowledge and acquiescence, he may maintain a bill in equity for damages. *Tombigbee Valley R. Co. v. Loper*, 184 Ala. 343, 63 So. 1006.

Title to Support Action.—Plaintiff, to recover for trespass in laying tracks in street, must show actual prior possession of the land whereon tracks were laid, or constructive possession through his fee, because of ownership of adjoining lots; and where it appears that defendant's acts related to the half of street not attinent to plaintiff's property, he could

not recover. *Sudduth v. Central, etc., R. Co. (Ala.)*, 77 So. 350.

Preserving Existing Rights—Statute.—Section 3 of the dam act (Act of Cong. March 4, 1907, c. 2912, 34 Stat. 1288) does not create a cause of action, but merely preserves existing rights as against taking or injuring property. *Meharg v. Alabama Power Co. (Ala.)*, 78 So. 909.

Subsequent Damages.—Where injuries complained of did not exist and could not be ascertained at the time of the construction of a dam, the property owner damaged could not under Const. 1901, § 235, recover his damages. *Meharg v. Alabama Power Co. (Ala.)*, 78 So. 909.

§ 137. Injunction.

§ 139. — Restraining Taking of or Injury to Property.

§ 139 (2) Failure to Compensate Owner.

Enjoining City from Changing Grade of Street.—A citizen may enjoin a municipality from taking or injuring his property by changing grade of a street without first making compensation without regard to solvency or insolvency of parties, or fact that adequate damages at law can be recovered. *Troy v. Watkins (Ala.)*, 78 So. 50.

Compelling Restoration of Street.—A property owner has right to require municipality to restore street to former condition, and may enjoin acts of damage to his property by the municipality where there is an attempt to take or injure his property for public use without compensation in advance. *Troy v. Watkins (Ala.)*, 78 So. 50.

§ 139 (3) Failure to Institute Proceedings.

Notwithstanding the general principle that a trespass upon lands will not be enjoined in equity where the rights of the parties are legal and adequate legal relief can be afforded, chancery will enjoin a corporation empowered to exercise the right of eminent domain when it is proceeding to take or injure land for its uses without the consent of the owner and without legal proceedings to subject it to such use. *Dancy v. Alabama Power Co. (Ala.)*, 73 So. 901.

§ 140. — Restraining Construction of Works.

Under Const. 1901, § 227, making corporations liable to abutting proprietors for actual damages to their property, an owner of a lot abutting a street and having the ultimate fee therein held entitled to restrain a railroad company from constructing under municipal authority a side track in the street in front of his property until compensated. *South, etc., R. Co. v. Davis*, 185 Ala. 193, 64 So. 606.

§ 151. Pleading.

Bill for Damages—Allegations of Possession.—A bill against a railroad for appropriating a strip across complainant's tract without condemnation or lawfully acquiring it, alleging the construction of a railway thereon, and that defendant has since possessed said right of way and operated said railway, is not objectionable as contradictory in its allegations of possession because also alleging as to the tract that plaintiff has been in possession of it since obtaining patent therefor. *Tombigbee Valley R. Co. v. Loper*, 184 Ala. 343, 63 So. 1006.

Sufficiency of Petition.—Allegations of replications, where plaintiff sought damages for trespass against his leasehold interest by a railroad which sought to justify, under probate deed in eminent domain, was insufficient for failure to show the precise character, time of beginning, and duration of his interest. *Smith v. Jeffcoat*, 196 Ala. 96, 71 So. 717.

Theory of Complaint.—Counts charging that tracks were wrongfully laid, and not that they were laid under franchise, are not based on Const. 1901, § 227, but must proceed under § 235, or on the theory of a wrongful obstruction of the street amounting to a public nuisance. *Sudduth v. Central, etc., R. Co. (Ala.)*, 77 So. 350.

Plea—Time of Payment.—A plea in an action of trespass *quare clausum fregit*, attempting to justify, under a probate decree condemning realty to the use of a railroad for a right of way and authorizing it to construct its line thereon, alleging that the plaintiff occupied the premises under a lease from the owner,

entered into after condemnation proceeding was filed, and that trespass was only so much as was necessary to permit the use of the land for the right of way, is demurrable if compensation had not been paid for the property, prior to the entry, as required by Code 1907, § 3882. *Smith v. Jeffcoat*, 196 Ala. 96, 71 So. 717.

§ 152. Evidence.

§ 153. — Admissibility in General.

Where, in an action for damages from the construction of a highway upon which plaintiff's lot abutted, there was no proof that any assessment had been made against plaintiff's property for the improvement of the highway, evidence as to the cost of such improvement was properly excluded. *Birmingham v. Kennedy*, 9 Ala. App. 541, 63 So. 770.

§ 158½. Damages and Amount of Recovery in General.

Where a city takes or injures property without resorting to condemnation proceedings, the measure of damages, where property is taken or injured, held the same in a suit for damages as though condemnation proceedings had been resorted to. *Huntsville v. Goodenrath*, 13 Ala. App. 579, 68 So. 676, certiorari denied in *Ex parte Gudenrath*, 194 Ala. 568, 69 So. 629.

§ 160. Judgment or Decree.

Where land is taken and appropriated by a railroad company without grant or condemnation, whether with or without the owner's knowledge and acquiescence, on a bill in equity for damages, the decree may be made effectual by injunction. *Tombigbee Valley R. Co. v. Loper*, 184 Ala. 343, 63 So. 1006.

V. TITLE OR RIGHTS ACQUIRED.

§ 161½. Extent of Right to Use of Property.

The court will confine a party condemning property to the property rights acquired, and a proceeding to condemn under a statute will not be interfered with on the theory that if condemnation is allowed the condemnor will transgress his limits. *Alabama Interstate Power Co. v. Mt. Vernon-Woodberry Cotton Duck Co.*, 186 Ala. 622, 65 So. 287.

§ 162. Time of Passing of Title or Right.

If the railroad compensates the owner for land taken by eminent domain, its right and title vests upon such payment, and, as against intervening rights, relates back to the filing of the petition for condemnation. *Smith v. Jeffcoat*, 196 Ala. 96, 71 So. 717.

Employers' Liability Act.

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EQUITY.

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Cross References.

See the title EQUITY, vol. 5, and references there given.

I. JURISDICTION, PRINCIPLES, AND MAXIMS.**(A) NATURE, GROUNDS, SUBJECTS, AND EXTENT OF JURISDICTION IN GENERAL.****§ 1. Nature and Source of Jurisdiction.**

Created to Supplement Law.—Smith *v.* Roney, 182 Ala. 540, 62 So. 753. See the title EQUITY, § 1, vol. 5, p. 460.

§ 3. Grounds of Jurisdiction in General.

Useless Purpose.—Dixie Grain Co. *v.* Quinn, 181 Ala. 208, 61 So. 886. See the title EQUITY, § 3, vol. 5, p. 460.

§ 15. Property and Rights Therein in General.

The grace which equity should extend to litigant in cases in which law courts can not give proper protection to property rights is matter of right in the litigant. Cullman Property Co. *v.* Hitt Lumber Co. (Ala.), 77 So. 574.

§ 17. Equitable Estates or Interests.

Holder of equitable title in court of chancery may have legal title transferred to him, if this can be done without injury to innocent third parties. Townley *v.* Corona Coal, etc., Co. (Ala.), 77 So. 1.

§ 18. Liens.

Scope of Equitable Jurisdiction in General.—Greil Bros. Co. *v.* Montgomery, 182 Ala. 291, 62 So. 692. See the title EQUITY, § 18, vol. 5, p. 465.

Enforceable in Equity at Any Time.—Greil Bros. Co. *v.* Montgomery, 182 Ala. 291, 62 So. 692. See the title EQUITY, § 18, vol. 5, p. 465.

§ 20. Administration of Estates.

Settlement of Firm Transactions be-

tween Estate and Administrator.—Where the administration of a decedent's estate involves a settlement of firm transactions between the estate and the administrator, the chancery court may assume exclusive jurisdiction at the suit of a distributee. Newell *v.* Bradford, 187 Ala. 251, 65 So. 800.

Beneficiary Joining Herself in Representative Capacity.—Seay *v.* Graves, 178 Ala. 131, 59 So. 469. See the title EQUITY, § 20 (2), vol. 5, p. 467.

Facts Held to Give Jurisdiction.—Seay *v.* Graves, 178 Ala. 131, 59 So. 469. See the title EQUITY, § 20 (3), vol. 5, p. 467.

§ 21½. Penalties and Forfeitures.

Courts of equity abhor forfeitures, and will never enforce them, unless necessary to enforce the law, and to do justice between the parties. McDonough *v.* Saunders (Ala.), 78 So. 160.

Complainant purchased a mortgage on the installment plan, the instrument being delivered in escrow, to be held by the depositary until all payments were made. Complainant defaulted in some of the payments, and on defendant claiming the right to declare all payments due, the parties agreed that certain credits should be applied to the matured notes, and that they would have a settlement. Thereafter defendant refused to make the settlement and demanded possession of the mortgage from the depositary. Held, that as equity will relieve against unconscionable forfeitures, equity had jurisdiction of a suit to enjoin the depositary from delivering the mortgage or defendant from obtaining possession of it. Franklin *v.* Long, 191 Ala. 310, 68 So. 149.

§ 25. Jurisdiction of Property or Other Subject Matter.

Suit for Accounting of Trust Funds against Nonresident.—*Tigrett v. Taylor*, 180 Ala. 296, 60 So. 858. See the title EQUITY, § 25, vol. 5, p. 469.

Suit to Enforce Vendor's Lien Where Parties Nonresident.—Under Code 1907, § 3052, providing that the jurisdiction of courts of chancery extends to civil causes in which a plain and adequate remedy at law is not provided to subject an equitable title or claim to real estate, and generally all equitable assets to the payment of debts, etc., and § 3054, providing that courts of chancery must take cognizance of suits against nonresidents, concerning an estate of, or charge upon, lands within the state, the chancery court of a county in which land was situated had jurisdiction of a bill to set aside an alleged fraudulent conveyance thereof, or to enforce an alleged vendor's lien thereon, though the complainant and his debtor, the alleged fraudulent grantor, were residents of other states. *Moore v. Altom*, 192 Ala. 261, 68 So. 326.

§ 26. Amount or Value in Controversy.

Redemption of Lands.—*Bains Bros. Invest. Co. v. Walthall*, 180 Ala. 45, 60 So. 142. See the title EQUITY, § 26, vol. 5, p. 469.

§ 28. Exercise of Jurisdiction beyond Territorial Limits.

Cancelling Mortgage of Land in Foreign State.—*Lamkin v. Lovell*, 176 Ala. 334, 58 So. 258. See the title EQUITY, § 28, vol. 5, p. 470.

§ 29. Retention of Jurisdiction Acquired.

§ 31. — Complete Relief.

Equity Abhors Multiplicity of Suits.—*Enterprise Lumber Co. v. First Nat. Bank*, 181 Ala. 388, 61 So. 930. See the title EQUITY, § 31 (1), vol. 5, p. 470.

Removal of Administration into Chancery.—Where a bill seeking to subject non-exempt life insurance policies to deceased husband's debts, properly sought the removal of the administration of the deceased husband's estate into the chancery from the probate court, notwithstanding the administrator had filed a re-

port in the probate court alleging insolvency of the estate, where no further action than the mere filing of such report had been taken; the administration and settlement of the estate being a single continuous proceeding, proper for the application of the general rule that a court of equity, having assumed jurisdiction for one purpose, will retain and proceed to dispose of the entire case. *Kimball v. Cunningham Hdw. Co.*, 197 Ala. 631, 73 So. 323.

Removal of Clouds on Title.—Where a suit involves title to land, equity has jurisdiction to give complete relief by removing any impediments, such as clouds on title. *Cooper v. Cloud*, 194 Ala. 449, 69 So. 928.

Determination of Complainant's Rights in Other Actions.—Since, once having assumed jurisdiction, a court of equity will proceed to full adjudication of all issues presented by the pleadings and evidence, where complainant filed its bill to restrain prosecution of two actions against it, it could not question the jurisdiction of the court to render decree determining complainant's rights in the other actions. *Alabama, etc., R. Co. v. Aliceville Lumber Co. (Ala.)*, 74 So. 441.

Determination of Legal Titles.—Though courts of equity do not intervene merely to test legal titles to land, especially by injunction as substitute for ejectment, in some cases it may be necessary, to do complete justice, where equity acquires jurisdiction for equitable purposes, to determine legal titles, as, where the injury threatened is shown to be irreparable, it will be enjoined though the legal title is in dispute. *Cullman Property Co. v. Hitt Lumber Co. (Ala.)*, 77 So. 574.

Retention of Bill of Discovery.—*El-liott v. Kyle*, 176 Ala. 173, 57 So. 752. See the title EQUITY, § 31 (2), vol. 5, p. 473.

§ 32. — Denial of Equitable Relief.

Where a mortgagee transferred one of the several notes secured, and the transferee sold the premises, and the mortgagee sued to vacate the sale, equity will not, the mortgagee having an adequate remedy at law, and not being entitled to have the sale vacated, retain jurisdiction

to enable the mortgagee to recover surplus proceeds of sale. *Farmers' Sav. Bank v. Murphree* (Ala.), 76 So. 932.

§ 33. Waiver of Objections.

By Filing Cross-Bills.—Defendants, who by filing cross-bills become plaintiffs, submit themselves to the jurisdiction of the chancery court. *Alabama, etc., R. Co. v. Aliceville Lumber Co.* (Ala.), 74 So. 441.

Joining Other Grounds of Objection to Want of Jurisdiction.—*Tigrett v. Taylor*, 180 Ala. 296, 60 So. 858. See the title EQUITY, § 33, vol. 5, p. 474.

(B) REMEDY AT LAW AND MULTIPLICITY OF SUITS.

§ 34. Existence of Remedy at Law and Effect in General.

Where complainant has an adequate remedy at law, equity will afford no relief. *Hogan v. Scott*, 186 Ala. 310, 65 So. 209; *Farmers' Sav. Bank v. Murphree* (Ala.), 76 So. 932.

In a suit for a decree that a mortgage satisfied by mistake be held as security for the payment of one of the secured notes, which had not been paid, and for a sale of the land if the note was not paid, the bill was not demurrable because of an adequate remedy at law, as the foreclosure of the mortgage was within the jurisdiction of equity. *Lacey v. Pearce*, 191 Ala. 258, 68 So. 46.

§ 36. Adequacy of Legal Remedy.

§ 39. — Administration of Estates.

Removal after Jurisdiction of Probate Court Has Attached—Existence of Special Equity.—*Swope v. Swope*, 178 Ala. 172, 59 So. 661. See the title EQUITY, § 39 (2), vol. 5, p. 483.

Same—Necessity of Showing Special Equity.—*Swope v. Swope*, 178 Ala. 172, 59 So. 661. See the title EQUITY, § 39 (2), vol. 5, p. 483.

Same — Equity Sufficiently Shown.—*Swope v. Swope*, 178 Ala. 172, 59 So. 661. See the title EQUITY, § 39 (2), vol. 5, p. 483.

§ 45. Multiplicity of Suits.

A bill of peace to enjoin the prosecution of numerous actions of law must aver a complete defense to the actions

sought to be enjoined, for one can not invoke equity merely to have his wrongdoing adjudged in one suit instead of many. *Hamilton v. Alabama Power Co.*, 195 Ala. 438, 70 So. 737.

For a bill to contain equity on the sole ground of preventing a multiplicity of suits, it must show a community of interest in the subject matter of several suits in which the several litigants are interested, and not a mere community of interest in the questions of law or fact involved. *Ætna Ins. Co. v. Hann*, 196 Ala. 234, 72 So. 48.

§ 46. Waiver of Objections.

Submission to General Jurisdiction by Answering.—*Smith v. Roney*, 182 Ala. 540, 62 So. 753. See the title EQUITY, § 46, vol. 5, p. 469.

(C) PRINCIPLES AND MAXIMS OF EQUITY.

§ 48. Equity Regards Substance Rather than Form.

Equity looks through mere forms and shadows to the real and substantial equities of the controversy. *Zimmerman Mfg. Co. v. Wilson* (Ala.), 77 So. 364.

Equity Not Bound by Surface Appearance.—*Elkins v. Bank*, 180 Ala. 18, 60 So. 96. See the title EQUITY, § 48, vol. 5, p. 489.

§ 49. Where Equities Are Equal, the Law Will Prevail.

Legal Title.—*Dean v. Roberts*, 182 Ala. 221, 62 So. 44. See the title EQUITY, § 49, vol. 5, p. 490.

§ 51. He Who Comes into Equity Must Come with Clean Hands.

In General.—The maxim that "he who comes into equity must come with clean hands" is not confined alone to those cases where fraud or illegality prevents a suitor from relief in equity, but any unconscientious conduct connected with the controversy to which he is a party will suffice to deny him relief. *Anders v. Sandlin*, 191 Ala. 158, 67 So. 684.

In order to establish that complainant is not entitled to equitable relief because he does not come into equity with clean hands, it is not essential that the fraud or deceit be such as would be a defense to an action at law, or as would require

a court of equity to cancel the contract; but it is sufficient if it appears that complainant has been guilty of unscrupulous practices, or overreaching, or has concealed important facts, though not actually fraudulent, or has been guilty of trickery, or taking undue advantage of his position, or unconscientious conduct. *Harton v. Little*, 188 Ala. 640, 65 So. 951.

Conduct Barring Relief.—*Galliland v. Williams*, 181 Ala. 173, 61 So. 291. See the title EQUITY, § 51, vol. 5, p. 691.

Complainant, having an option to purchase 150 acres at \$25 an acre, offered to sell to defendant L. the land at \$50 an acre, concealing the fact of his option. L. declined to purchase more than half of the land, whereupon complainant suggested that they get J. to purchase the other half with defendant. J. declined to purchase, but offered to furnish complainant \$500 to pay on the other half interest, provided he would purchase with defendant and have the title to such interest conveyed to J. as security for the loan. This was agreed to, and, in order to deceive defendant, J. executed a check to complainant for \$500 which was never used, defendant paying his \$500, and subsequently the balance in cash with which complainant paid in full for the land under his option at \$25 per acre. Held, that though complainant in the first instance was under no obligation to disclose his option, such duty devolved on him when he became a quasi partner of defendant in the purchase, and he, not having done so, was not entitled to equitable relief as against defendant under the maxim that "he who comes into equity must come with clean hands." *Harton v. Little*, 188 Ala. 640, 65 So. 951.

§ 52. He Who Seeks Equity Must Do Equity.

The meaning of the maxim, "He who seeks equity must do equity," is that whatever be the nature of the controversy, and whatever the nature of the remedy demanded, the court will not confer equitable relief upon the party seeking its aid, unless he acknowledges or will admit and provide for all the equitable rights and demands justly belonging to the adversary party, growing

out of, or necessarily involved in, the subject matter of the controversy. *Coburn v. Coke*, 193 Ala. 364, 69 So. 574.

Infants.—The rule that "he who seeks equity must do equity" applies whether plaintiff be an adult or infant, since an infant has no more right than an adult to seek relief from the acts of others and at the same time hold the benefits of them. *Coburn v. Coke*, 193 Ala. 364, 69 So. 574.

Necessity of Offer to Pay Legal Interest Where Usury Exists.—By Code 1907, § 4623, declaring that all contracts for the payment of interest upon the loan of goods, money, etc., or upon any contract whatever, at a higher rate than prescribed, are usurious and can not be enforced except as to the principal, the maxim that he who seeks equity must do equity, as applied to a mortgagor seeking to redeem, where the mortgage was tainted with usury, is abrogated, and the mortgagor need not offer to pay legal interest, operation of the statute not being limited to transactions originating in loans of money. *Lewis v. Hickman (Ala.)*, 77 So. 46.

Parties can not come into equity in their own behalf when their conduct previously has been such as to prevent equity being done. *Gayle v. Pennington*, 185 Ala. 53, 64 So. 572.

Sufficiency of Evidence to Render Rule Applicable.—In the absence of evidence that the wife who joined with her husband in a mortgage of their joint property, received any of the consideration therefor, the rule that he who seeks equity must do equity could not be applied against her children, in a suit for partition against owner of other undivided half interest in the lands mortgaged. *Shannon v. Ogletree (Ala.)*, 76 So. 865.

II. LACHES AND STALE DEMANDS.

§ 53. Nature and Elements in General.

Laches Goes to Foundation of Complainant's Right.—*Walshe v. Dwight Mfg. Co.*, 178 Ala. 310, 59 So. 630. See the title EQUITY, § 53, vol. 5, p. 492.

Acquiescence or knowledge in assertion of an adverse right for an unreasonable time on which the rule of laches is based will be presumed, after lapse of time, where the equity of the case de-

mands. *Veitch v. Woodward Iron Co.* (Ala.), 76 So. 124.

§ 54. Grounds and Essentials of Bar.

§ 58. — Prejudice from Delay in General.

No arbitrary rule exists for determining when a demand becomes stale, and, in the absence of substantial change of condition or prejudice to third parties, mere delay does not constitute laches. *Woodlawn Realty, etc., Co. v. Hawkins*, 186 Ala. 234, 65 So. 183.

Laches is sufficient to bar equitable relief, especially where it has been so long continued as to render relief doubtful, uncertain, unfair, or unjust. *Gayle v. Pennington*, 185 Ala. 53, 64 So. 572.

Mere delay working no disadvantage to another and not changing the circumstances so that there can no longer be a safe determination of the controversy will not bar complainant. *Waddail v. Vassar*, 196 Ala. 184, 72 So. 14.

§ 60. Excuses.

§ 62. — Personal Disabilities.

Non Compos Mentis.—*Bradley v. Singleterry*, 176 Ala. 106; 59 So. 58. See the title EQUITY, § 62, vol. 5, p. 495.

§ 63½. — Fraud, Concealment, or Other Act of Adverse Parties.

Where an agent to purchase land, in actual fraud of his principal's rights, took title in the name of his infant son, which was the same name as his own, except for the middle initial, and thereafter executed a deed conveying the premises to the principal, in which he recited that the premises were the same land as conveyed to him, and the deed to the son was not recorded for more than 18 years, the principal and his successors in title were not required, as ordinarily, to examine the deed to the agent so as to have constructive notice of the fraud, but actual notice thereof to them must be shown before their rights can be barred by laches, no matter how long the delay. *Fowler v. Alabama Iron, etc., Co.*, 189 Ala. 31, 66 So. 672.

§ 64½. Application of Doctrine in General.

Laches is a shield and not a sword, and, though in harmony with well-es-

tablished principles, precedents are not allowed to control particular cases, but each case is to be considered and determined upon its own peculiar facts. *Fowler v. Alabama Iron, etc., Co.*, 189 Ala. 31, 66 So. 672.

§ 66. Following Statute of Limitations.

Laches depends principally upon the inequity of permitting a claim to be enforced, and, if this inequity exists, relief will be denied, though the statutory period of limitation has not elapsed. *Gayle v. Pennington*, 185 Ala. 53, 64 So. 572.

Where laches is invoked, statutes of limitation do not bind a court of equity, unless there has been legal adverse possession. *Waddail v. Vassar*, 196 Ala. 184, 72 So. 14.

Analogy.—In applying the doctrine of laches, courts of equity act in accord with the analogy furnished by statutes of limitations. *Woodlawn Realty, etc., Co. v. Hawkins*, 186 Ala. 234, 65 So. 183.

When a suit is brought within the time fixed by an analogous statute of limitations, defendant must show laches, but, when brought after the statutory time, complainant must plead and prove that laches does not exist. *Woodlawn Realty, etc., Co. v. Hawkins*, 186 Ala. 234, 65 So. 183.

Prima facie a delay in filing a bill in equity, less than the analogous period of limitations at law, is not laches, and special matters excusing the delay need not be alleged; the facts rendering the delay culpable being matters of defense. *Southern States Fire Ins. Co. v. Kelley*, 186 Ala. 259, 65 So. 328.

§ 67. Waiver of Objections.

Unless appearing on the face of the bill, the defense of laches must be raised by answer. *Hogan v. Scott*, 186 Ala. 310, 65 So. 209.

III. PARTIES AND PROCESS.

§ 72. Necessary or Indispensable Parties.

§ 73. — Persons Indispensable to Complete and Final Determination.

Possessors of Interest in Subject Matter Only Necessary Parties.—*Seay v. Graves*, 178 Ala. 131, 59 So. 469. See the title EQUITY, § 73, vol. 5, p. 498.

§ 74. — Grounds for Omitting or Dispensing with Parties.

All persons interested in a suit in equity and whose rights will be directly affected by a decree are necessary parties, unless they are too numerous and some of them are beyond the reach of process or are not in being. *Culley v. Elford*, 187 Ala. 165, 65 So. 381.

§ 76. Proper Parties.

§ 77. — Interest in Controversy Separable.

Parties Participating in Fraud.—*Moore v. Empire Land Co.*, 181 Ala. 344, 61 So. 940. See the title EQUITY, § 77, vol. 5, p. 500.

§ 79. Complainants.

§ 80. — In General.

A bill by a distributee for the removal of the administration to the chancery court and for equitable relief against the administrator, which shows that a proper adjustment of accounts between the administrator and decedent will preserve the solvency of decedent's estate, shows that complainant has such an interest as authorizes him to bring the suit. *Newell v. Bradford*, 187 Ala. 251, 65 So. 800.

§ 83. Defendants.

§ 85. — Joinder.

Joint Interest.—*Moore v. Empire Land Co.*, 181 Ala. 344, 61 So. 940. See the title EQUITY, § 85, vol. 5, p. 52.

§ 89. Intervention.

The proper purpose of a petition for leave to intervene and file a cross-bill in equity is not of itself to disclose the equity on which the intervening complainant relies, but merely to bring to the court's attention the facts afforded in the bill it is proposed to file, and invite an order allowing it to be filed. *Douglass v. Blake*, 189 Ala. 24, 66 So. 617.

Where, in a suit by a chattel mortgagee to restrain foreclosure by assignees of a series of notes as collateral security, the mortgagee applied for leave to intervene, alleging that certain of the defendants were conspiring to deprive him of his rights, and that he had tendered his debt, for which the notes were held as collateral, and thereby became re-

stored to legal ownership of the notes and mortgage, notwithstanding his tender was refused, and that since the issuance of a preliminary injunction other notes secured by the mortgage had matured and remained unpaid, such mortgagee was not a mere intervener, seeking participation in the relief prayed in the original cause, but was seeking relief on an independent equity, antagonistic to that sought in the original suit, to which he was not a party, and which must be awarded, if at all, on an original bill of intervention in the nature of a cross-bill, and hence such bill was not a mere accessory to the original cause. *Douglass v. Blake*, 189 Ala. 24, 66 So. 617.

§ 90. Bringing in New Parties.

A mere suggestion, in the answer in a suit to have a deed declared a mortgage and for redemption, that a third party had purchased without notice, did not require the court to order such party brought in. *Dawsey v. Culbreth* (Ala.), 75 So. 459.

§ 92. Amendment as to Parties.

Making Party Plaintiff or Defendant.—*Lewis v. Alston*, 176 Ala. 271, 58 So. 278. See the title EQUITY, § 92, vol. 5, p. 506.

§ 93. Process in General.

Facts averred must be sufficient to extend jurisdiction to tribunal assuming to exercise it over res, and the notice, actual or constructive, must be sufficient to bring the res within the jurisdiction, since judgment without jurisdiction over the person is of no avail. *Gill v. More* (Ala.), 76 So. 453.

Person Deceased.—If, when complainant filed a bill to quiet title, a person sought to be made a party defendant was dead, he was not made a party, however perfect the constructive notice given as to him. *Gill v. More* (Ala.), 76 So. 453.

IV. PLEADING.

(A) ORIGINAL BILL.

§ 100. Introduction or Statement as to Parties.

Under Code 1907, § 3106, providing that, where it is necessary to make any

persons defendant to a bill, and the names of all or any are unknown, and can not be ascertained on diligent inquiry, and plaintiff annexes an affidavit that the names of such persons are unknown, etc., proceedings may be had and a decree rendered against them without naming them, unknown devisees or heirs at law were not made parties to a bill to quiet title against decedent if alive, or against them, in the alternative, if he was dead, and were not bound by the decree, nor precluded from later assertion of their property rights to the lands in question, where no affidavit was annexed to the bill. *Gill v. More* (Ala.), 76 So. 453.

§ 103. Averment of Jurisdiction.

Facts averred must be sufficient to extend jurisdiction to tribunal assuming to exercise it over the res. *Gill v. More* (Ala.), 76 So. 453.

Sufficiency of averment of jurisdictional facts to enable the tribunal to hear and determine must be tested by the law in force within the state where right of action is conferred and sought to be enforced. *Gill v. More* (Ala.), 76 So. 453.

§ 104. Prayer for Relief.

Part of Relief Prayed for Barred.—*Walshe v. Dwight Mfg. Co.*, 178 Ala. 320, 59 So. 630. See the title EQUITY, § 104, vol. 5, p. 511.

Relief Not Authorized by Facts Averred.—That a bill contains a prayer for specific relief not authorized by the facts averred will not destroy its equity where there is a prayer under which relief may be granted. *Todd v. Interstate Mortg., etc., Co.*, 196 Ala. 169, 71 So. 661.

§ 105. Prayer for Process.

Parties Defendant Only Those against Whom Process Is Prayed.—*Jackson v. Putman*, 180 Ala. 39, 60 So. 61. See the title EQUITY, § 105, vol. 5, p. 511.

§ 107. Form and Sufficiency of Allegations in General.

A bill in equity must allege issuable facts, not the evidence to establish facts or prove issue. *Cullman Property Co. v. Hitt Lumber Co.* (Ala.), 77 So. 574.

Legal Conclusions.—Allegations of the bill as to complainant's ownership, or rights of action as to trespasses on lands

before complainant acquired them, were merely conclusions, as were allegations as to defendant corporation's liability to complainant as for trespasses by other parties. *Cullman Property Co. v. Hitt Lumber Co.* (Ala.), 77 So. 574.

Failure to Fill in Date.—It does not go to the equity of a bill that it contains a blank from failing to fill in a date. *Peerless Coal Co. v. Lamar*, 180 Ala. 307, 60 So. 837.

§ 108. Directness and Positiveness or Argumentativeness.

Argumentative allegations and expressions of opinion in bills are objectionable. *Cullman Property Co. v. Hitt Lumber Co.* (Ala.), 77 So. 574.

§ 109. Certainty.

In chancery pleading, it is not sufficient merely to aver evidence from which a required fact may be inferred, though the evidence, if uncontradicted, may be sufficient to induce a chancellor or a jury to find the fact from it. *Board v. Merrill*, 193 Ala. 521, 68 So. 971.

General charge of fraud in a bill without facts is insufficient. *Cullman Property Co. v. Hitt Lumber Co.* (Ala.), 77 So. 574.

Of Date by Reference to Other Parts of Bill.—*Peerless Coal Co. v. Lamar*, 180 Ala. 307, 60 So. 837. See the title EQUITY, § 109, vol. 5, p. 517.

The bill for specific performance is not open to the objection of being repugnant to or variant from itself, or leaving the contract so uncertain as to preclude a decree for performance, complainants being ready to pay the balance of the price, because alleging not only that complainant entered into a contract with E. for purchase of the land at the agreed price of \$900, to be paid \$100 presently, and the balance in installments of \$200 each on certain dates, and that by the terms thereof on the payment of said purchase price E. was to execute to complainant a deed conveying the title, but also that the first payment E. signed and delivered to complainant "the following written agreement," namely: "Received of R. \$100 on land purchased of E. this day, which leaves of said purchase money \$800 secured by notes and a mortgage on

said land." *Eason v. Roe*, 185 Ala. 71, 64 So. 55.

§ 110. Consistency, Ambiguity, or Repugnancy.

See ante, "Certainty," § 109.

§ 112. Multifariousness.

§ 113. — In General.

Definition.—"Multifariousness" is the joinder of distinct and independent matters, thereby confounding them, or the uniting in one bill of several distinct and unconnected matters against one defendant, or the demands of several distinct and independent matters of a distinct and independent nature against several defendants in the same bill; it is frequently a matter of discretion; every case must be governed by its own peculiar facts, subject to certain equity jurisprudence; in determining this question multiplicity of suits should be avoided, as equity delights to do justice, and not by halves, and it is left in a large measure to the sound discretion of the court. *Ford v. Borders* (Ala.), 75 So. 398.

"Multifariousness" is abstractly incapable of an accurate definition, but includes those cases where a party is brought as a defendant on a record with a large portion of which, and, in the case made by which, he has had no connection whatever. *O'Neal v. Cooper*, 191 Ala. 182, 67 So. 689.

In testing a bill for multifariousness, the whole bill must be considered; each case depending on its own merits. *Webb v. Butler*, 192 Ala. 287, 68 So. 369.

Judicial Discretion.—The trial court has considerable discretion in determining whether a bill is multifarious. *Webb v. Butler*, 192 Ala. 287, 68 So. 369.

Bill seeking cancellation of a decree in so far as it clouded complainants' title to certain lands was not multifarious in so far as it related to complainants' interest in the lands and the adjudication of the right or interest therein of complainant in the suit resulting in the decree sought to be set aside. *Gill v. More* (Ala.), 76 So. 453.

§ 114. — Misjoinder of Causes of Action.

§ 114 (1) In General.

Cancellation of Mortgage on Lands

Severally Owned.—A bill seeking cancellation of a single mortgage on lands averred to be severally owned, is not multifarious under Code 1907, § 3095, declaring a bill is not multifarious because it seeks alternative or inconsistent relief growing out of the same subject matter or founded on the same contract or transaction. *Mathews v. Carroll Mercantile Co.*, 195 Ala. 501, 70 So. 143.

Matters Incident to Main Relief.—*Minge v. Green*, 176 Ala. 343, 58 So. 381. See the title EQUITY, § 114 (1), vol. 5, p. 522.

Unsupported Prayers for Alternative Relief.—Complainant alleged that he purchased certain real property from defendants and paid the price, received possession, and made valuable improvements; that prior to filing the bill he tendered to defendants a warranty deed, with the request that it be executed, but that defendants refused to execute the deed. The bill prayed that defendants be required to execute a valid deed to complainant, with an alternative prayer that, if a good deed could not be made, defendants be required to repay to complainant the price paid, together with the reasonable value of complainant's permanent improvements and his other expenses and a reasonable attorney's fee, and that, if complainant was not entitled to a decree of specific performance, a lien be decreed in complainant's favor for the items specified, including damages for defendant's breach of contract, and that the land be sold for its satisfaction. Held, that the only equity in the bill was complainant's right to specific performance by the execution and delivery of a deed, and that the alternative prayers, unsupported by any averment, should be rejected as surplusage, and did not render the bill multifarious. *Brown v. Sheridan*, 185 Ala. 122, 64 So. 68.

Cancellation of Transfer and Removal of Agent.—*Peerson v. Danley*, 181 Ala. 163, 61 So. 302. See the title EQUITY, § 114 (1), vol. 5, p. 523.

§ 114 (3) Several Grounds for Single Relief.

Alternative Allegations as to Consideration for Conveyance.—*Leonard v. Roden Grocery Co.*, 183 Ala. 578, 62 So. 782.

See the title EQUITY, § 114 (3), vol. 5, p. 524.

§ 114 (4) Prayer for Different Kinds of Relief in General.

Inconsistent Relief in Alternative.—

Under Code 1907, § 3095, providing that a bill is not multifarious which seeks alternative or inconsistent relief growing out of the same subject matter or founded on the same contract or transaction in a divorce suit, if complainant's amendment to her bill sought inconsistent relief in the alternative, the amended bill was not demurrable, if arising out of the same transaction or subject matter or relating to the same property between the same parties. *Barrington v. Barrington* (Ala.), 77 So. 711.

Abatement of Nuisance, and Additional Relief Sought by Amendment.—

Sloss-Sheffield Steel, etc., Co. v. McLaughlin, 182 Ala. 266, 62 So. 96. See the title EQUITY, § 114 (4), vol. 5, p. 526.

Ward Seeking Relief against Frauds of Guardian.—A bill by a ward, after majority, for relief against her guardian and his surety, alleging fraud of the guardian in the procurement of a consent decree settling his guardianship, and which avers that, after attaining full age, he, by virtue of his control and influence over her, induced her to execute a conveyance, and which prays for relief on that account, is multifarious, and not within Code 1907, § 3095, declaring that a bill is not multifarious which seeks alternative or inconsistent relief growing out of the same subject matter, for the conveyance complained of does not come within the guardianship bond, and the claim arising therefrom can not be treated as an asset of the ward in the hands of the guardian, though the transaction may be shown as a corroborative evidence of the fraudulent procurement of the decree. *Manegold v. Beaven*, 189 Ala. 241, 66 So. 448.

§ 114 (7) Injunction and Other Relief.

Where a bill was filed to protect complainant's property rights against the unlawful acts of defendants during a strike, which acts were threatened in the execution of a conspiracy between de-

fendants and others, the bill being merely to prevent criminal acts of violence threatened against complainant or its employees, actual or prospective, was not multifarious because it charged the commission of sundry, injurious, and unlawful acts by defendants or their co-conspirators for the single purpose of interfering with complainant in the lawful conduct of its business and tending to its injury in that behalf. *Hardie-Tynes Mfg. Co. v. Cruse*, 189 Ala. 66, 66 So. 657.

A bill asking an injunction to prevent repeated trespasses by a corporation which was cutting timber on complainant's land, for discovery as to the amount already cut, and for damages for the timber cut, not only by the corporation, but also by the firm, which was converted into the corporation, and by its individual members, who were officers of the corporation, is bad for multifariousness, which is described generally as the joinder of distinct and independent matters, or the uniting in one bill of several distinct matters unconnected with one defendant, or the demand of several matters of a distinct and independent nature against several defendants in the same bill, and the defect is not cured by Code 1907, § 3095, providing that a bill is not multifarious for seeking alternative relief growing out of the same subject matter, or founded on the same transaction, or relating to the same property between the same parties. *Hitt Lumber Co. v. Cullman Property Co.*, 189 Ala. 13, 66 So. 720.

§ 114 (8) Partition and Other Relief.

Bill between Heirs and Cotenants for Partition.—A bill by the heirs at law of a decedent against other heirs at law, their cotenants, for partition, with a sale for distribution, and also seeking a cancellation of deeds from the decedent to two of the defendants on the ground that they had been obtained through undue influence and for a grossly inadequate consideration, where the removal of the cloud or the adjustment of legal or equitable rights would leave a community of interest, entitling all the parties to share in the distribution, was not multifarious. *Long v. Long*, 195 Ala. 560, 70 So. 733.

A bill for partition among tenants in common is not rendered multifarious by seeking an accounting among the tenants in common as for rent or other uses of the common property and for amounts expended thereon by some. *Ford v. Borders* (Ala.), 75 So. 398.

Accountings as to Other Matters.—Even if the parties to a suit for partition are the only parties interested in accountings as to other matters and transactions, these independent matters can not be joined in one suit. *Ford v. Borders* (Ala.), 75 So. 398.

A tenant in common, in suit for partition in specie, or for a sale of the common property for distribution, can not have an accounting between himself and another of the cotenants as to matters not so related to or connected with the common property sought to be divided as to be logically embraced in the main accounting. *Ford v. Borders* (Ala.), 75 So. 398.

A tenant in common, deriving her interest under will of her mother, who had bought the lands with another tenant in common, in a suit against such other tenant for partition and an accounting, could not by the same bill seek an accounting between herself as administratrix of her mother's estate and such other tenant as to other transaction of his with her testatrix not involving the lands sought to be partitioned; Code 1907, § 3095, providing that a bill is not multifarious which seeks alternative or inconsistent relief growing out of the same subject matter, not applying. *Ford v. Borders* (Ala.), 75 So. 398.

§ 114 (10) Enforcement of Mortgage or Relief Therefrom and Other Relief.

Under Code 1907, § 3095, providing that a bill is not multifarious which seeks alternative or inconsistent relief growing out of the same subject matter, a bill to set aside a mortgage foreclosure sale under a power of sale, or, in the alternative, for leave to redeem, is not multifarious. *Dozier v. Farrior*, 187 Ala. 181, 65 So. 364.

A bill seeking to foreclose a chattel mortgage on crops and also to redeem from the mortgagor's landlord as superior lienholder would be multifarious, as

joining wholly distinct matters. *West v. Henry*, 185 Ala. 168, 64 So. 75.

The bill to foreclose a first mortgage, so far as it seeks to have the second mortgage, and the sale under a power therein, declared void, seeks relief not germane to, but independent of, and in no way connected with, its foreclosure feature, and so is multifarious, it being immaterial to complainant whether the second mortgage, or such sale, be void, his claim on the land being superior to those under the second mortgage. *Arnett v. Willoughby*, 190 Ala. 530, 67 So. 426.

§ 114 (11) Suits Relating to the Administration of Estates.

Removal of Administration into Equity.—*Seay v. Graves*, 178 Ala. 131, 59 So. 469. See the title EQUITY, § 114 (11), vol. 5, p. 531.

§ 114 (12) Suits to Enforce Creditors' Claims.

Code 1907, § 3095, provides that, unless taken by demurrer, objection to a bill because of multifariousness must not be entertained, and that a bill is not multifarious which seeks alternative or inconsistent relief growing out of the same subject matter or founded on the same contract or transaction, or relating to the same property between the same parties. Section 3740 provides for discovery supplemental to execution. Section 4293 provides that all conveyances of any estate or interest in real or personal property, and every charge upon the same, made with intent to hinder, delay, or defraud creditors, purchasers, or other persons of their lawful suits, damages, forfeitures, debts, or demands against the persons who are or may be so hindered, delayed, or defrauded, their heirs, personal representatives, and assigns, are void. Section 4295 provides that every general assignment made by a debtor, or a conveyance by a debtor, of substantially all of his property subject to execution in payment of a prior debt, by which a preference or priority of payment is given to one or more creditors over the remaining creditors of the grantor, shall be and inure to the benefit of all the creditors of the grantor

equally. Held, that a bill is not multifarious in seeking discovery of alleged concealed assets, in seeking decree that debtors made a fraudulent transfer of property, and in seeking relief on the theory that the debtors have made a transfer or conveyance of all of their property, which act, under the statute, the creditor would have adjudged a general assignment for the benefit of all creditors. *Hard v. American Trust, etc., Bank* (Ala.), 76 So. 30.

Code 1907, § 3095, declares that a bill is not multifarious which seeks alternative or inconsistent relief growing out of the same subject matter, or founded on the same transaction, or relating to the same property between the parties. Before becoming a partner in a banking venture, one of defendants transferred land to his daughter. The partnership became insolvent, and such defendant thereafter executed a second deed to his daughter; the first being defective. Held, that in a suit to compel such defendant to pay his pro rata share of the firm debts, the daughter could not be joined as a party and the conveyance to her questioned, for, while multiplicity of suits should be avoided, that would make the bill multifarious as to the daughter; multifariousness being where a defendant is brought in upon a record, a large portion of which he has no connection with, or where plaintiff demands several different matters of different natures of different defendants by the same bill. *Webb v. Butler*, 192 Ala. 287, 68 So. 369.

§ 114 (14) Suits Relating to Corporate Rights or Liabilities.

See ante, "Injunction and Other Relief," § 114 (7).

A bill asking that the directors of a corporation be compelled to pay to it the amounts lost by it because of their negligence, and that complainant recover from the amount so refunded the money paid by him for the purchase of corporate stock which he was induced by the fraud of the corporation's agent to buy, is not multifarious, since the refund by the directors of the corporation is merely subsidiary to the real relief sought—the recovery of complainant's

money. *King v. Livingston Mfg. Co.*, 192 Ala. 269, 68 So. 897.

Bill to Avoid Execution Sale and to Redress Corporate Wrongs.—*Empire Realty Co. v. Harton*, 176 Ala. 107, 57 So. 763. See the title EQUITY, § 114 (14), vol. 5, p. 536.

§ 114 (15) Cancellation or Reformation and Other Relief.

See ante, "In General," § 114 (1).

Cancellation of Deed and Reformation of its Description.—Under Code 1907, § 3095, providing that a bill is not multifarious which seeks alternative or inconsistent relief, founded on the same contract or transaction, and relating to the same property between the same parties, a bill to annul a deed and reform the description thereof was not multifarious, though it sought inconsistent alternative relief. *Kant v. Atlanta, etc., R. Co.*, 189 Ala. 48, 66 So. 598.

Cancellation of Deed and Declaration of Trust.—*Moore v. Empire Land Co.*, 181 Ala. 344, 61 So. 940. See the title EQUITY, § 114 (15), vol. 5, p. 536.

Instruments to Different Persons Secured by Same.—A bill which seeks to cancel for fraud separate assignments and conveyances to different persons, but secured by the same persons, as the result of the same transaction, is not multifarious. *Adams v. Davidson*, 192 Ala. 200, 68 So. 267.

Redemption and Accounting in Alternative.—A bill by a mortgagor, seeking cancellation of the mortgage on the ground it was given as security for her husband's debt, and for redemption and accounting in the alternative, is not subject to demurrer for multifariousness, in view of Code 1907, § 3095, providing that a bill is not multifarious which seeks alternative or inconsistent relief growing out of the same subject matter. *Macke v. Macke* (Ala.), 76 So. 26.

§ 115. — Misjoinder of Complainants.

Person in Different Capacities.—A tenant in common, deriving her interest under will of her mother, who had bought the lands with another tenant in common, in a suit against such other tenant for partition and an accounting, could properly join herself as adminis-

tratrix of her mother's estate to have a full accounting, including items due her mother's estate prior to the time when complainant acquired her individual interest, in order to avoid two suits. *Ford v. Borders* (Ala.), 75 So. 398.

Community of Interest.—*Zadek v. Burnett*, 176 Ala. 84, 57 So. 443. See the title EQUITY, § 115, vol. 5, p. 536.

§ 116. — Misjoinder of Defendants.

§ 116 (1) Common or Distinct Interests or Liabilities in General.

A partnership engaged in salvaging a wreck, divided into two groups, each of which kept separate accounts with defendant who disposed of the property salvaged. Complainant, who was the manager of one group, asserted that defendant had not paid over all sums due his group, but had wrongfully paid over some of its funds to the other. Held, that in a suit against the second group, defendant might be joined, and he could not demur to the bill on the ground of multifariousness; all parties having an interest and equity abhorring a multiplicity of suits. *Forcheimer v. Foster*, 192 Ala. 218, 68 So. 879.

A bill, by an assignee of a mortgage, whose attorney bid in at foreclosure sale, and took foreclosure deed under verbal agreement to hold for his client, and thereafter brought ejectment against the mortgagors, wherein he prevailed, against the attorney's devisee and the mortgagors, seeking complainant assignee's investment with the title apparently acquired by the attorney after foreclosure, and sale for division of the proceeds of the land, in which complainant assignee was also tenant in common with the feme mortgagor, was not multifarious, since each defendant had an interest in the subject matter, and the relief sought asked the court to determine all rights or claims relating thereto. *Wilson v. Henderson* (Ala.), 75 So. 935.

§ 116 (2) Separate Acts or Transactions Affecting Same Property.

Bill to Quiet Title.—*Osborne v. Waddell*, 176 Ala. 232, 57 So. 698. See the title EQUITY, § 116 (2), vol. 5, p. 540.

§ 116 (3) Suit for Foreclosure or Relief from Mortgage.

Suit against Purchaser and Grantee.—

Dixie Grain Co. v. Quinn, 181 Ala. 208, 61 So. 866. See the title EQUITY, § 116 (3), vol. 5, p. 540.

Mortgage Foreclosure and Cancellation of Conveyance.—A bill to foreclose two mortgages on real estate, one executed by J. and others and the other executed later by M., and to reform certain features of the descriptions in the mortgages, and which, as amended, sought the cancellation of a conveyance by J. and M. to the son and heir of M., as a condition to the enforcement of the mortgages, was not "multifariousness," as the purpose of the bill was single—that is, the enforcement of the complainant's liens—and as it is not essential in such cases that every defendant have an interest in or concern for all matters or phases of the controversy. *Mitchell v. Cudd*, 196 Ala. 162, 71 So. 660.

§ 116 (4) Suits Relating to Administration of Decedent's Estates.

Cancellation of Conveyance and Removal of Administration into Chancery.—*Wilks v. Wilks*, 176 Ala. 151, 57 So. 776. See the title EQUITY, § 116 (4), vol. 5, p. 540.

§ 116 (5) Suit for Partition and Other Relief.

Purchasers of part of the interest of a cotenant are proper parties to partition proceedings between the cotenants, and their joinder does not make the bill multifarious. *O'Neal v. Cooper*, 191 Ala. 182, 67 So. 689.

Partition and to Quiet Claims of Others.—*Edmonds v. Cogsdill*, 182 Ala. 309, 62 So. 691. See the title EQUITY, § 116 (5), vol. 5, p. 541.

§ 116 (6) Suit to Enforce Creditors' Claims.

Judgment creditor's bill to reach equitable assets of a corporation, affirming them to be, first, those arising from corporation's right to call on stockholders for unpaid subscriptions, and, second, those that may be produced by setting aside fraudulent conveyances of corporate property, is not subject to demurrer for multifariousness, and any number of fraudulent grantees and stockholders, subject as such for unpaid

stock, may be joined. *Bellview Cemetery Co. v. Faulks* (Ala.), 73 So. 927.

§ 116 (8) Suits Involving Principal and Surety.

In a suit to foreclose a lien for the purchase price of a stock of goods and fixtures reserved in a contract of sale, the joinder as correspondents of sureties who guaranteed performance of the contract by the purchaser did not render the bill objectionable for multifariousness. *Averyt Drug Co. v. Ely-Robertson-Barlow Drug Co.*, 194 Ala. 507, 69 So. 931.

§ 118. Exhibits.

Exhibits attached to a bill should be treated as part thereof on demurrer. *Clements v. Clements* (Ala.), 76 So. 855.

Copy of Unsigned Contract.—*Conoley v. Harrell*, 182 Ala. 243, 62 So. 511. See the title EQUITY, § 118, vol. 5, p. 545.

Records of Probate Court.—Where a bill to vacate proceedings in the probate court attached the records thereof as exhibits, such exhibits, in so far as not disputed or contradicted by its averments, are, under chancery rule 16, p. 1533, as much a part of the bill as if set out in the body. *Hogan v. Scott*, 186 Ala. 310, 65 So. 209.

§ 119. Construction and Operation.

Reasonable Interpretation.—*Zeigler v. Zeigler*, 180 Ala. 246, 60 So. 810. See the title EQUITY, § 119, vol. 5, p. 546.

Construction against Pleader.—*Randolph v. Vails*, 180 Ala. 82, 60 So. 159. See the title EQUITY, § 119, vol. 5, p. 546.

A bill is to be construed most strongly against the pleader. *Schloss v. Brightman*, 195 Ala. 540, 70 So. 670.

Bills are construed against pleader, and facts not averred are deemed not to exist. *Cullman Property Co. v. Hitt Lumber Co.* (Ala.), 77 So. 574.

Inference of Complainant's Intention.—Where a bill seeking reformation of an instrument expressly avers mistake only of the complainant, the court will not infer, in order to uphold the bill as against a demurrer, that complainant intended to allege a mutual mistake. *Kant v. Atlanta, etc., R. Co.*, 189 Ala. 48, 66 So. 598.

Effect of Cumulative Averment.—Averment of bill to abate nuisance that was merely cumulative or superfluous, and did not vary the principle of relief claimed, whether well pleaded or not, did not go to the equity of bill. *Florence Land Co. v. Florence* (Ala.), 75 So. 19.

Effect of Concession as to Mortgagor's Option to Disaffirm Sale.—In suit by a mortgagee against mortgagors, a widow and her husband's heirs, of two tracts, owned one by the widow, the other by the heirs, the widow having joined in the mortgage only as surety, where the original bill alleged foreclosure by the mortgagee, and its purchase of the two mortgaged parcels of land en masse, praying that the mortgagors be required to elect whether they would affirm or disaffirm the sale under power, and, in the event of disaffirmance, that the mortgage be foreclosed by appropriate decree, thus conceding the option of the mortgagors to disaffirm, the widow's right, to the benefit of a proper foreclosure of the two tracts separately under decree of the court, by her cross-bill became fixed, and she could not be deprived thereof by dismissal of the original bill, or its amendment to withdraw the averments of sale en masse, the prayer that the mortgagors be required to elect, and the introduction of a prayer that the sale be confirmed by decree. *Todd v. Interstate Mortg. Bond Co.*, 196 Ala. 169, 71 So. 661.

(B) PLEA, ANSWER, AND DISCLAIMER.

§ 124. Answer.

§ 141. — Denials and Admissions.

Admissions in the answer to a bill in equity concede only facts well pleaded. *Cullman Property Co. v. Hitt Lumber Co.* (Ala.), 77 So. 574.

The denials of a sworn answer, though it is not presented to the chancellor through a note of testimony, must be considered in connection with its admissions. *Stouts Mountain Coal, etc., Co. v. Pollak*, 195 Ala. 556, 70 So. 846.

Rule as to Matters within Respondent's Peculiar Knowledge.—The rule that where material matter is charged in

the bill which prima facie is within respondent's peculiar knowledge, and the answer is only a general denial, matter so charged must be considered as admitted, has no application where the fraud charged against defendant is manifestly known to complainant. *Johnson v. Pinckard*, 196 Ala. 259, 72 So. 127.

§ 142. — Allegations of New Matter.

Occurrences Subsequent to Filing of Bill.—*Rucker v. Jackson*, 180 Ala. 109, 60 So. 139. See the title EQUITY, § 142, vol 5, p. 552.

§ 145. Failure to Answer.

Where bill to restrain alleged nuisance was not answered, its averments must be considered as confessed. *State v. Ellis* (Ala.), 78 So. 71.

(C) CROSS-BILL AND PLEA AND ANSWER THERETO.

§ 146. Nature and Office of Cross-Bill.

Distinguished from Original Bill in Nature of Cross-Bill.—A cross-bill is allowed to enable one, not a party to the original suit, to come into the cause and, by appropriate averments, show his right to be heard therein, and by appropriate process in his matter bring before the court those parties who claim interests adverse to him; the distinction between an original bill in the nature of a cross-bill and a mere cross-bill being that a "cross-bill" is filed in a cause by a party thereto and seeks the enforcement of an equity germane to or springing out of the subject matter of the original bill, while an "original bill in the nature of a cross-bill" is a pleading filed by leave of the chancellor by a person not a party to the original suit, and between whom and the complainant there is no privity. *Reynolds Co. v. Reynolds*, 190 Ala. 468, 67 So. 293.

Not Distinct Suit.—*Bell v. McLaughlin*, 183 Ala. 548, 62 So. 798. See the title EQUITY, § 146, vol. 5, p. 552.

Classification.—*Bell v. McLaughlin*, 183 Ala. 548, 62 So. 798. See the title EQUITY, § 146, vol. 5, p. 553.

Original Bill without Equity.—*Vaughn v. Vaughn*, 180 Ala. 212, 60 So. 872. See the title EQUITY, § 146, vol. 5, p. 553.

§ 147. Necessity for Cross-Bill.

Filing of cross-bill is necessary to the granting of affirmative relief to defendant. *Farmers' State Bank v. Kirkland* (Ala.), 75 So. 894.

It is a rule in equity practice that a defendant will be granted affirmative relief only on cross-bill. *O'Kelley v. Clark*, 184 Ala. 391, 63 So. 948.

§ 150. Form and Requisites of Cross-Bill.

A cross-bill may properly refer to matters of description in the original bill and adopt them as a part of the cross-bill, and while a party is not required to plead any matters set up in the original bill, he may shorten his cross-bill by referring to the pleadings already on file. *Reynolds Co. v. Reynolds*, 190 Ala. 468, 67 So. 293.

§ 151. Sufficiency of Cross-Bill.

Equity of Original Bill.—Under Code 1907, § 3118, authorizing cross-bill, to obtain relief for any cause connected with bill, the cross-bill must exhibit same equity as an original bill. *Haralson v. Whitcomb* (Ala.), 75 So. 913.

Pleadings and Proceedings of Original Cause.—A cross-bill by intervener, seeking independent and antagonistic relief to that sought in the original cause, need not recite the pleadings and proceedings of record in the original cause, but may adopt them by reference. *Douglass v. Blake*, 189 Ala. 24, 66 So. 617.

Facts of Intervener's Petition.—Where an intervener files a petition for leave to file a cross-bill, and states therein facts on which he bases his independent equity, the bill which he subsequently files on leave granted, pursuant to the petition, should follow the averments of the petition with substantial accuracy. *Douglass v. Blake*, 189 Ala. 24, 66 So. 617.

§ 154. Parties and Process.

A cross-bill for settlement of a decedent's estate is multifarious, where it seeks to enjoin settlement of the accounts of a partnership in which decedent was a member, but as to which the heirs were not proper parties. *Swope v. Swope*, 178 Ala. 172, 59 So. 661.

§ 154½. Answer.

Sufficiency of original complainant's

response to cross-bill is to be determined with reference to allegations of original bill. *Wilson v. Henderson* (Ala.), 75 So. 935.

If a bill is not demurrable because failing to show affirmatively that the amount in controversy is within chancery jurisdiction, the objection must be made by plea or answer. *Kelly v. Wollner* (Ala.), 78 So. 823.

(E) DEMURRER, EXCEPTIONS, AND MOTIONS.

§ 161. Grounds for Demurrer to Bill.

§ 162. — In General.

Where alternative causes of action were set up in a bill, it is demurrable, unless each alternative shows a cause of action. *Atlantic, etc., R. Co. v. Woolfolk*, 178 Ala. 190, 59 So. 633.

Laches may be raised by demurrer when the bill shows a long delay in asserting the rights claimed. *Gayle v. Pennington*, 185 Ala. 53, 64 So. 572; *Veitch v. Woodward Iron Co.* (Ala.), 76 So. 124.

A demurrer will lie for laches, as well as for statutory limitations. *Woodlawn Realty, etc., Co. v. Hawkins*, 186 Ala. 234, 65 So. 183.

Matter of Defense.—*Dixie Grain Co. v. Quinn*, 181 Ala. 208, 61 So. 886. See the title EQUITY, § 162, vol. 5, p. 561.

§ 165. — Objections to Form or Frame of Bill.

Although a special prayer of a bill is inapt, a demurrer will not lie where appropriate relief may be given under the general prayer. *Skidmore v. Stewart* (Ala.), 75 So. 1.

Prayer for Unwarranted Relief.—*Wilks v. Wilks*, 176 Ala. 151, 57 So. 776. See the title EQUITY, § 165, vol. 5, p. 562.

§ 166. — Objections to Substance of Bill.

Failure to Show Jurisdictional Amount.—While a bill must disclose a case falling within the jurisdiction of the chancery courts, a bill is not demurrable because failing to show affirmatively that the amount in controversy is within the jurisdiction. *Kelly v. Wollner* (Ala.), 78 So. 823.

Exhibit Omitted.—A blank in a bill at a place where an exhibit was called for did not render the bill demurrable, where the contents of the omitted exhibit did not go the essential equity of the bill. *United States Fidelity, etc., Co. v. Pittman*, 183 Ala. 602, 62 So. 784.

Alternative or Inconsistent Relief.—Under the express provisions of Code 1907, § 3095, a bill was not demurrable because it sought alternative or inconsistent relief, where in each alternative it related to the same transaction and concerned the same subject matter. *Morris v. Fidelity Mortg. Bond Co.*, 187 Ala. 262, 65 So. 810.

Sufficiency of General Conclusion.—As against a demurrer to a bill in equity, the general conclusion of the pleader is sufficient. *De Soto Coal, etc., Co. v. Hill*, 188 Ala. 667, 65 So. 988.

§ 172. Demurrer to Bill Good in Part.

General Rule.—*Dixie Grain Co. v. Quinn*, 181 Ala. 208, 61 So. 886; *Whitley v. Willingham*, 176 Ala. 264, 57 So. 816. See the title EQUITY, § 172, vol. 5, p. 565.

Want of equity and multifariousness urged as grounds of demurrer to a bill attack the bill as a whole and can not be sustained if any or part of the bill entitles complainant to equitable relief. *Hardietynes Mfg. Co. v. Cruise*, 189 Ala. 66, 66 So. 657.

Good as Bill to Quiet Title.—*Moore v. Empire Land Co.*, 181 Ala. 344, 61 So. 940. See the title EQUITY, § 172, vol. 5, p. 565.

Bill to Redeem from Mortgage.—Demurrers directed to a bill to redeem from a mortgage as a whole could not be sustained, even if particular allegations hinted at relief in other aspects which they would not support. *Sewell v. Walkley* (Ala.), 73 So. 422.

If either aspect of bill in alternative has equity, demurrer taking point that there is no equity in the bill can not be sustained. *Macke v. Macke* (Ala.), 76 So. 26.

Where several demurrers were addressed to the bill as a whole, and not severally to such particular aspects as each was appropriate to, the demurrers

were properly overruled, though the bill was defective in every aspect. *Thompson v. Brown* (Ala.), 76 So. 298.

§ 173. General Demurrer.

Rule under Code of 1907.—*McDuffie v. Lynchburg Shoe Co.*, 178 Ala. 268, 59 So. 567; *Shannon v. Long*, 180 Ala. 128, 60 So. 273. See the title EQUITY, § 173, vol. 5, p. 566.

§ 176. Admissions by Demurrer.

General Rule.—*Dixie Grain Co. v. Quinn*, 181 Ala. 208, 61 So. 886; *Hicks v. Dadeville Oil Mill*, 177 Ala. 661, 59 So. 67. See the title EQUITY, § 176, vol. 5, p. 567.

A demurrer to a bill confesses the facts stated. *Peerson v. Gray*, 184 Ala. 312, 63 So. 467.

§ 178. Hearing and Determination on Demurrer.

Complainant's bill will on demurrer be construed most strongly against him. *Bernheimer v. Gray* (Ala.), 78 So. 840; *Cannon v. Birmingham Trust, etc., Co.*, 194 Ala. 469, 69 So. 934.

Presumption as to Notice of Hearing.—Where a bill to enjoin the enforcement of an assessment for a public improvement contains no allegation to the contrary, it will be presumed on demurrer that the notice of the hearing on the final assessment conveyed information to complainant that an assessment would be levied against her property for its lawful share of the cost of the improvement. *Birmingham v. Abernathy*, 178 Ala. 221, 59 So. 180.

Evidence in Original Suit Where Demurrers to Cross-Bill.—Where a cross-bill in intervention is filed pursuant to leave granted, demanding a different and antagonistic relief to that prayed by complainant in the original suit, evidence in such original suit can not be considered in determining demurrers to the cross-bill. *Douglass v. Blake*, 189 Ala. 24, 66 So. 617.

§ 179. Operation and Effect of Decision on Demurrer.

§ 181½. — Sustaining Demurrer as to Part of Bill.

A demurrer to a part of a bill is equiva-

lent to a motion to strike out the part demurred to, and the sustaining of the demurrer has the same effect as the sustaining of a motion to strike the objectionable portion. *Pollak v. Stouts Mountain Coal, etc., Co.*, 184 Ala. 331, 63 So. 531.

Misjoinder.—On the sustaining of a demurrer to a bill for misjoinder, the proper practice is to allow plaintiff to elect to proceed for one only of the matters of suit. *Ford v. Borders* (Ala.), 73 So. 398.

§ 182. — Amendment after Demurrer Sustained.

Acts 1915, p. 279, merging the chancery court into the circuit court, and Acts 1915, p. 708, declaring the circuit court open for the transaction of any and all business or judicial proceedings of every kind during the whole year, do not change the rule that it is error to sustain a demurrer to an original bill in vacation without according the complainant an opportunity to amend to meet an amendable defect. *Davidson v. Rice* (Ala.), 78 So. 862.

§ 188. Motions Relating to Pleading.

§ 189. — Striking Out Pleading.

Formal Defects.—*Bell v. Burkhalter*, 183 Ala. 527, 62 So. 786. See the title EQUITY, § 189, vol. 5, p. 570.

(F) AMENDED AND SUPPLEMENTAL PLEADINGS AND REVIVOR.

§ 191. Right to Amend Pleadings in General.

A decree sustaining a demurrer and dismissing the bill will be reversed when rendered in vacation without opportunity being given to amend as required by Code 1907, § 3126, requiring that amendments be allowed. *Pollock & Co. v. Haigler*, 195 Ala. 522, 70 So. 258.

§ 194. Amendment of Bill.

§ 195. — In General.

Under Code 1907, § 3126, a proposed amendment which did not strike out or add new parties to the bill, and added nothing in the way of giving it equity, and did not meet the demurrer and the

decree sustaining it, is properly refused. *Ex parte New*, 177 Ala. 147, 59 So. 52.

In suit for sale of land for division among cotenants, where original bill averred complainant and defendants owned all described 80-acre tract, answer denying generally, but proof showed parties owned west half of tract only; bill should have been amended before granting relief as to west half. *Carson v. Sleigh* (Ala.), 78 So. 229.

§ 200. — Matter Making New Cause.

Mere Alteration of Theory of Recovery.—Where primary purpose of original bill was to collect the debt out of lands belonging legally or equitably to defendant, an amendment abandoning original theory of preferential lien, but seeking same object by creditor's bill for discovery of assets and their subjection to complainant's claim, worked no departure; as the alteration of a theory upon which a result is to be reached, although new facts are interjected, is not a departure within the rules of equity procedure. *Harton v. Amason* (Ala.), 76 So. 953.

Modification of Relief.—Code 1907, § 3126, which provides that amendments to bills must be allowed at any time before final decree, by striking out or adding new parties, or to meet any state of evidence authorizing relief, is to be given a broad and liberal construction; and, to make an amendment improper, it is not enough that there be a mere inconsistency or repugnancy of allegation, but there must be inconsistency or repugnancy of the purpose of the bill, as contradistinguished from a modification of the relief. *Ex parte Delpey*, 188 Ala. 449, 66 So. 22.

Purpose of Bill Not Changed.—Code 1907, § 3126, provides that amendments to bills must be allowed at any time before final decree, by striking out or adding new parties, or to meet any state of evidence which will authorize relief. The original bill averred that plaintiff purchased a lot with the improvements thereon by lease-sale contract, signed "Thompson Realty Company, by J. Cary Thompson, Manager," and went into possession in 1904, and was continuously in possession thereafter; that the Realty

Company was a corporation; that in 1909 the company mortgaged the lot to defendant N. to secure a loan; that N. took the mortgage with notice of complainant's equity; that complainant had fully paid all the purchase price, or such sum as entitled him to a warranty deed; that such deed had been refused, though he was ready and willing to pay the balance; with a prayer that the mortgage be declared a cloud on his title, or declared to be subject to his equity. Held, that a proposed amendment, changing the bill so as to strike out the Realty Company and to make J. Cary Thompson and his wife parties defendant, to aver that Thompson employed the name of the company as to tradename, and that he had conveyed the property to his wife, who had notice of complainant's equities, conforming to the facts as the pleader then took them to be, did not change the purpose of the original bill, and hence was improperly disallowed. *Ex parte Delpey*, 188 Ala. 449, 66 So. 22.

Conversion into Bill to Remove Cloud from Title.—Where a bill was brought under the statute (Code 1907, §§ 5443-5446) to compel the determination of claims to land, and as amended was converted into a bill to remove a cloud from title, the change was not such as to constitute a departure. *Sloss-Sheffield Steel, etc., Co. v. Yancey* (Ala.), 77 So. 726.

Recovery of Money Paid for Stock.—Where the original bill was in deceit for fraud by the corporation's agent in the sale of stock, and prayed for the recovery of money paid, an amendment setting forth a fraudulent scheme whereby the directors, to whom the corporation was indebted, represented that it was solvent and prosperous and declared dividends, and thereby induced the stockholders to purchase new stock, from the proceeds of which they paid the debts due themselves, and prayed that the directors be compelled to refund to the corporation the amounts lost to it by their negligent management of its affairs, and that complainant be paid therefrom the amount paid by him for the stock, while altering the theory of the bill, does not depart from it, since the substance is unchanged,

and its purpose the same. *King v. Livingston Mfg. Co.*, 192 Ala. 269, 68 So. 897.

§ 201. — As to Relief Prayed.

Modification or Enlargement of Relief.—*Sloss-Sheffield Steel, etc., Co. v. McLaughlin*, 182 Ala. 266, 62 So. 96. See the title EQUITY, § 201 (1), vol. 5, p. 578.

Bill by Stockholder to Recover Money.

—An amended bill by a stockholder for the recovery of money invested in stock held not to work a departure though it became a bill for equitable discovery and relief. *King v. Livingston Mfg. Co.*, 180 Ala. 118, 60 So. 143.

§ 217. Form and Sufficiency of Amended Pleading.

Footnotes.—Amendments to substance of bill by additions to certain paragraphs, and not by adding distinct new paragraphs, do not require new footnote requiring respondent to answer. *Shannon v. Ogletree (Ala.)*, 76 So. 865.

In a mechanic's lien suit, where the bill, having the usual footnote, was amended through a single paragraph to ask that another person be brought in as party defendant by adding her name as party respondent, no additional footnote to the amended bill was necessary. *King v. Woodlawn Lumber Co. (Ala.)*, 78 So. 893.

§ 226. Bill of Revivor.

§ 227. — Nature and Office.

No Abatement of Action.—*Vaughn v. Vaughn*, 180 Ala. 212, 60 So. 872. See the title EQUITY, § 227, vol. 5, p. 588.

(G) SIGNATURE, VERIFICATION, FILING, AND SERVICE.

§ 229. Necessity of Verification.

§ 231. — Of Plea.

Code 1907, § 5332, requiring that a plea, denying the execution by defendant, his agent, attorney, or partner, of any instrument in writing, the foundation of a suit, or the assignment of the same, must be verified by affidavit, applies to proceedings in equity. *Sulzby v. Palmer*, 194 Ala. 524, 196 Ala. 645, 70 So. 1.

Code 1907, § 3967, providing that every written instrument, the foundation of a suit, purporting to be signed by the de-

fendant, his partner, agent, or attorney in fact, must be received in evidence without proof of execution unless the execution thereof is denied by verified plea, extends to equity. *Sulzby v. Palmer*, 194 Ala. 524, 196 Ala. 645, 70 So. 1.

§ 235. Filing and Notice Thereof.

Where no time is specified by the chancellor or register, the entry on the register's order book, under Code 1907, § 3133, relating to notice of amendments to parties in default, does not suffice as notice of an amendment. *Smith v. Lambert*, 196 Ala. 269, 72 So. 118.

Under Chancery Rule 44, subd. 3 (Code 1907, p. 1540), providing that all parties, who, at the allowance of an amendment, shall be in default, shall be deemed to have notice, after notice that the bill has been amended shall have been entered on the order book for such time as the chancellor or register may direct, the fact that a decree pro confesso was entered did not dispense with notice provided for by the rules of chancery practice and Code 1907, §§ 3124-3128, 3133, of a material amendment subsequently made changing the issue, the purpose of the bill, and the relief authorized; the only amendments authorized by rule 44 being those applied for at the hearing. *Smith v. Lambert*, 196 Ala. 269, 72 So. 118.

(H) ISSUES, PROOF AND VARIANCE.

§ 237. Issues in General.

A cause in equity is composed of original bill and responses thereto, and cross-bill and response thereto. *Wilson v. Henderson (Ala.)*, 75 So. 935.

In equity, appropriate pleading is as essential to enforcement of right as proof is necessary to support such pleading, proof without pleading being generally ineffectual. *Manchuria S. S. Co. v. Donald & Co. (Ala.)*, 77 So. 12.

§ 236. Matters to Be Proved.

An averment of bill admitted by the answer need not be proven. *Lunsford v. Empire Realty, etc., Co. (Ala.)*, 75 So. 960.

Code 1907, § 3115, providing that defendant shall not take any advantage by

pleading or proving an immaterial plea, and complainant need not test the sufficiency of such a plea, or move to strike it out, and, if his bill contains equity and is proved, he shall have relief, notwithstanding the pleading, and proving of any such special plea, is merely intended to change the rule in equity as to the effect of taking issue on an immaterial plea, and does not change the effect of proving a good and sufficient plea. *Phillips v. Birmingham Industrial Co.*, 180 Ala. 311, 60 So. 896.

§ 240. Variance between Allegations and Proof.

There is no variance between a bill in equity alleging that defendant purchased property under an agreement with complainant and a third person, whereby complainant should furnish part of the price, and have a corresponding interest, and that complainant paid that amount by check delivered to defendant, and the proof that complainant mailed to a third person a check for the amount, that the third person indorsed the check, and placed the proceeds to his personal credit, and gave his personal check to defendant, who obtained the money thereon, and complainant is entitled to relief. *Smith v. Pullum*, 184 Ala. 380, 63 So. 965.

(I) DEFECTS AND OBJECTIONS, AND WAIVER THEREOF.

§ 242. Cure by Subsequent Pleading.

In view of Code 1907, § 3094, providing that bills must contain a clear and orderly statement of the facts on which the suit is founded and conclude with a prayer for the appropriate relief, a party must stand on his own pleadings. *Turner v. Turner*, 193 Ala. 424, 69 So. 503.

§ 243. Waiver of Objections to Pleadings in General.

Multifariousness.—*Edmonds v. Cogsdill*, 182 Ala. 309, 62 So. 691. See the title EQUITY, § 243, vol. 5, p. 596.

Defect in Cross-Bill to Quiet Title.—*Bell v. McLaughlin*, 183 Ala. 548, 62 So. 798. See the title EQUITY, § 243, vol. 5, p. 596.

Time for Jurisdictional Objection.—Objection that a bill for specific perform-

ance does not definitely and distinctly aver the terms of the contract is jurisdictional and may be taken for the first time on the submission for decree on the facts alleged and proved. *Eason v. Roe*, 185 Ala. 71, 64 So. 55.

VI. TAKING AND FILING PROOFS.

§ 262. Depositions.

Under Code 1907, § 5225, providing that, in actions in the probate court for partition, evidence shall be taken as in chancery cases, although chancery court rule 49 provides that testimony can not be taken by either party until the cause is at issue by sufficient answers, or decree pro confesso, as to all the defendants, a decree pro confesso having no place in the practice of the probate court, in an action for sale of land for division among tenants in common, where all defendants but one allowed the case to go by default, evidence taken by depositions after interrogatories filed, after legal service on all defendants, was taken as in chancery cases within the meaning of the statute. *Cross v. Watson*, 197 Ala. 171, 72 So. 394.

§ 263. Filing Proofs.

Rule 75 of the rules for chancery practice provides that "the complainant's counsel must then offer his testimony in chief, naming the witnesses and other testimony, of which the register must take a note," and that the testimony of the defendant must then be offered and noted, to which complainant must offer his rebutting testimony, and that any testimony not so offered and noted on the minutes must not be considered as any part of the record, nor be considered by the chancellor. On a bill for subrogation to a vendor's lien against complainant's copurchaser and his heirs, the recitals on the record were: "January 27, 1896. Testimony ordered published and cause submitted on pleadings and proof for decree in vacation;" and "July 27, 1896. Continued under former order of submission, the file to be forwarded to the chancellor by the 10th day of February next;" and there was a purported note of testimony, certified as of July 27, 1896, whereon the chancellor on April 3, 1897, decreed:

"This cause was submitted on pleadings and proof in term time for consideration and final decree in vacation and is argued and heard on such submission." Held, that the effect of the rule is by reference to the note of testimony to make a record of the evidence and to bring to the chancellor's attention evidence upon which the parties rely, and upon appeal to inform the supreme court as to the evidence considered by the chancellor, and that, while the supreme court will reverse decrees when the evidence on which they have been based is not noted as the rule requiring, yet that there was a substantial compliance with the rule. *Turner v. Turner*, 193 Ala. 424, 69 So. 503.

VII. DISMISSAL BEFORE HEARING.

§ 266. Voluntary Dismissal.

Where Cross-Bill Filed. — *Swope v. Swope*, 178 Ala. 172, 59 So. 661, cited in note in Ann. Cas. 1917A, 1192. See the title EQUITY, § 266 (2), vol. 5, p. 609.

Rule under Code 1907, § 3118, Where Cross-Bill Filed.—*Faulk & Co. v. Hobbie Grocery Co.*, 178 Ala. 254, 59 So. 450, cited in note in Ann. Cas. 1917A, 1192. See the title EQUITY, § 266 (2), vol. 5, p. 610.

Effect on Cross-Bill.—Dismissal of the original bill did not per se carry with it a cross-bill, nor authorize dismissal of the same, where the cross-bill as amended contained equity independent of the original bill, growing out of the subject matter of the original bill. *Swope v. Swope*, 178 Ala. 172, 59 So. 661.

§ 267. Involuntary Dismissal.

§ 266. — Grounds.

Motion to dismiss for want of equity will be sustained only when, admitting all the facts apparent on the face of the bill, though illy pleaded, complainant can have no relief. *Clio v. Lee* (Ala.), 74 So. 243.

§ 269. — Motion and Determination Thereof.

Defects Curable by Amendment. — *Vaughn v. Vaughn*, 180 Ala. 212, 60 So. 872, cited in note in Ann. Cas. 1916A, 1231. See the title EQUITY, § 269 (1), vol. 5, p. 613.

Sufficiency of Apparent Facts of Bill.

—Motion to dismiss for want of equity will be sustained only when complainant can have no relief after admitting all facts apparent on face of bill, whether or not well pleaded. *Thompson v. Johnson* (Ala.), 78 So. 91.

§ 272. — Dismissal without Prejudice.

Disability of Part of Complainants. — *Randolph v. Vails*, 180 Ala. 82, 60 So. 159. See the title EQUITY, § 272, vol. 5, p. 617.

§ 273. — Operation and Effect.

On a bill to cancel a note given for rent, a cross-bill, seeking a mere personal judgment and having no independent equity, was carried out by a dismissal of the original bill. *Anders v. Sandlin*, 191 Ala. 158, 67 So. 684.

Cross-Bill Showing Independent Equity. — *Bell v. McLaughlin*, 183 Ala. 548, 62 So. 798. See the title EQUITY, § 273, vol. 5, pp. 618, 619.

VIII. HEARING, SUBMISSION OF ISSUES TO JURY, AND RE-HEARING.

§ 275. Condition of Cause.

Amendments. — Under Code 1907, § 3128, relating to amendments, a decree pro confesso for complainant after amendment to the bill, to which respondent merely demurs, is necessary to put a cause at issue as a condition precedent to its regular submission. *Sloss-Sheffield Steel, etc., Co. v. Yancey* (Ala.), 77 So. 726.

Cross-Bill.—Code 1907, § 3118, contemplates that a cross-bill shall be heard at same time as the original bill, but does not intend that a cross-complainant, by failing or neglecting to prepare the cross-cause for hearing, may delay indefinitely or unduly the submission of original cause. *Carson v. Sleight* (Ala.), 78 So. 229.

§ 279. Hearing on Bill and Answer.

Undenied Allegations of Answer. — When suit is presented for hearing upon the bill and an answer, which denied the allegations of the bill, the undenied allegations of the answer must be taken as

true. *Curry v. Leonard*, 186 Ala. 666, 65 So. 362.

Introducing Whole of Answer. — *Daughdrill v. Lockhart*, 181 Ala. 338, 61 So. 802. See the title EQUITY, § 274, vol. 5, p. 621.

§ 281. **Submission of Issues to Jury.**

§ 282. — **In General.**

Discretion of Chancellor.—Where jury trial in equity is not a matter of right, but only to aid the chancellor, he has the utmost discretion to determine whether an issue shall be submitted to a jury. *Alabama, etc., R. Co. v. Aliceville Lumber Co. (Ala.)*, 74 So. 441.

The chancellor may in his discretion submit to a jury issues of fact, and may impanel the jury himself or certify the questions to a law court for trial by a jury. *Ex parte Colvert*, 188 Ala. 650, 65 So. 964.

Code 1876, § 3890, as to jury trials in equity cases, has been essentially changed by Code 1907, § 3201, and decisions under the former statute have no application, but under §§ 3201, 3202, the court may submit an issue to a special jury in chancery, or certify an issue to the district court for trial. *Alabama, etc., R. Co. v. Aliceville Lumber Co. (Ala.)*, 74 So. 441.

Where a court of chancery directs a suit at law, the court of law has power to render judgment and settle all the issues involved in the case, but this rule does not apply where only an issue is sent by a court of chancery to a law court for trial. *Ex parte Colvert*, 188 Ala. 650, 65 So. 964.

§ 286. — **Verdict and Findings.**

Motion for Relief from Jury's Verdict.—A party aggrieved by the verdict on questions certified by the chancellor to a law court for trial by jury must have the particulars wherein he supposes himself injured on the trial in the law court certified by the presiding judge thereof to the chancery court, and make such certificate or certified exceptions the basis of a motion for relief before the chancellor. *Ex parte Colvert*, 188 Ala. 650, 65 So. 964.

Revision of Jury's Verdict. — The

chancellor or court of equity which submits an issue to a jury has revisory power over the verdict. *Alabama, etc., R. Co. v. Aliceville Lumber Co. (Ala.)*, 74 So. 441.

Disregard of Jury's Verdict.—In an action in equity by a successful plaintiff in ejectment for a sale for division of the land against the former defendant in ejectment, an owner of an undivided interest therein, respondent set up his hostile claim and demanded a jury trial, which was conducted on the law side of the court, and resulted in a verdict for him because of an error in excluding the ejectment judgment as evidence on the trial. On motion before the chancellor, the verdict was set aside and a decree rendered for complainant as to the contested interest. Held, that the jury trial being but part of the chancery proceedings, the verdict was subject to the revisory power of the chancellor, and was properly disregarded and a decree rendered without prejudice to respondent, as there were no disputed issues of fact to support the verdict; the ejectment judgment being *res judicata* as to the matters submitted. *Robinson v. Inzer*, 195 Ala. 491, 70 So. 717.

§ 286½. — **New Trial.**

A chancellor directing the trial of issues of fact by a jury may set aside the verdict and order a new trial, on application to him therefor. *Ex parte Colvert*, 188 Ala. 650, 65 So. 964.

§ 287. **Reception of Evidence.**

Notes of Testimony. — The rule of chancery practice, that nothing is in evidence unless included in the note of testimony, is mandatory. *Kelley v. Chandler (Ala.)*, 75 So. 973.

Rule of chancery practice as to noting testimony does not apply to evidence heard orally before court as provided by Gen. Acts 1915, p. 705. *Kelley v. Chandler (Ala.)*, 75 So. 973.

Same—Time of Filing.—Where crossbill was filed January 30th, submission taken February 17th, without decree pro confesso, but with leave to file notes of testimony later, and on February 20th answer confessing averments of cross-

bill was filed, and on February 24th notes of testimony were filed, but marked February 17th, the procedure was irregular in view of chancery rule 75 (Code 1907, p. 1551), requiring notes of testimony to be available at hearing. *Carson v. Sleigh* (Ala.), 77 So. 380.

Same — Amendments. — Where, on submission of a cause, certain material evidence is not included in note of testimony of either of the parties, trial court errs in setting aside submission in vacation, on complainant's motion, without notice to defendant and permitting him to amend his note of testimony to include omitted evidence, since it permits the introduction of new testimony after the submission of the cause without notice to the other side. *Kelley v. Chandler* (Ala.), 75 So. 973.

In suit for a division of land among joint owners, where an order was entered submitting the cause for final decree on the pleadings and proof as noted by the register, and, more than two months after submission, the note of testimony was permitted to be amended by additional proof as to a material part of complainant's case, the former submission being allowed to stand, the procedure was erroneous, as the submission should first have been set aside. *Darling v. Hanlon*, 197 Ala. 455, 73 So. 20.

§ 288. Submission of Cause.

In view of the purposes of chancery rule 75 (Code 1907, p. 1551), providing that the parties must offer their testimony on the hearing of a cause, naming the witnesses and other testimony, of which the register must make a note, that any testimony not so offered and noted by the register on the minutes must not be considered as part of the record, nor be considered by the chancellor, decree reciting a submission for final decree on the pleadings and proof as noted by the register, there appearing no occasion to doubt that the note of testimony in the cause has fully served its purpose, will not be reversed because rendered after hearing on the date the parties to the original cause, when the defendants in the cross-bill had not been brought in, joined in a submission, the

pleadings and the evidence on either hand being afterwards noted by the register. *Carson v. Sleigh* (Ala.), 78 So. 229.

Setting aside of submission of cause without notice to other party and resubmission after permitting complainant to offer additional testimony is error. *Kelsey v. Culbreth* (Ala.), 75 So. 459.

§ 289. Dismissal at Final Hearing.

Where after repeated amendments of a bill, submission was had for final decree on defendants' answers and on their demurrer incorporated therein, as permitted by Code 1907, § 3128, in the case of answers to bills amended after answer, there was no error in dismissing the bill without prejudice for failure of a necessary averment. *Hale v. Hale* (Ala.), 75 So. 150.

Under Laws 1915, p. 135, providing that the chancery court shall always be open for the transaction of business except that the court shall not have power to open or set aside any final decree after 30 days from its rendition, where submission was had by agreement of counsel for final decree, there was no error in rendering a decree of dismissal on holding the bill insufficient. *Hale v. Hale* (Ala.), 75 So. 150.

§ 290. Rehearing.

An application for a rehearing rested in the discretion of the chancellor. *Dawsey v. Culbreth* (Ala.), 75 So. 459.

When a rehearing is granted by the chancery court, the case stands as if no decree had ever been rendered. *Cox v. Brown* (Ala.), 73 So. 964.

To Defendant.—It is a rule, applicable alike in courts of law and equity, that a new trial or rehearing will never be granted to a defendant or respondent, unless it appears that he has a good defense, and therefore that the judgment on another trial would properly be different from the one set aside. *Ingram v. Alabama Power Co.* (Ala.), 75 So. 304.

Additional Evidence.—When a rehearing is granted by the chancellor the original submission is not ipso facto set aside, but the question of allowing additional evidence to be offered is within the

sound discretion of the chancellor, and, if it is allowed, there must be notice to the opposite party and a resubmission. *Cox v. Brown* (Ala.), 73 So. 964.

Fault in Not Making Proof at Trial.—

There is no error in refusing new trial to defendants in suit to set aside deed as fraudulent, on affidavits of consideration; they not acquitting themselves of fault in not making proof at trial. *Strickland v. Stuart* (Ala.), 76 So. 867.

Amendment of Bill. — Written statement in open court by one who has ceased to be party to a bill, declaring his release of his interest to certain parties to the bill, can not be regarded as amendment of bill, and will be disregarded. *Shannon v. Ogletree* (Ala.), 76 So. 865.

IX. MASTERS AND COMMISSIONERS, AND PROCEEDINGS BEFORE THEM.

§ 293½. Appointment, Qualification, and Tenure.

Appointment of Special Register. —

Under Code 1907, § 3078, providing that the chancellor may appoint a special register when necessary, the chancellor may appoint a special register, even though the regular register is not legally disqualified, whenever the circumstances are such that reasonable grounds exist for apprehending bias of the regular register. *State v. Benners*, 185 Ala. 350, 64 So. 308.

Disqualification by Interest. — In a suit to compel a surviving partner to account for the assets of the firm and also to account as administrator and as guardian, it appeared that the regular register of the court of chancery had once been law clerk with a firm who were of counsel for complainant during most of the time the case had been pending, and that the register's father was indebted to the firm, unless it was barred by the statute of limitations. Held, that those facts did not disqualify the register under the common law or under Chancery Rule, § 6, declaring that, in all cases when the register is interested or related to the parties within the fourth degree, it shall be the duty of the chan-

cellor to appoint a special register. *State v. Benners*, 185 Ala. 350, 64 So. 308.

§ 295. Questions and Matters Proper for Reference.

Fraud on Marital Right and Incapacity to Execute Conveyance.—On bill to set aside deed for want of consideration, a fraud on the marital right of grantor's wife, and grantor's incapacity by reason of intoxication to execute the conveyance, chancellor properly referred the ascertainment of facts to the register, on reference. *Lewis v. Davis* (Ala.), 73 So. 419.

The denial of compensation to a trustee because of fraud or gross neglect, like the question of the removal of the trustee on such grounds, is a judicial question which the chancellor, acting within his general equity powers, should determine for himself without necessity for the services of the register. *Horst v. Pake*, 195 Ala. 620, 71 So. 430.

§ 299. Report.

§ 302. — Operation and Effect.

Code 1907, § 5955, subd. 1, provides that the supreme court shall give no weight to the decision of the chancellor upon the facts, but shall weigh the evidence and give judgment as they deem just. Held, that a register's finding on the oral examination of witnesses is presumed correct, and should not be disturbed if there is a reasonable doubt as to whether it is correct, and this rule applies to the review of his holding both by the chancellor and by the supreme court. *Bidwell v. Johnson*, 195 Ala. 547, 70 So. 685.

§ 303. Objections and Exceptions to Report and Hearing Thereof.

§ 303 (1) Necessity of Objection and Exception.

Under rule 93 of chancery practice, providing that the chancellor need not consider evidence not noted on exceptions to the register's report, the chancellor may consider evidence despite the absence of notations. *Faulk & Co. v. Hobbie Grocery Co.*, 178 Ala. 254, 59 So. 450.

§ 303 (6) Accompanying Exception with Reference to Evidence.

Power to Consider Evidence Not Noted on Exceptions.—*Curtis v. Curtis*, 180 Ala. 70, 60 Sq. 165. See the title EQUITY, § 303 (6), vol. 5, p. 632.

X. DECREE AND ENFORCEMENT THEREOF.

§ 309. Nature and Essentials in General.

Certainty as to Parties Concluded.—Decree in a suit to quiet title wherein the bill sought to make a named person a party defendant, if he was alive, and, if he was dead, sought by alternative averment to make parties defendant his devisees, heirs, or next of kin, was to that extent indefinite as to the parties concluded by the decree. *Gill v. More* (Ala.), 76 So. 453.

§ 311. Decree Pro Confesso.

§ 312. — Requisites and Validity.

Taken without Notice.—A final decree based upon decrees pro confesso, taken without notice after defendants had regularly entered an appearance, some by demurrer and all by a plea, will be reversed. *Ferrell v. Leonard* (Ala.), 76 So. 51.

Lack of Process and Appearance.—While generally a decree pro confesso can not be rendered against a defendant who has not been served with process or entered an appearance, where defendant files a cross-bill against complainant default may be entered as to the cross-bill in view of Code 1907, § 3118, providing that it shall not be necessary to issue summons to any defendant in a cross-bill except where he is not complainant in the original bill. *Hale v. Kinnaird* (Ala.), 76 So. 954.

Necessity of Supplementing Bill by Intendment.—A decree pro confesso will not be sustained, if it is necessary to supply by intendment any essential matter in the bill. *Hodges v. Birmingham Securities Co.*, 187 Ala. 290, 65 So. 920.

After Filing of Incomplete Answer.—Although the answer filed to a bill of complainant was not sufficiently complete, a decree pro confesso, taken after such filing, was not authorized, and a final de-

cree, in part based upon such decree pro confesso, will be reversed. *Hamaker v. Whitfield* (Ala.), 76 So. 52.

Failure to File Amended Answer Required by Unauthorized Decree.—Under Loc. Acts 1907, pp. 723-725, conferring equity jurisdiction on circuit court in certain counties and under Loc. Acts Sp. Sess. 1907, p. 23, fixing the time for holding such courts, and under chancery practice rule 74 (Civ. Code, pp. 1550, 1551), providing for the setting down of demurrers for hearing after 10 days' notice, where there was no consent to the submission of a demurrer during vacation period, and no observance of rule 74, decree held unauthorized, and defendant's failure to file an amended answer within the time fixed by such decree was not a default justifying a decree pro confesso. *Thomas v. Davis*, 197 Ala. 37, 72 So. 365.

Necessity of Evidence of Damages.—Notwithstanding decree pro confesso in suit for trespass, evidence of damages is necessary. *Brewer v. Kaul Lumber Co.*, 193 Ala. 269, 69 So. 84.

Failure to Answer Interrogatories.—Where defendant, after answer filed, defaulted by his failure to answer interrogatories, a decree of pro confesso was properly entered against him. *Rosenau v. Powell*, 184 Ala. 396, 63 So. 1020.

§ 313. — Opening or Setting Aside.

Where, on their bill to prevent foreclosure of a mortgage and to redeem, complainants had a decree pro confesso before the register, and later the cause was submitted to the chancellor for decree, under Code 1907, § 3164, as amended by Acts 1915, p. 606, whereupon a decree was rendered declaring complainants' right to redeem and ordering a reference for the ascertainment of any balance due on the mortgage, there was no final decree within Acts 1915, p. 135, providing that the chancery court shall not have the power to open or set aside any final decree after the lapse of 30 days from the date of its rendition, since, so long as the ultimate relief remains in the keeping of the court, it may recast its interlocutory decrees. *Sawyer v. Edwards* (Ala.), 75 So. 338.

§ 315. — Effect.

Every fact well pleaded in the bill is taken as confessed on a decree pro confesso. *Hodges v. Birmingham Securities Co.*, 187 Ala. 290, 65 So. 920.

Code 1907, § 3170, as to decree entered against defendant without personal service not being absolute for twelve months, has no application to defendant in cross-bill who is complainant in original bill and against whom a decree pro confesso is taken on default. *Hale v. Kinnaird* (Ala.), 76 So. 954.

§ 316. Interlocutory Decree.

Decree as to Manner of Taking Account.—*Gainer v. Jones*, 176 Ala. 408, 58 So. 288. See the title EQUITY, § 316, vol. 5, p. 641.

§ 317. Final Decree.

Better Practice to Adjudicate All Matters in One Decree.—*Gainer v. Jones*, 176 Ala. 408, 58 So. 288. See the title EQUITY, § 317, vol. 5, p. 641.

§ 318. Nature and Extent of Relief in General.

A court of equity has jurisdiction to render a personal decree for payment of money. *Billups v. Gilbert*, 195 Ala. 518, 70 So. 145.

§ 319. Incidental or Alternative Relief.

Power to Adjust Respective Rights of Complainants. — *Zadek v. Burnett*, 176 Ala. 80, 57 So. 447. See the title EQUITY, § 319, vol. 5, p. 643.

§ 320½. Relief to Defendant.

Where complainant held a title bond to land and defendant at complainant's request advanced the unpaid purchase money and took a conveyance of the land directly to himself from the vendor, and subsequently, claiming to be the owner, attached crops grown on the land for the rent and was required to account therefor, equity required that there should be deducted from the proceeds of the crops for which he was required to account the amount of a valid mortgage which he held on the crops, with interest. *Nolen v. East*, 194 Ala. 440, 69 So. 826.

§ 321. Conformity to Pleadings, Proofs, and Findings.**§ 321 (1) In General.**

No relief can be granted on account of a prayer unsupported by any of the allegations in the bill. *Farmers' Sav. Bank v. Murphree* (Ala.), 76 So. 932.

Where there is no demurrer to a bill, the court should grant such relief under the pleading and proof, as justice and equity require, although the bill is multifarious, under Code 1907, § 3212. *Blair v. Jones* (Ala.), 78 So. 69.

Land Stricken from Complainant by Amendment.—The court, in an action to quiet tax titles, was without power to adjudge anything as to certain land which had been by amendment stricken from the complaint. *Gamble v. Andrews*, 187 Ala. 302, 65 So. 525.

Cross-Complainants Eliminated by Amendment to Bill.—Where defendants filed cross-complaint, whereupon plaintiffs amended by withdrawing all allegations of the bill on which the cross-complaint was based, thus effectually eliminating the cross-complainants as parties in that capacity, the decree on the merits of the cross-complaint was error. *Carson v. Sleigh* (Ala.), 77 So. 380.

§ 321 (2) Conformity to Prayer.

Relief can not be awarded which is inconsistent with that asked in the prayer, or inconsistent with the facts averred, even though it be consistent with the evidence or proof. *Smith & Sons v. Securities Co.* (Ala.), 73 So. 892.

In suit for sale of land for division among cotenants, where the original bill averred complainant and defendants owned all of a described 80-acre tract, but the proof showed without conflict that the parties owned only the west half, the proof as to the necessity of a sale for equitable division being directed specifically to such 40-acre tract owned by the parties, decree for sale of the 40-acre tract owned will not be reversed on account of the difference between the relief prayed and that granted. *Carson v. Sleigh* (Ala.), 78 So. 229.

Upon bill to have canceled as a cloud

certain mortgages and a deed made in pursuance of foreclosure under power contained in the mortgages, which secured a debt for which petitioner was mere surety, and upon proof that the mortgages secured also a debt of complainant, a decree, allowing complainant to redeem upon payment of the amount of her debt, was erroneous, although the prayer for relief was general, since the pleading and proof did not correspond; notwithstanding Code 1907, § 3212, providing that, "on the submission of any cause for final decree, the chancellor may render decree, granting such relief as the equity and justice of the case may require." *Stewart v. Snider*, 197 Ala. 129, 72 So. 409.

§ 331 (3) Relief under Prayer for General Relief.

Where the allegations of bill did not make a case where grantee's performance was imposed as a condition subsequent to retention and enjoyment of deed, relief by rescission of the executed deed, even if consistent, would not be granted under the general prayer for relief. *Sewell v. Walkley* (Ala.), 73 So. 422.

Relief Properly Granted under General Prayer.—*Dixie Grain Co. v. Quinn*, 181 Ala. 208, 61 So. 886. See the title EQUITY, § 321 (3), vol. 5, p. 646.

In a mortgagee's suit against the mortgagors, a widow and her husband's heirs, for whom she was surety, to require defendants to affirm or disaffirm a sale under power, it was proper for the court, on suggestion made at bar or ex mero, to decree a sale of the two parcels of land in order suggested by the fact that the widow was a surety, though her cross-bill, in relation to the matter, prayed only general relief. *Todd v. Interstate Mortg. Bond Co.*, 196 Ala. 169, 71 So. 661.

§ 332. Entry and Record.

Decree Filed with Register for Enrollment.—*Johnson v. Johnson*, 182 Ala. 376, 62 So. 706. See the title EQUITY, § 322, vol. 5, p. 647.

§ 333. Amendment or Modification.

Amendment or Modification after Term.—*Gainer v. Jones*, 176 Ala. 408, 58 So.

288. See the title EQUITY, § 323, vol. 5, p. 647.

XI. BILL OF REVIEW.

§ 329. Nature and Scope of Remedy.

A bill to vacate proceedings in the probate court on the ground of fraud is one in the nature of a bill of review. *Hogan v. Scott*, 186 Ala. 310, 65 So. 209.

Sufficiency of Contents of Bill.—*Vaughn v. Vaughn*, 180 Ala. 212, 60 So. 872. See the title EQUITY, § 329, vol. 5, p. 650.

§ 331. Grounds.

§ 333. — Errors and Irregularities.

Errors apparent on the face of the record may be attacked by a bill of review. *Morris v. Marshall*, 185 Ala. 179, 64 So. 312.

§ 336. Leave to File Bill.

§ 337. — Necessity.

An original bill in the nature of a bill of review, which was intended to correct a settlement of the probate court, unlike a bill of review, may be filed without leave of court. *Clements v. Clements* (Ala.), 76 So. 855.

§ 345. Hearing and Determination.

On a bill of review, the court considers errors of substance only. *Turner v. Turner*, 193 Ala. 424, 69 So. 503.

On bill of review for error apparent on the record in a cause, questioning the correctness of its final disposition, as affecting the substantial rights of complainants in the bill, the answer must be found on the face of the record, consisting of the pleadings, processes, and decree in the cause, in short, all the proceedings except the evidence itself, which can not be considered. *Turner v. Turner*, 193 Ala. 424, 69 So. 503.

Defendants.—Upon a bill by the purchaser of land, who with another took a joint deed and gave joint purchase-money notes, and who on his copurchaser's failure to pay his share of the notes had been compelled to pay the whole of them, for subrogation to the vendor's lien against such copurchaser and his heirs,

<p>where the amount of the indebtedness for which a lien was sought was fixed as against the heirs, the failure to make such copurchaser's personal representative a party defendant, not shown to</p>	<p>have prejudiced an heir in the determination of the amount, if error, was not error to work a reversal on bill of review. <i>Turner v. Turner</i>, 193 Ala. 424, 69 So. 503.</p>
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Erections.

See post, FIXTURES; MECHANICS' LIENS.

Erosion.

See post, NAVIGABLE WATERS.

Error, Writ of.

See ante, APPEAL AND ERROR; CRIMINAL LAW.

ESCAPE.

§ 8. Indictment or Information.

§ 10. Trial.

Cross References.

See the title ESCAPE, vol. 5, p. 660, and references there given.

As to proper instructions in trial of case of escape, see ante, CRIMINAL LAW.

§ 8. Indictment or Information.

Assisting to Escape — Sufficiency. — *Johnson v. State*, 7 Ala. App. 88, 60 So. 973. See the title ESCAPE, § 8, vol. 5, p. 662.

§ 10. Trial.

Instructions.—*Johnson v. State*, 7 Ala. App. 88, 60 So. 973. See the title ESCAPE, § 10, vol. 5, p. 664.

Escheat.

See the title ESCHEAT, vol. 5, p. 664, and references there given.

ESCROWS.

§ 8. Time When Instrument Takes Effect.

§ 9. Unauthorized or Wrongful Delivery by Depositary.

Cross References.

See the title ESCROWS, vol. 5, p. 665, and references there given.

In addition, see ante, **BILLS AND NOTES; DEEDS; post, MORTGAGES; PRINCIPAL AND SURETY; SUBROGATION; VENDOR AND PURCHASER.**

As to effect of withdrawal by surety from note held in escrow by bank, see post, **PRINCIPAL AND SURETY.** As to effect of payment of purchase price of land where deed therefor is held in escrow, see post, **SUBROGATION.**

§ 8. Time When Instrument Takes Effect.

Relating Back to First Delivery.—

Where complainant knew of his grantor's prior contract to convey and of delivery of deed in escrow, and intermeddled for purpose of preventing such grantor from performing prior contract, deed delivered in escrow will be treated as relating back to date of its execution and delivery in escrow. *Hargett v. Hargett* (Ala.), 78 So. 865.

Upon Performance of Conditions.—

When money or other property or a written instrument is delivered in escrow to a depositary, to be delivered by virtue of an executory contract to a third person, who is entitled thereto upon the performance of his obligations in the premises, such third person has no title or right of possession to such property until he has performed the conditions imposed

upon him by the escrow. *Brown & Sons Lumber Co. v. Steele*, 195 Ala. 211, 70 So. 161.

§ 9. Unauthorized or Wrongful Delivery by Depositary.

Transfer of Possession.—Where deed was delivered in escrow, and grantee failed to perform his part of agreement on which delivery was dependent, there could be no vesting of title in grantee; transfer of possession by depositary being insufficient to constitute delivery. *Gibson v. Gibson* (Ala.), 76 So. 949.

Wrongful Delivery.—If note was to be held in escrow and was delivered in violation of agreement, or if delivery was merely to help get a trade through, one indorsing before delivery held discharged from liability on the note. *Farley v. Baldwin* (Ala.), 77 So. 723.

Establishment.

See ante, **BOUNDARIES; BRIDGES; COUNTIES; post, HIGHWAYS; MUNICIPAL CORPORATIONS.**

ESTATES.

§ 1. Nature and Incidents in General.

§ 2. Merger.

Cross References.

See the title ESTATES, vol. 5, p. 668, and references there given.

In addition, see post, EXECUTORS AND ADMINISTRATORS; LIFE ESTATES; PERPETUITIES; TRUSTS; WILLS.

As to right of creation of estates in property by testator, see post, WILLS.

§ 1. Nature and Incidents in General.

Comprehension.—"Estate" is a word capable of greatest extension, and comprehends every species of property describing both corpus and extent of interest. *Pearce v. Pearce* (Ala.), 74 So. 952.

§ 2. Merger.

Definition.—The merger of estates is the fusion or absorption of the one into the other, where a greater and a lessor estate coincide and meet in the same person without any intermediate estate, the effect being the annihilation of the lessor estate, or, more accurately speaking, a coalescing of the two, each imparting to the

whole its particular attributes. *Kidd v. Cruse* (Ala.), 76 So. 59.

Purpose of Doctrine.—The reason for the doctrine of merger is that protection may be afforded the estate of one who subsequently acquires in the property an interest greater than that which he first possessed; the doctrine being intended primarily to protect the estates by causing them to blend or coalesce, and not to destroy them. *Kidd v. Cruse* (Ala.), 76 So. 59.

Estates Created by Same Instrument.

—Merger will be held not to have taken place where two estates are created by the same agency or instrument, at same time. *Kidd v. Cruse* (Ala.), 76 So. 59.

ESTOPPEL.

I. By Record.

§ 3. Pleadings.

II. By Deed.

(A) Creation and Operation in General.

§ 14. Grounds of Estoppel.

§ 15. — Recitals.

§ 16. — Covenants.

§ 16½. Operation and Effect in General.

§ 18. Persons Estopped in General.

§ 19. Grantors or Mortgagors and Privies.

§ 23. Matters Precluded.

(B) Estates and Rights Subsequently Acquired.

§ 26. Instruments Operating on Title Subsequently Acquired.

§ 27. — Conveyances with Covenants.

III. Equitable Estoppel.

(A) Nature and Essentials in General.

§ 37. Nature and Elements of Estoppel in Pais.

§ 38. Intent.

§ 41. Acts Done or Omitted, and Change of Position.

§ 42. Benefit to Person against Whom Estoppel Is Asserted.

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(B) Grounds of Estoppel.

§ 51. Claim or Position in Judicial Proceedings.

§ 51 (1) Claim Inconsistent with Previous Claim or Position in General.

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§ 55. Acts Making Injury Possible as between Actor and Another Equally Blameless.

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§ 57. — Real Property.

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§ 64. — In General.

§ 64 (2) Ownership of Property.

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§ 67. — Relying and Acting on Representations.

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§ 70. — Assent to or Ratification of Acts of Others in General.

§ 72. — Acceptance of Benefits.

§ 73. — Permitting Improvements or Expenditures.

§ 74. — Permitting Sale or Mortgage of Property.

§ 75. — Silence.

- (C) Persons Affected.
 - § 77. Persons Estopped.
- (D) Matters Precluded.
 - § 79. Title or Claim to Property.
 - § 81. Availability at Law.
- (E) Pleading, Evidence, Trial, and Review.
 - § 84. Pleading as Defense.
 - § 85. — Necessity.
 - § 87. Pleading in Avoidance of Defense.
 - § 87½. Issues, Proof, and Variance.
 - § 88. Presumptions and Burden of Proof.
 - § 88½. Questions for Jury.
 - § 89. Instructions.

Cross References.

See the title **ESTOPPEL**, vol. 5, p. 672, and references there given.

As to injecting vitality into an illegal transaction by way of estoppel, so as to cause a waiver of right to such a defense, see ante, **CONTRACTS**. As to estoppel of plaintiff in ejectment to set up his own fraud in changing name in deed after delivery to prove title, see post, **FRAUDULENT CONVEYANCES**. As to estoppel of widow to assert her homestead right against mortgagee, see post, **HOMESTEAD**. As to estoppel to recover rent from third person by wife who knew husband was misusing rent collected, see post, **HUSBAND AND WIFE**. As to husband's conduct estopping him from asserting invalidity of wife's conveyance, see post, **HUSBAND AND WIFE**. As to estoppel to recover on insurance policy, see post, **INSURANCE**. As to estoppel by judgment operating mutually, see post, **JUDGMENT**. As to requisites of estoppel on which judgment may be based, see post, **JUDGMENT**. As to estoppel between landlord and tenant, see post, **LANDLORD AND TENANT**. As to estoppel of property owner to attach validity of special assessment, see post, **MUNICIPAL CORPORATIONS**. As to estoppel by encouraging or acquiescing in erection of building, to complain of it as a nuisance, see post, **NUISANCE**.

I. BY RECORD.

§ 3. Pleadings.

Pleading in Former Action—Effect.—Where in a former action one of the parties verified a pleading before one not authorized to administer oaths generally, and the matter therein pleaded was not a necessary element of the defense, he is not estopped to deny any admission therein in a subsequent action but his admission is admissible to contradict his statements in the second action. *Tumlin v. Tumlin*, 195 Ala. 457, 70 So. 254.

II. BY DEED.

(A) CREATION AND OPERATION IN GENERAL.

§ 14. Grounds of Estoppel.

§ 15. — Recitals.

Bounding on Public Highway.—Owners

of land conveyed it by deeds, describing it as bounding on a public highway, irrevocably recognized the highway as a public highway. *Rudolph v. Birmingham*, 188 Ala. 620, 65 So. 1006.

When Recitals Are Binding on Parties and Privies.—Ordinarily a grantee in a deed is not estopped by the recitals therein, but, when the recital shows that the object of the parties is to make the matter recited a fixed fact, the recital is binding on all the parties and their privies. *Pendrey v. Godwin*, 188 Ala. 565, 66 So. 43.

When Recitals Are Binding on Grantee.—A grantor, in anticipation of death, executed a deed which described the property as the place known as the "Jess Myers place, described as follows," followed by a description of 80 acres according to government survey, and authorized his

executor to correct any error in the description. The grantor had purchased the 80 acres described from Jess Myers. The evidence showed that the land so described was known as the "Jess Myers place." The evidence was conflicting as to whether an adjoining 40 acres was known as the "Jess Myers place." The executors by deed conveyed the Jess Myers place by the same government description, and the grantee accepted the deed from the executors. Held, that the description in the executors' deed was conclusive on the grantee as to the land conveyed, though he did not read the deed, but retained it without reading it, though having full capacity and opportunity to do so. *Pendrey v. Godwin*, 188 Ala. 565, 66 So. 43.

§ 16. — Covenants.

Construction of "Warranty" in Chattel Mortgage.—By a chattel mortgage given by a husband and wife on all of their farming tools and implements, live stock, and other personal property, which contained a covenant that they were seized of an indefeasible estate in fee simple free from incumbrance, that the property was their own, and that they had a right to convey it, the husband merely conveyed what he owned in severalty and the wife what she owned in severalty, it not appearing that they owned anything jointly, and the wife did not undertake to convey what the husband owned, and did not warrant his title thereto, as a "warranty" is a collateral undertaking on the part of the seller as to the title to personal property sold by him, and is not an undertaking on the part of a third party; and, where the husband's property was covered by a prior mortgage of which the subsequent mortgagee had notice, the wife was not precluded by the mortgage from purchasing the property from the prior mortgagee or estopped from showing that such property was the property of the husband and that she had acquired title through the prior mortgagee. *King v. Thomas*, 190 Ala. 649, 67 So. 241.

§ 16½. Operation and Effect in General.

Accordance with Intention.—Where it is sought to fasten an estoppel on a party to a deed by virtue of a clause therein, it is proper to ascertain what was meant at the time by the deed, and, when the inten-

tion can be determined, the instrument must be limited in its operation by way of estoppel to accord with the intention. *Pendrey v. Godwin*, 188 Ala. 565, 66 So. 43.

§ 18. Persons Estopped in General.

Quitclaim—Strangers to Instrument.—*Hale v. Chandler*, 180 Ala. 391, 61 So. 885. See the title ESTOPPEL, § 18, vol. 5, p. 678.

§ 19. Grantors or Mortgagors and Privies.

Necessity for Proof of Title.—In an action by a mortgagee of timber for the value of lumber purchased by defendant from the mortgagor, proof of title to the timber in either the mortgagee or mortgagor was unnecessary, since the purchaser was estopped to deny the title of the mortgagor, from whom it purchased, and the mortgagor's title, if any be had, inured to the mortgagee under the warranty in the mortgage. *Steverson v. Agee & Co.*, 9 Ala. App. 389, 63 So. 794.

§ 23. Matters Precluded.

Estates Subject to Partition.—Though chancery courts have no jurisdiction to partition or sell for distribution any estate as to which none of the parties has any present interest in use or possession, where complainant's interest was acquired by a warranty deed from respondent purporting to convey a fee simple, the common estate must be conclusively regarded as an estate in fee simple and subject to division in like manner as are such estates; respondent being estopped by her covenants of warranty from asserting that the common estate is one in remainder only. *Harper v. Martin*, 194 Ala. 521, 69 So. 930.

By Deed—Conclusiveness of Grant.—As against grantor or his privies it is not necessary for grantee to show that grantor was in fact owner of premises, but the grant is conclusive of his title, and the grantor is estopped to deny it. *Cox v. Brown* (Ala.), 73 So. 964.

(B) ESTATES AND RIGHTS SUBSEQUENTLY ACQUIRED.

§ 26. Instruments Operating on Title Subsequently Acquired.

§ 27. — Conveyances with Covenants. When Title Vests in Mortgagee. —

Where a mortgage on timber by a person having no title contained a warranty, a title subsequently acquired by the mortgagor inured to the benefit of the mortgagee, and vested in him as from the time of the execution of the mortgage. *Steverson v. Agee & Co.*, 9 Ala. App. 389, 63 So. 794.

III. EQUITABLE ESTOPPEL.

(A) NATURE AND ESSENTIALS IN GENERAL.

§ 37. Nature and Elements of Estoppel in Pais.

An "equitable estoppel" or "estoppel in pais" arises when one represents by word of mouth, conduct, or silent acquiescence that a certain state of facts exists, thus inducing another to act in reliance upon the supposed existence of such facts, so that if the party making the representation were not estopped to deny its truth, the party relying thereon would be subjected to loss or injury. *Graves v. Leach*, 192 Ala. 164, 68 So. 297.

Acts Which One Has Power to Do.—Doctrine of estoppel can go no further than to preclude a party from denying that he has done that which he had power to do. *Crosby v. Turner* (Ala.), 75 So. 937.

§ 38. Intent.

Conduct as Basis of Estoppel.—*Huntsville Elks' Club v. Garrity-Hahn Bldg. Co.*, 176 Ala. 128, 57 So. 750. See the title ESTOPPEL, § 38, vol. 5, p. 684.

§ 41. Acts Done or Omitted, and Change of Position.

Acting on Representations or Concealment.—*Huntsville Elks' Club v. Garrity-Hahn Bldg. Co.*, 176 Ala. 128, 57 So. 750. See the title ESTOPPEL, § 41, vol. 5, p. 685.

Sales—Failure to Assert Title.—Although the owner of an automobile stands by and makes no objection while another makes assertions of ownership to a prospective buyer, he is not estopped from later asserting title against buyer, unless buyer has, because of owner's failure to assert title, suffered substantial loss or altered his position for the worse. *Martin v. Brown* (Ala.), 74 So. 241.

Reliance on Adverse Party.—One claiming that another has estopped himself by his conduct must show that he was induced to act or to omit action on the faith thereof. *Hodges v. Kyle*, 9 Ala. App. 449, 63 So. 761.

§ 42. Benefit to Person against Whom Estoppel Is Asserted.

Claim Inconsistent with Previous Position.—To come within rule that party who obtains or defeats a judgment by pleading or representing a thing or judgment in one aspect is estopped from giving it another in a suit founded upon the same subject matter, the election pleaded by way of estoppel must have been of some avail to the party against whom it is pleaded. *Todd v. Interstate Mortg., etc., Co.*, 196 Ala. 169, 71 So. 661.

§ 43. Prejudice to Person Setting up Estoppel.

What Is Essential.—It is essential to an estoppel that one party has been induced by the declaration or conduct of another to act or desist from acting to his detriment. *Mobile Towing, etc., Co. v. First Nat. Bank* (Ala.), 78 So. 797.

(B) GROUNDS OF ESTOPPEL.

§ 51. Claim or Position in Judicial Proceedings.

§ 51 (1) Claim Inconsistent with Previous Claim or Position in General.

Attacking Order of Revivor—Equitable Estoppel.—Where defendant appealed from an adverse judgment, and plaintiff died pending the appeal, defendant, who procured an order of revivor against plaintiff's administratrix, can not, his appeal having been dismissed, attack the order of revivor as invalid. *Lasseter v. Deas*, 9 Ala. App. 564, 63 So. 735.

Change of Position in Judicial Proceedings.—Where a summons and complaint against J. M. had been served on V. M., who appeared and filed special pleas, which were stricken on the statement by plaintiff's attorney that he was not suing V. M., and the court, in the presence of plaintiff's counsel, stated that, if execution of the judgment therein entered were levied on the property of V. M., the officer would be liable in damages, plaintiff was estopped to assert, when V. M.

claimed the property levied on to satisfy a judgment, that V. M. and J. M. were the same person, since estoppel, which is the rule that, where a fact has been asserted or an admission made through which an advantage has been derived from another or upon the faith of which another has been induced to act to his prejudice, so that a denial of such assertion or admission would be a breach of good faith, the law precludes the parties from rebutting such representation from afterwards denying the truth of the admission, applies to the conduct of causes in courts and the results thereby obtained (citing Words and Phrases, Estoppel). *Millitello v. Rolen Grocery Co.*, 190 Ala. 675, 67 So. 420.

Enforcement of Vendor's Lien—Estoppel by Pleading.—Where a grantee, in a suit by the grantor to set aside a deed on the ground of fraud, admitted by his plea and testimony the validity of the grantor's claim for a vendor's lien for the unpaid price, he was precluded from denying in another suit the validity of the vendor's lien, and only the amount could be questioned by him. *Wooddy v. Matthews*, 194 Ala. 390, 69 So. 607.

Claim in Judicial Proceeding.—A defendant, who has objected to an application for dismissal, is estopped to complain of the withdrawal of the application on the ground that he may be required to pay costs previously accrued, which on dismissal would be taxable against complainant. *Ex parte Johnson*, 194 Ala. 565, 69 So. 603.

Pleas in Abatement.—Where defendant telegraph company filed a plea in abatement, averring that the contract sued on was a joint contract with plaintiff and other named persons, and that there was a nonjoinder of parties plaintiff, and plaintiff confessed such plea and amended by making such persons parties plaintiff, and such persons were forced to take a nonsuit in their separate individual suits against the company and to pay costs of suit before being permitted to join as necessary parties plaintiff, the defendant, having gained the advantage of requiring such joinder of parties plaintiff, was estopped to set up pleas in abatement, averring that the suit was begun by plaintiff

alone, and that such other persons had previously instituted individual suits on the same breach of contract, which were pending when the amendment was made. *Western Union Tel. Co. v. Emerson*, 14 Ala. App. 247, 69 So. 335.

Inconsistent Position—Action on Policy.—Insured was not estopped from suing on his policies because he had sued a third person for negligence in allowing her wall to fall upon his property and destroy it, since there was no inconsistency in charging such party with the negligence in constructing the wall, and in alleging that the insured's property burned while covered by his policies. *Ætna Ins. Co. v. Hann*, 196 Ala. 234, 72 So. 48.

Setting up Adverse Possession in Ejectment.—One, after unsuccessfully maintaining suit to enjoin ejectment against him, on the ground of an equitable title only, and for specific performance of an oral contract for the land, can not assert in the ejectment action title by adverse possession perfected at date of bill. *Harrison v. Harrison (Ala.)*, 76 So. 295.

§ 51 (2) Claim Inconsistent with Contract or Title Previously Asserted.

Claim under Deed—Previous Claim under Will.—*Mays v. Burleson*, 180 Ala. 396, 61 So. 75. See the title ESTOPPEL, § 51 (2), vol. 5, p. 689.

Prior Contract.—Where defendant, who was one of several banking partners, signed an agreement appointing trustees to administer the firm property, and the agreement was confirmed by the chancery court, he can not, by the demurrer, question a bill to compel him to pay his pro rata part of the debts, the firm being insolvent, on the ground that the statute provided the only method of settling the affairs of the bank. *Webb v. Butler*, 192 Ala. 287, 68 So. 369.

§ 51 (3) Defense or Objection Inconsistent with Previous Claim or Position in General.

Inconsistent Claim—Damages for Wrongful Injunction.—Where bill for injunction was against E. E. Y. Turpentine Company and E. E. Y., and the final decree was rendered against them both, the company being a partnership of which E.

E. Y. was a member, and the writ was served only on E. E. Y., and in obedience thereto business of the company was suspended, the plaintiff in such suit is estopped in an action for damages for wrongful injunction from saying the company was not enjoined. *Yarbrough Turpentine Co. v. Taylor (Ala.)*, 78 So. 812.

§ 55. Acts Making Injury Possible as between Actor and Another Equally Blameless.

Loss as between Two Innocent Persons.—Where one of two innocent persons must suffer by the acts of a third person, he who has enabled such third person to occasion the loss must sustain it. *Farmers' Bank, etc., Co. v. Shut*, 192 Ala. 53, 68 So. 363.

§ 56. Clothing Another with Apparent Title or Authority.

§ 57. — Real Property.

Equitable Estoppel—Interest in Land.—Defendant having applied to probate a will of her father, and a deed conveying to her certain real property willed to her sister as a testamentary instrument, the sister contested the will, but before the determination of the contest a settlement was arrived at by which defendant's claim under the deed was abandoned. It was agreed that the parties should take under the will, whereupon the will was probated, and the property in controversy surrendered to the sister under the will. She immediately took possession and retained the same until she conveyed to plaintiff who was induced to purchase by defendant's representations that her sister had title to the property and good right to convey. Held, that defendant was thereby estopped to claim title to the property under the deed, on the theory that the settlement agreement had never been made, and, if made, was void. *Burleson v. Mays*, 189 Ala. 107, 66 So. 36.

§ 58. — Personal Property.

Indicia of Ownership—Bona Fide Purchasers.—One exception to general rule that no one can transfer a better title than he possesses exists where owner has intrusted another with possession, indicia of ownership, and apparent authority to sell, in which case an innocent purchaser will

be protected and the sale prevail over the rights of the owner. *People's Bank, etc., Co. v. Walthall (Ala.)*, 75 So. 570.

Fraudulent Purpose or Knowledge of Owner.—For the owner to estop himself from claiming his property in the hands of a bona fide purchaser from a person clothed by the owner with apparent title, there must have been a fraudulent purpose by the owner, or at least knowledge on his part of the acts of ownership from which his acquiescence may be inferred. *Kelly v. Cook (Ala. App.)*, 73 So. 220.

§ 63. Representations.

§ 64. — In General.

§ 64 (2) Ownership of Property.

Estoppel in Pais—Want of Delivery.—*Bender v. Barton*, 182 Ala. 181, 62 So. 732. See the title ESTOPPEL. § 64 (2), vol. 5, p. 695.

Right of Way—Compensation Paid to Agent.—Plaintiff and his brother each owned in severalty half of a 40-acre tract of land, over which defendants established a highway. Defendants contracted with plaintiff's brother that he was to receive \$75 for a right of way over such 40-acre tract, and the road commission, under instructions from the brother, paid the money to an attorney for the right of way over the lands of both plaintiff and the brother, and the brother received the money as belonging to them both. The road was laid out across plaintiff's land with his knowledge, and he raised no objection thereto; but the brother did not account to plaintiff for his share of the fund. Held, that plaintiff, having induced defendants to pay the money to his brother on the supposition that he was authorized to receive it for both, was estopped to deny such authority, and to object to the use of the road on the ground that his property had not been lawfully taken for such purpose. *Stamps v. Boon*, 184 Ala. 400, 63 So. 1019.

§ 64 (3) Existence and Extent of Liens and Claims.

Misrepresentations.—Plaintiff, who represented that a third person's indebtedness to him was only a certain amount, held estopped, against defendants, who had advanced such amount on chattel mortgage, to assert the continued valid-

ity of a chattle mortgage not paid and not included in such amount. *Graves v. Leach*, 192 Ala. 164, 68 So. 297.

§ 67. — Relying and Acting on Representations.

Estopped by Conduct.—One asserting an estoppel by conduct or representations must have acted or failed to act in reliance thereon. *Tennessee Coal, etc., R. Co. v. Perry*, 10 Ala. App. 371, 64 So. 651.

§ 69. Acquiescence.

§ 70. — Assent to or Ratification of Acts of Others in General.

Bankruptcy — Attorney and Client.—Where after bankrupt's estate is closed he allows attorney to prosecute suit and retain a reasonable fee for services therein, he is estopped from claiming against attorney. *Watson v. Motley (Ala.)*, 73 So. 147.

Inducement to Act.—*Farrow v. Sturdivant Bank*, 181 Ala. 283, 61 So. 286. See the title ESTOPPEL, § 70, vol. 5, p. 701.

Estoppel to Abate Nuisance.—Although one who acquiesces for a time in a nuisance may be denied equitable relief and left to legal remedy, the fact that he knows that a structure is being built and knows its purpose does not estop him to sue to abate it as a nuisance because of injuries thereafter arising, unless he encouraged its erection. *McCary v. McLendon*, 195 Ala. 497, 70 So. 715.

§ 72. — Acceptance of Benefits.

Contracts — Assigns of Sublease.—Where a coal mining company, being a large stockholder in another coal mining company operating a coal mine under a sublease, undertook to carry out the sublease and mine coal thereunder, it was estopped from accepting the benefits and rejecting the burdens of the sublease. *Bruce Coal Co. v. Bibby (Ala.)*, 77 So. 545.

§ 73. — Permitting Improvements or Expenditures.

Abatement of Nuisance.—A complainant's silent acquiescence in construction of a cut across a street does not estop him from enjoining its future maintenance because constituting a nuisance. *Louisville, etc., R. Co. v. Mauter (Ala.)*, 74 So. 932.

Construction of Railroad—Recovery in Ejectment.—Where a landowner acquiesces in occupation for construction of a railroad, equity will preclude him from recovering the land in ejectment and in such case there remains in the owner only a right of compensation. *Boone v. Gulf, etc., R. Co. (Ala.)*, 78 So. 956.

§ 74. — Permitting Sale or Mortgage of Property.

Sale or Conveyance—Equitable Estoppel.—Where a grantee in a deed consented to one of her grantors erasing his name from the deed under the mistaken belief that that would revert him with title, and thereafter consented to a sale of his interest to a third person, she is estopped from ever after setting up her legal title. *Ely v. Brewer*, 182 Ala. 396, 62 So. 742.

§ 75. — Silence.

Willfulness and Fraud.—Mere silence to raise an estoppel against the assertion of title must have features of willfulness and fraud. *Boone v. Gulf, etc., R. Co. (Ala.)*, 78 So. 956.

(C) PERSONS AFFECTED.

§ 77. Persons Estopped.

Parties Claiming under Persons Estopped.—Persons claiming ownership of land under others who are estopped to claim ownership are also bound by the estoppel. *Boone v. Byrd (Ala.)*, 78 So. 958.

(D) MATTERS PRECLUDED.

§ 79. Title or Claim to Property.

Estoppel in Pais Affecting Title to Land.—Representations or admissions made in answer to inquiries for information on which to base action, where the purpose of inquiry is known, may constitute an equitable estoppel in pais, affecting the title to land. *Boone v. Byrd (Ala.)*, 78 So. 958.

§ 81. Availability at Law.

Title to Land—Estoppel in Parol.—In a court of law title to land can not be affected by an estoppel in parol since in law the title can pass only by writing. *Boone v. Gulf, etc., R. Co. (Ala.)*, 78 So. 956.

(E) PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 84. Pleading as Defense.

§ 85. — Necessity.

Where estoppel is relied upon as a defense, it should be pleaded. *Gingold v. Coplon*, 186 Ala. 340, 65 So. 328.

Estoppel, to be available as a defense, must be specially pleaded. *Dickey v. Vaughn* (Ala.), 73 So. 507.

Estoppel in Pais—Not Affirmatively Appearing.—Estoppel in pais must be specially pleaded if it does not affirmatively appear from the face of the bill. *Card Lumber Co. v. Ozment*, 187 Ala. 237, 65 So. 792.

When Estoppel Can Not Be Pleaded.—Where estoppel is relied on it must be specially pleaded, unless the case is such that it can not be. *Millitello v. Roden Grocery Co.*, 190 Ala. 675, 67 So. 420.

Jurisdiction of County Board—Trespass for Cutting Fence.—In action of trespass against board of commissioners of roads and revenue of county for cutting fence erected by plaintiff across road, direction of which he had been authorized to change, though board had later rescinded its action, though fact that plaintiff appeared before board and requested order for change of road would have operated as estoppel against him to dispute board's jurisdiction, it was not available to board in absence of special plea of estoppel. *Jackson v. Bohlin* (Ala. App.), 75 So. 697.

Assertion of Estoppel.—An estoppel not specially pleaded can not be asserted. *Baker, etc., Co. v. American Agr. Chemical Co.* (Ala.), 77 So. 866.

When Entitled to Affirmative Charge.—Defendant not having specifically pleaded estoppel was not entitled to affirmative charge on theory that plaintiff was estopped. *Wells v. Parker* (Ala.), 75 So. 914.

Enjoining Road Improvements.—In suit to enjoin the making of a road improvement whereby surface water was diverted to complainant's injury, estoppel by reason of acquiescence or consent held not available when not specially pleaded of complainant. *Dancy v. Ratliff* (Ala.), 77 So. 688.

Breach of Contract to Deliver Stock—Acceptance of Dividends.—In action for breach of contract to deliver stock, acceptance of dividends by plaintiff, to operate as an estoppel to maintain action to recover value of stock, because of a breach of contract to issue certificate, must be availed of by a special plea. *Mutual Loan Soc. v. Stowe* (Ala. App.), 73 So. 202.

§ 87. Pleading in Avoidance of Defense.

Necessity to Negative Estoppel.—*Rawleigh Medical Co. v. Wilson*, 7 Ala. App. 242, 60 So. 1001. See the title ESTOPPEL, § 87, vol. 5, p. 714.

Express or Implied Revocation — Replication.—*Southern Iron, etc., Co. v. Acton*, 8 Ala. App. 502, 62 So. 402. See the title ESTOPPEL, § 87, vol. 5, p. 714.

§ 87½. Issues, Proof, and Variance.

When Estoppel Not Specially Pleaded Is Available.—While estoppel is not available unless specially pleaded, a subagent, defending an action to recover the general agent's part of the first annual premiums on policies sold by the subagent, who pleaded "in short, by consent, the general issue, with leave to give in evidence any matter that could be specially pleaded," might set up an estoppel as against the agent's right to recover part of such premiums. *Barnes v. Marshall*, 193 Ala. 94, 69 So. 436.

§ 88. Presumptions and Burden of Proof.

The burden of proving an estoppel rests upon the party invoking it. *Mobile Towing, etc., Co. v. First Nat. Bank* (Ala.), 78 So. 797.

§ 88½. Questions for Jury.

Position in Legal Proceeding.—Where a life tenant who was illiterate denied having sworn to a bill to quiet title against the original owner of the land, she did not thereby as a matter of law forfeit her life estate acquired from a subsequent grantee, but, at best, such forfeiture was a question for the jury. *Lyon Co. v. Crane* (Ala.), 75 So. 366.

§ 89. Instructions.

Reliance on Adverse Party.—*McAdams & Co. v. Smith*, 8 Ala. App. 515, 62 So. 1000. See the title ESTOPPEL, § 89, vol. 5, p. 715.

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See the title EVIDENCE, vol. 6, p. 1, and references there given.

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I. JUDICIAL NOTICE.

§ 2. Matters of Common Knowledge in General.

Where defendant agreed to sell a 6x10 hoisting engine, but shipped an 8x10 log skidder, the court could not take judicial notice that they were practically the same. *Donahoo Co. v. Reliance Equipment Co. (Ala.)*, 78 So. 800.

The court judicially knows that in a sawmill enterprise much machinery is used, that the employment of laborers is necessary to its operation, and that accidents are likely to occur. *Jackson Lumber Co. v. Trammell (Ala.)*, 74 So. 469.

Escape of Gas.—*Romano v. Birmingham R., etc., Co.*, 182 Ala. 335, 62 So. 677, 46 L. R. A., N. S., 642. See the title EVIDENCE, § 2, vol. 6, p. 30.

Setting Fire by Locomotives.—It is a matter of common knowledge that locomotives carry fire and emit sparks, especially when a heavy load and a steep grade require an extraordinary working of the steam exhaust, and that a strong wind may carry such sparks to a considerable distance, and that they may readily set fire to any dry and inflammable materials upon which they happen to fall. *Deason v. Alabama, etc., R. Co.*, 186 Ala. 100, 65 So. 172.

Courts judicially know that fire will escape from the best equipped and most

prudently operated locomotives in sufficient quantities to ignite combustible material along the track. *Southern R. Co. v. Slade*, 192 Ala. 568, 68 So. 867.

It is common knowledge that quantity of sparks emitted by railroad locomotive depends on force and rapidity of exhaust, which is dependent on load, as well as grade and curve of track. *Louisville, etc., R. Co. v. Davis (Ala.)*, 75 So. 977.

Difference in Construction and Maintenance of Streets and Highways.—It is a matter of common knowledge that public streets and the sidewalks adjacent thereto, in the larger municipalities, are generally materially different in construction and very differently maintained, from the public highways without the corporate confines—those usually constructed and maintained by the county. *State v. Board (Ala.)*, 78 So. 964.

As to Charitable Hospitals.—The courts may take judicial notice of the well-known fact that many noted hospitals were established by endowments, were not operated for profit, accept charity patients, and come within definition of charitable institutions. *Tucker v. Mobile Infirmary Ass'n*, 191 Ala. 572, 68 So. 4, L. R. A. 1915D, 1167.

That Handling and Transportation of Immense Quantity of Lumber Expensive.—Court of appeals judicially knows

by common knowledge that handling of 350,000 feet of lumber is expensive, and that chartering of vessel to transport so much lumber is also expensive. *McGowin Lumber, etc., Co. v. Camp Lumber Co.* (Ala. App.), 77 So. 433.

§ 4. Qualities and Properties of Matter.

Corn Meal.—The courts judicially know that corn meal is an unmixed meal made from entire grains of corn, and that unbolted corn meal is simply meal from which the bran has not been sifted or separated. *Miller Grain, etc., Co. v. International Sugar Feed No. 2 Co.*, 197 Ala. 100, 72 So. 368.

§ 6. Scientific Facts and Principles.

Insulation of Electric Wires. — Courts judicially know that even wires carrying very high voltage may be so insulated as to at least materially lessen danger of shock to those who come in contact therewith. *Dwight Mfg. Co. v. Word* (Ala.), 75 So. 979.

§ 7. Geographical Facts.

§ 7 (2) Location of Cities, Towns, and Villages.

Courts will take judicial notice of the location of a particular community. *Jackson Lumber Co. v. Trammell* (Ala.), 74 So. 469.

Court of appeals judicially knows location of Mobile, Ala., and of Carrabelle, Fla. *McGowin Lumber, etc., Co. v. Camp Lumber Co.* (Ala. App.), 77 So. 433.

§ 7 (3) Location and Boundaries of States, Counties, and Townships.

The court judicially knows that there is but one "range 5 west" in this state, and that that range lies west of the Huntsville meridian, and that there is but one "township 18" in the state that bisects "range 5 west," and that section 34 in township 16, range 5 west, is in Jefferson county. *Nichols v. Nichols*, 192 Ala. 206, 68 So. 186.

§ 7 (4) Lakes, Streams, and Mountains, and Navigability of Waters.

Navigability of Waters.—The court will take judicial notice of the fact that the Tennessee river in Alabama is nav-

igable and susceptible of being used in ordinary condition as a highway for commerce. *Pappenburg v. State*, 10 Ala. App. 224, 65 So. 418.

The court of appeals will take judicial notice that the Tallapoosa river is navigable as far as Tallassee. *Tallassee Falls Mfg. Co. v. State*, 13 Ala. App. 623, 68 So. 805, reversed on other grounds in 194 Ala. 554, 69 So. 589.

§ 9. Statistical Facts.

Population.—Courts will take judicial notice of the population of a particular community. *Jackson Lumber Co. v. Trammell* (Ala.), 74 So. 469.

§ 10. Facts Relating to Human Life, Health, Habits, and Acts.

Offensive Odors.—The court will not take judicial notice that the offensive odors emitted from a stable contained ammonia, and was "supposed to be more or less healthful." *Kyser v. Hertzler*, 188 Ala. 658, 65 So. 967.

Effect of Venereal Disease.—*Empire Improv. Co. v. Lynch*, 181 Ala. 473, 62 So. 16. See the title EVIDENCE, § 10, vol. 6, p. 35.

Where a life policy provided that it should be void if insured had been attended by a physician for any serious disease, the court can not take judicial notice that the fact that he had been attended by a physician for treatment of syphilis increased the risk within Code 1907, § 4572. *Metropolitan Life Ins. Co. v. Goodman*, 10 Ala. App. 446, 65 So. 449.

§ 14. Weights, Measures, and Values.

Value — Military Equipment. — The court will judicially notice that arms and military equipment have no general market value under ordinary conditions, being only valuable as military equipment. *State v. Stoddard*, 13 Ala. App. 560, 69 So. 980.

Same—Cotton.—The court judicially knows that cotton is a world staple, and that its price is fixed by the daily market quotations furnished by the cotton exchanges, and that cotton is bought and sold at prices graduated according to its classified quality as fixed universal standards. *Baker v. Lehman, etc., Co.*, 186 Ala. 493, 65 So. 321.

§ 16. Management and Conduct of Occupations.

§ 16 (1) In General.

Power of Partner.—*Lichenstein v. Murphree*, 9 Ala. App. 108, 62 So. 444. See the title EVIDENCE, § 16 (1), vol. 6, p. 37.

§ 16 (2) Banks, Railroads, and Telegraphs.

Courts will take knowledge of the custom of railroads to carry children under one year free when accompanied by adult passenger paying fare. *Southern R. Co. v. Herron*, 12 Ala. App. 415, 68 So. 551.

Notice of Approach to Station.—The proper and customary notice of approach or arrival at a passenger's ticketed station is a matter of such common knowledge that proof of it is not required to entitle the court and jury to take cognizance of it. *Central, etc., R. Co. v. Crane*, 11 Ala. App. 249, 65 So. 866.

Judicial notice will be taken of the usual practice of railroad operators to give notice of a train's near approach to a station for which it has a passenger by causing a general announcement to be made in the car where the passenger is or ought to be. *Central, etc., R. Co. v. Crane*, 189 Ala. 538, 66 So. 604.

Weight of Carload of Cotton Seed.—Courts do not take judicial knowledge as to the maximum and minimum weight of a "carload" of cotton seed. *Thompson v. Strong* (Ala.), 74 So. 34.

The courts take judicial notice of the fact that a contract calling for sale of three carloads of cotton seed carried with it the knowledge of the fact that such a carload necessarily has a maximum and minimum rate. *Thompson v. Strong* (Ala.), 74 So. 34.

Setting out Fire by Locomotives.—See ante, "Matters of Common Knowledge in General," § 2.

§ 18. Corporations and Associations and Members Thereof.

Existence of Corporation.—*King Land Co. v. Bowen*, 7 Ala. App. 462, 61 So. 22. See the title EVIDENCE, § 18, vol. 6, p. 38.

§ 19. Matters Relating to Government and Its Administration in General.

Public Surveys.—The supreme court has judicial knowledge that the crossing of the Mobile & Ohio Railroad and the Southern Railroad in Chilton county is in township 21, and not township 20; such fact being disclosed by public surveys. *Foshee v. Kay*, 197 Ala. 157, 72 So. 391.

The court of appeals will take judicial notice of the contents of the published volumes of the reports of the United States surveyors. *Tallassee Falls Mfg. Co. v. State*, 13 Ala. App. 623, 68 So. 805, reversed on other grounds in 194 Ala. 554, 69 So. 589.

§ 21. Laws of the State.

§ 26. — Municipal Ordinances.

Ordinances Must Be Pleaded.—*Clayton v. Martin*, 7 Ala. App. 190, 60 So. 963, cited in note in Ann. Cas. 1914C, 1232. See the title EVIDENCE, § 26, vol. 6, p. 43.

Courts can not take judicial notice of municipal ordinances. *Bivins v. Montgomery*, 13 Ala. App. 641, 69 So. 224.

Speed Ordinances.—*Adler v. Martin*, 179 Ala. 97, 59 So. 597. See the title EVIDENCE, § 26, vol. 6, p. 44.

§ 27. — Legislative Proceedings and Journals.

It is matter of common knowledge that Legislature of 1915 appointed committee to sit during recess to prepare and adopt bills for revision of judicial system of state, that committee reported back number of bills, and that many were re-enacted into laws at session, one being Acts 1915, p. 862 et seq. *State v. Torbert* (Ala.), 77 So. 37.

§ 32. Existence, Organization, and Terms of Courts.

Existence and Organization.—It is matter of common knowledge that at date of passage and approval of act submitting constitutional amendment (February 28, 1911) and time of adoption of amendment and of passage of salaries act thereunder, Jefferson county composed one district of Northwestern chancery division of state, and had comprised separate district of chancery division

since passage of Act Feb. 18, 1867 (Acts 1867), p. 702. *Osborn v. Henry* (Ala.), 76 So. 119.

Terms of Courts.—Court of appeals knows judicially whether term of circuit court at which conviction was had has expired, and that such court is open at all times during term for transaction of all business or judicial proceedings of any kind in view of Acts 1915, p. 707. *State v. Gunter* (Ala. App.), 77 So. 443.

§ 33. Judicial Proceedings and Records.

§ 33 (1) In General.

Decisions Conflicting.—The supreme court judicially knows that the question of the duty of a water supply company to lay service pipes from its mains to the property of applicants for water service is a question on which the courts do not agree. *State v. Birmingham Waterworks Co.*, 185 Ala. 388, 64 So. 23.

Own Records.—The supreme court will judicially notice the contents of its own records. *Nashville, etc., Railway v. Crosby*, 194 Ala. 338, 70 So. 7; *Terrell v. Nelson* (Ala.), 74 So. 929.

§ 33 (2) Records or Decisions in Same Case.

The supreme court can not take judicial knowledge of the record in the circuit court of a suit not a part of the record on appeal. *Rhodes v. Downing*, 13 Ala. App. 494, 68 So. 788.

Notice of Original Record.—*Bohanan v. Dodd*, 7 Ala. App. 220, 60 So. 955. See the title EVIDENCE, § 33 (2), vol. 6, p. 48.

§ 33 (3) Proceedings in Other Courts.

On appeal in suit, under Code 1907, § 4295, to have mortgage declared general assignment, supreme court can not judicially know that bankruptcy proceedings alleged by respondent's special plea to be pending are dismissed, as alleged in replication to plea. *Anders Bros. v. Latimer* (Ala.), 73 So. 925.

§ 34. Officers and Official Position and Authority.

Secretary of Public Service Commission.—Although the court may take judicial notice that one authenticating copies of Public Service Commission orders

is its secretary, where no date is stated, the court can not judicially know that the person named was then its secretary. *Louisville, etc., R. Co. v. Boggs* (Ala.), 74 So. 337.

Vacancy.—Where it appears that re-lator was appointed by the governor to office of president of board of revenue of Shelby county under Loc. Acts 1911, p. 154, for term of four years ending May 22, 1919, the supreme court will judicially know that there was no vacancy in said office on January 15, 1917; at which time respondent took possession of the office under an election held under a void local act. *Longshore v. State* (Ala.), 76 So. 33.

Expiration of Commission of Notary.—Court judicially knows whether commission of notary who took plaintiff's affidavit had expired. *Birmingham v. Edwards* (Ala.), 77 So. 841.

That notary who took plaintiff's affidavit was de facto officer was matter of proof, as rule that courts take judicial notice of commissioned officers has no application to de facto officers. *Birmingham v. Edwards* (Ala.), 77 So. 841.

§ 35. Elections and Appointments to Office.

Notaries.—Courts take judicial notice of appointment by chief executive of notaries. *Birmingham v. Edwards* (Ala.), 77 So. 841.

§ 35½. Administrative Rules and Regulations.

Of State Live Stock Board.—The court will not take judicial notice of rules and regulations of the state live stock board. *Hill v. Cameron*, 194 Ala. 376, 69 So. 636.

Courts do not take judicial notice of such administrative regulations as the state live stock sanitary board is authorized to prescribe, unless they are of such wide application and established duration as to have become a part of the common knowledge of well-informed persons at least. *Ferguson v. Starkey*, 192 Ala. 471, 68 So. 348.

§ 36. Official Proceedings and Acts.

The supreme court can not judicially know whether the consent of the inhabitants of a given township to the sale or

lease of school lands had been ascertained at any time since the admission of the state under any of the various statutes governing such leases or sales. *State v. Board*, 183 Ala. 554, 63 So. 76.

Acts of Federal Officers.—*Mauldin v. Central, etc., R. Co.*, 181 Ala. 591, 61 So. 947. See the title EVIDENCE, § 36, vol. 6, p. 50.

Orders of President.—Held, that court will take judicial notice of acts of the President pursuant to acts and resolutions of Congress (including National Defense Act approved June 3, 1916), and resolution of July 1, 1916, mustering militia of state into service of United States and ordering mobilization on Mexican border. *Ex parte McMillan* (Ala. App.), 74 So. 396.

II. PRESUMPTIONS.

§ 42. Personal Status and Condition in General.

Solvency of Debtor.—A debtor is presumed to be solvent, in the absence of evidence to the contrary. *Webb v. Eutaw*, 9 Ala. App. 474, 63 So. 687.

§ 43½. Health and Physical Condition.

At the age of 50 years there is no presumption in our courts of female incapacity to procreate. *Sims v. Birden*, 197 Ala. 690, 73 So. 379, 744.

§ 47. Continuance of Fact or Condition.

Insolvency.—*Aycock v. Ft. Branch Milling Co.*, 182 Ala. 326, 62 So. 94. See the title EVIDENCE, § 47 (1), vol. 6, p. 53.

Relationship of Landlord and Tenant.—A tenant relying on a contract to purchase must overcome the presumption that the relationship of landlord and tenant once shown is presumed to continue. *Rhodes v. Downing*, 13 Ala. App. 494, 68 So. 788.

Continuance of Single State.—*Rucker v. Jackson*, 180 Ala. 109, 60 So. 139. See the title EVIDENCE, § 47 (1), vol. 6, p. 54.

Insanity at any particular time, if shown to be habitual and permanent, is presumed as a matter of law to exist at any future time, and from its existence alone at a later time there is a presumption of fact that it existed at a given

prior time. *Melvin v. Murphy*, 184 Ala. 188, 63 So. 546.

Continuance of Municipal Ordinance.—Where a municipal ordinance introduced in evidence purported to have gone into effect in 1906, it would be presumed to continue in effect. *Hill v. Condon*, 14 Ala. App. 332, 70 So. 208.

§ 50. Mailing, and Delivery of Mail Matter.

Letters properly addressed and duly mailed were presumably received. *Hartford Fire Ins. Co. v. Ollinger, etc., Dry Dock Co.* (Ala. App.), 77 So. 452.

Postage Prepaid.—There is a presumption that a letter, mailed with postage prepaid, is duly received by the addressee, though that presumption may be rebutted. *Holmes v. Bloch*, 196 Ala. 322, 71 So. 670.

Registered Mail.—There is a presumption of law that postal authorities delivered registered mail and that the person who signed the receipt had authority. Hence the return postal registry receipt is admissible in evidence. *Farmers' Mut. Ins. Ass'n v. Tankersley*, 13 Ala. App. 524, 69 So. 410, cited in notes in Ann. Cas. 1917E, 1059, 1063.

Mailing in Street Mail Box.—A letter which was mailed by dropping in a street mail box is admissible under the same presumption of delivery as though it were deposited in the post office. *Corry v. Sylvia y Cia*, 192 Ala. 550, 68 So. 891.

Application of Presumption to Depositions—Modification of General Rule.—*Cleghorn v. State*, 8 Ala. App. 272, 63 So. 329, cited in notes in Ann. Cas. 1917E, 1061; 49 L. R. A., N. S., 468. See the title EVIDENCE, § 50, vol. 6, p. 56.

§ 50½. Sending and Delivery of Telegrams and Other Messages.

Delivery of a properly addressed message to a telegraph company for transmission raises a presumption that it was received in due course by the addressee. *Corry v. Sylvia y Cia*, 192 Ala. 550, 68 So. 891.

§ 51. Evidence Withheld or Falsified.

§ 52. — In General.

Where one party seeks to prove a transfer of land to his ancestor, no pre-

sumption of fraud arises from failure to produce or require the production of the original transfer where it was presumptively in the possession of the other party. *Tumlin v. Tumlin*, 195 Ala. 457, 70 So. 254.

Where a party could have prevailed by showing that a letter was written at a certain time other than the date thereof, and failed or neglected to do so, having the means and opportunity, it will be presumed that the letter was not written at such certain time. *Mobile Towing, etc., Co. v. First Nat. Bank (Ala.)*, 78 So. 797.

§ 54. — Failure to Call Witness.

Where plaintiff's absent witness was as accessible to the defendant as to the plaintiff, and it did not appear that he knew of any material fact not testified to by the plaintiff, or that his testimony would not have been merely cumulative, no prejudicial inference could be drawn from plaintiff's failure to produce such witness. *Central, etc., R. Co. v. Sanders*, 9 Ala. App. 632, 64 So. 190.

§ 55. — Suppression or Spoliation of Evidence.

Destruction of Documentary Evidence.

—Against a party who has purposely and wrongfully destroyed documentary evidence that the spoliator knows is pertinent and material to the interest of his opponent, whether an action is then pending or not, a rebuttable presumption arises unfavorable to the spoliator. *McCleery v. McCleery (Ala.)*, 75 So. 316.

In statutory ejectment, plaintiff's evidence tending to show that the conveyance sustaining his action was in form a deed, bearing certain signatures, that it was a deed, and had been delivered to him, and that he was named as grantee therein, etc., with evidence that defendant had purposely destroyed such instrument, made a *prima facie* case. *McCleery v. McCleery (Ala.)*, 75 So. 316.

The measure and quality of evidence descriptive of instrument necessary to afford basis for the presumption against the spoliator are that there should be presented, by him whose right or interest is supposed to be prejudiced by the destruction of the instrument, evidence

of a general character, reasonably calculated to invite the conclusion that an instrument of the type in question existed, and that it was purposely destroyed or caused to be destroyed by the alleged spoliator, and strict proof of the contents of such an instrument, so destroyed, is not required, for if a higher degree of proof were to be exacted, the rule of the maxim would be without practical service. *McCleery v. McCleery (Ala.)*, 75 So. 316.

Presumption Not Rebuttable by Secondary Evidence.—The intentional destruction of a letter creates a presumption that its contents were detrimental, which can not be rebutted by secondary evidence. • *Russell v. Bush*, 196 Ala. 309, 71 So. 397.

§ 56. Laws of Other States.

Common Law Presumed to Prevail.—*Corinth Bank, etc., Co. v. King*, 182 Ala. 403, 62 So. 704. See the title EVIDENCE, § 56 (2), vol. 6, p. 60.

§ 58. Judicial Proceedings.

When the judgment of an inferior court shows the facts necessary to jurisdiction, the same presumptions are indulged in favor of the regularity of its proceedings as are extended to the superior courts, and the record can be impeached only in like cases and to the same extent. *Kenedy v. Miller Mill Co. (Ala. App.)*, 75 So. 191.

Acts of Probate Court.—*Milbra v. Sloss-Sheffield Steel, etc., Co.*, 182 Ala. 622, 62 So. 176. See the title EVIDENCE, § 58, vol. 6, p. 62.

Good Faith of Counsel.—In the absence of tangible indication to the contrary, good faith of counsel will be presumed. *Beatty v. Palmer*, 196 Ala. 67, 71 So. 422.

Time of Signing Minutes.—Under Code 1907, § 5732, providing that minutes of court must be read each morning and on adjournment signed by judge, court is presumed to have signed minutes of term at which case was tried upon adjournment. *Prudential Casualty Co. v. Kerr*, 14 Ala. App. 539, 71 So. 979.

Time of Making Orders.—Where orders made by probate judge in municipal incorporation proceedings are not dated,

it is assumed they were made at proper time, in absence of contrary showing. *Foshee v. Kay*, 197 Ala. 157, 72 So. 391.

§ 59. Official Proceedings and Acts.

Depositions of officials of court of another state as to their official assignment of judgment to complainant, held when usual presumption as to regularity of official acts is applied, sufficient to establish complainant's title to such judgment in a suit to set aside fraudulent conveyance of land brought by complainant or judgment creditor. *Murphy v. Pipkin*, 191 Ala. 111, 67 So. 675.

Payment of Illegal Warrants.—*Alston v. Dunn*, 176 Ala. 421, 58 So. 300. See the title EVIDENCE, § 59 (1), vol. 6, p. 62.

County Commissioners.—It will be presumed that the court of county commissioners proceeded regularly in all matters pertaining to establishment of public roads. *Hicks v. State* (Ala. App.), 75 So. 636.

Official Duty of Governor.—Presumption will be indulged, in absence of countervailing evidence, that matter of official duty was performed by governor. *Pool v. State* (Ala. App.), 78 So. 407.

Judge of Probate.—Since Gen. Acts 1915, p. 242, § 14, authorized judge of probate to publish poll list in only one paper, the presumption is that a judge did not authorize two papers to publish such list. *Deal v. Houston County* (Ala.), 78 So. 809.

A sheriff will be presumed to have exercised due diligence in the execution of a writ of seizure. *Newcomb Bros. Wall Paper Co. v. Wiggins* (Ala.), 78 So. 905.

In an action against a sheriff for failure to levy execution, the burden of proving negligence and damages resulting therefrom is upon the plaintiff, the presumption being that the sheriff performed his official duty. *Newcomb Bros. Wall Paper Co. v. Wiggins* (Ala.), 78 So. 905.

§ 60. Particular Facts.

Railroad tariff schedules posted in their offices will be presumed to be identical with those filed with the Interstate Commerce Commission, in the absence of any ground for suspicion. *Priebe v.*

Southern R. Co., 189 Ala. 427, 66 So. 573.

Administrator's Discharge and Settlement.—The lapse of 35 years raises a conclusive presumption of an administrator's discharge and settlement, so that he can not maintain ejectment for the land of his intestate. *Randolph v. Hubbert*, 190 Ala. 610, 67 So. 416.

III. BURDEN OF PROOF.

§ 61½. Nature and Scope in General.

"Burden of proof" means the duty to establish the truth of a given proposition by that quantum of evidence which the law demands, and also the duty of producing evidence at any stage of the trial to make or meet a prima facie case. *Davis v. Florey* (Ala. App.), 77 So. 413.

§ 62. Party Asserting or Denying Existence of Facts.

Averments in Complaint.—Plaintiff has the burden of proving the averments of his complaint. *Sherrill v. Merchants', etc., Sav. Bank*, 195 Ala. 175, 70 So. 723.

Where plaintiff replies to a special plea in confession and avoidance by a special replication in confession and avoidance, without denying the plea, defendant need not prove it; but if plaintiff takes issue on the plea by general replication, and replies by special replication in confession and avoidance, defendant must prove the plea. *Miller v. Johnson*, 189 Ala. 354, 66 So. 486.

Where plaintiff replied to a special plea in confession and avoidance by a general replication and a special replication of waiver in confession and avoidance, the burden of proving the plea remained with defendant. *Ray v. Fidelity-Phenix Fire Ins. Co.*, 187 Ala. 91, 65 So. 536.

Plaintiff Filing Special Replication.—Where plaintiff did not take issue on the pleas by special replication, but filed a special replication in confession and avoidance, the special pleas stand confessed, and the only issue was that raised by the special replication, the burden of proving which was on plaintiff. *Miller v. Johnson*, 189 Ala. 354, 66 So. 486.

§ 63. Proof of Negative.

Negative averments in pleadings need not be proven in prosecutions for pen-

alties provided by statute or when the allegation involves a charge of fraud, a breach of official duty, or a violation of trust, but other negative averments upon which a claim or defense depends must be established by the one alleging them. *Western Union Tel. Co. v. Brazier*, 10 Ala. App. 308, 65 So. 95.

§ 63½. Facts within Knowledge of Adverse Party.

As a general rule, when the subject matter of a negative averment lies entirely or peculiarly within the knowledge of the adverse party, the burden of proving the affirmative rests on the adverse party. *Western Union Tel. Co. v. Brazier*, 10 Ala. App. 308, 65 So. 95.

§ 64. Extent of Burden in General.

A presumption which establishes an element of a case imposes upon the other party the burden of proof on the point, especially where it supports an allegation of pleading. *Starks v. Comer*, 190 Ala. 245, 67 So. 440.

Evidence merely tending to prove an issue, which falls short of reasonably satisfying the jury thereon, does not shift the burden of proof, since the court has no right to assume the jury's belief of the testimony, even though it is contradicted. *Western Union Tel. Co. v. Brazier*, 10 Ala. App. 308, 65 So. 95.

§ 65. Matters of Defense and Rebuttal.

It is a rule of evidence and pleading that the burden of proof is on the defendant as to special pleas or defenses. *Forbes v. Plummer* (Ala.), 73 So. 451.

Where defendant did not controvert plaintiff's claim, but sought to set off against it the demand asserted by him in a suit against plaintiff, tried with the suit against defendant, the burden was on defendant to prove his counterclaim. *Reid v. McElderry*, 10 Ala. App. 472, 65 So. 421.

IV. RELEVANCY, MATERIALITY, AND COMPETENCY IN GENERAL.

(A) FACTS IN ISSUE AND RELEVANT TO ISSUES.

§ 67. Relevancy in General.

That testimony may be insufficient to

sustain issues presented by the pleadings does not render it inadmissible where it tends to prove such issues. *Farmers' Mut. Ins. Ass'n v. Stewart*, 192 Ala. 23, 68 So. 254.

The relevancy of evidence is tested by its tendency to prove the issue, and it is not necessary that evidence offered should be sufficient to prove the fact alleged. *Atlanta, etc., R. Co. v. Fowler*, 192 Ala. 373, 68 So. 283.

§ 67½. Circumstantial Evidence of Facts in Issue.

The death or injury of an animal caused by a railroad train may be shown by circumstantial evidence, as any other evidential fact may be shown. *Louisville, etc., R. Co. v. Hayward* (Ala.), 75 So. 22.

§ 69. Identity of Persons and Things.

There being a dispute in action for injury to a house from blasts in railroad construction, as to which of two construction companies was intrusted with the work, evidence of the financial ability of one is admissible. *Louisville, etc., R. Co. v. Lynne* (Ala.), 75 So. 14.

Oral Evidence to Show Real Party.—*Milbra v. Sloss-Sheffield Steel, etc., Co.*, 182 Ala. 622, 62 So. 176. See the title EVIDENCE, § 69, vol. 6, p. 72.

§ 70. Personal Status and Condition.

In action for wrongful death, testimony of witness in deposition that he was a Confederate veteran was properly excluded as irrelevant and immaterial. *Karpeles v. City Ice Delivery Co. (Ala.)*, 73 So. 642.

§ 73. Character or Reputation.

In an action for libel, evidence as to character of affiant executing libelous affidavit published by defendants held inadmissible, in absence of proof that defendants were acquainted with his character at the time of the publication. *Starks v. Commer*, 190 Ala. 245, 67 So. 440.

§ 75. Motive and Intent.

Intentions on Cross-Examinations.—*Davis v. Clausen*, 7 Ala. App. 381, 62 So. 267. See the title EVIDENCE, § 75, vol. 6, p. 74.

§ 77. Statements and Conduct of Parties.

Statements.—In action for assault and battery, testimony of what defendant said to a third party, after the assault on plaintiff, and after plaintiff had left the place where the difficulty occurred, was inadmissible, being without value in determining the relative rights of the parties. *Greenwood Cafe v. Walsh* (Ala. App.), 74 So. 82.

§ 80. Value or Market Price of Property.**§ 80 (1) In General.**

Evidence as to the average market value of garden corn during the season held admissible as a basis for estimating damages to an owner's land. *International Agr. Corp. v. Abercrombie*, 192 Ala. 50, 68 So. 873.

The amount of insurance on burned property is not admissible to establish value of the property. *Alabama, etc., R. Co. v. Loveman Compress Co.*, 196 Ala. 683, 72 So. 311.

Corporate Stock.—In action on bond for injunction restraining sale or voting of stock, where plaintiff testified he was owner of 917 shares when the injunction was issued, and that the reasonable market value was \$225 per share, he was properly permitted to testify that after the issuance of the injunction the value of the stock was decreased, and that at the time of the dissolution of the injunction the market value was \$35 per share. *National Surety Co. v. Citizens' Light, etc., Co.* (Ala.), 78 So. 834.

§ 80 (2) Time and Place of Valuation.

It is competent to prove the value of property at a certain time by showing its value at a prior and subsequent time in the same market, within reasonable limits. *Jones v. White*, 189 Ala. 622, 66 So. 605.

In an action for a private nuisance, evidence as to what plaintiff paid for his land several years before the alleged injury is not admissible to show the market value of the land. *Pratt Consol. Coal Co. v. Morton*, 14 Ala. App. 194, 63 So. 1015.

Evidence of the value of property, wrongfully destroyed, at other times and places, is admissible as showing its value at the time and place in question. *West-*

ern Railway v. Price, 192 Ala. 430, 68 So. 278.

§ 80 (9) Tax Assessment.

The value placed on land in its assessment for taxation is not admissible to show its value, unless the owner participated in fixing the assessed value. *Pratt Consol. Coal Co. v. Morton*, 14 Ala. App. 194, 68 So. 1015.

§ 80 (11) Animals.

On an issue as to the value of mules sold by defendants to a negro, the question as to whether one of defendants, in fixing the price, considered that they were sold to a negro on time was objectionable as calling for an uncommunicated motive of the witness. *Jones v. White*, 189 Ala. 622, 66 So. 605.

§ 81. Facts Relevant to Particular Issues.

Evidence Held Admissible.—On question whether seller knew that goods were ordered for another, letter giving notice that goods ordered were for another is admissible. *Oil-Well Supply Co. v. West Huntsville Cotton Mills Co.* (Ala.), 73 So. 899.

In ejectment, wherein the age of plaintiff's father was material, fixing of date of father's marriage and date of his father's death was admissible in connection with statements made by the father to his wife as to his age at such events. *Landers v. Hayes*, 196 Ala. 533, 72 So. 106.

Evidence Held Inadmissible.—In an action by a wife for injuries, testimony of the husband that the wife was of "no earthly account to me like she used to be," and that he had to help her wash and cook, which he had never had to do before, was incompetent, not being within the issues. *Alabama, etc., Railway v. Foley*, 195 Ala. 391, 70 So. 726.

Where the grantor's wife claimed that his deed was not delivered within his lifetime, and this claim constituted the only issue, testimony regarding what family the grantor and his wife had is irrelevant. *Love v. Lee* (Ala.), 75 So. 24.

Where a buyer of cotton claimed that, when weighed by his consignee, it was much less in amount than the weights furnished by plaintiff, evidence that the

buyer owned stock in the warehouse company where plaintiff weighed the cotton related to a collateral fact and was improperly received. *Hooper v. Herring*, 14 Ala. App. 455, 70 So. 308.

§ 83. Matters Explanatory of Facts in Evidence or of Inferences Therefrom.

Where witness for plaintiff, testifying as to dynamite in defendant's building, stated that he had gone there to buy cement, it was proper for defendant to testify as to when plaintiff's witness was there and when he had sold him cement. *Hamilton v. Cranford Mercantile Co. (Ala.)*, 78 So. 401.

Question asked a passenger, testifying to the conductor's statement as to whether the conductor was speaking to her, held explanatory of testimony given. *Seaboard, etc., R. Co. v. Mobley*, 194 Ala. 211, 69 So. 614.

§ 84. Evidence Irrelevant unless Preceded or Followed by Other Evidence.

Defective Condition of Motor.—*Owen v. Alabama, etc., R. Co.*, 181 Ala. 552, 61 So. 924. See the title EVIDENCE, § 84, vol. 6, pp. 84, 85.

(B) RES GESTAE.

§ 85. Nature of Doctrine in General.

Difficult to Define—Spontaneous Expression Contemporaneous with Main Fact.—*Bessierre v. Alabama City, etc., R. Co.*, 179 Ala. 317, 60 So. 82. See the title EVIDENCE, § 85, vol. 6, pp. 86, 87.

§ 86. Facts Forming Part of Same Transaction.

Evidence that street car just before striking traffic officer passed so close to another officer that it touched his arm, held a part of the res gestæ. *Mobile Light, etc., R. Co. v. Burch*, 12 Ala. App. 421, 68 So. 509.

Writing Forming Part of Transaction.—In seller's action on defendant dealer's guaranty of payment indorsed on purchase-price notes, contract between the parties, under which seller delivered property covered by notes, held admissible as part of transaction. *Clark v. International Harvester Co. (Ala.)*, 77 So. 692.

§ 87. Acts and Statements Accompanying or Connected with Transaction or Event.

§ 88. — In General.

§ 88 (1) In General.

All acts done or words spoken pending the doing of a particular act, and which tend in any way to illustrate or give character to the act, are receivable in evidence as part of the res gestæ. *Ward v. Lane*, 189 Ala. 340, 66 So. 499.

To be admissible as res gestæ, a contemporaneous declaration must directly relate to, and to some extent illustrate and explain, the occurrence, and must be the apparently spontaneous result of the occurrence operating on the perceptive senses of the speaker. *Illinois Cent. R. Co. v. Lowery*, 184 Ala. 443, 63 So. 952, 49 L. R. A., N. S., 1149.

Evidence Held Admissible.—In detinue for a mule taken by defendant, evidence that defendant, after seizing the animal, mounted her and rode her off on a run, held admissible as part of the res gestæ of the taking. *McCoy v. Prince*, 11 Ala. App. 388, 66 So. 950.

In an action for compelling plaintiff to alight short of his destination, evidence of another passenger that the conductor directed all to get off at the intervening point where plaintiff claimed he was required to alight was admissible as res gestæ. *Louisville, etc., R. Co. v. Grimes*, 184 Ala. 413, 63 So. 554.

Where plaintiff introduced a chain bearer to discredit the survey of a disputed boundary line made by B., and proved part of the details of the survey, defendant was entitled to prove by the witness that B. consulted the papers which he had with him while making the survey as res gestæ. *Ward v. Lane*, 189 Ala. 340, 66 So. 499.

Testimony of defendant's manager as to what he had said to the messenger boy, and what the boy had said to him, while engaged in and about the delivery of the telegram, or the ascertainment of the addressee's whereabouts, held admissible as part of the res gestæ. *Ex parte Western Union Tel. Co.*, 195 Ala. 359, 70 So. 633, reversing judgment *Western Union Tel. Co. v. Baker*, 14 Ala. App. 208, 69 So. 246.

§ 88 (3) By Agents or Employees.

In action against telegraph company for personal injuries by being run into by its messenger boy on a bicycle, refusal of messenger at the time of the accident to give his name on request and his statement that he was delivering a message, held admissible as a part of the "res gestæ." *Postal Telegraph-Cable Co. v. Minderhout*, 14 Ala. App. 392, 71 So. 89, certiorari denied in 195 Ala. 420, 71 So. 91.

§ 88 (4) Motive and Intent in General.

On trial for wrongfully ejecting passenger, without giving him opportunity to find misplaced ticket, statement of third person that plaintiff had a ticket, and request to conductor not to put plaintiff off, held admissible as part of the res gestæ, and as bearing on the conductor's conduct and motives. *Louisville, etc., R. Co. v. Mason*, 10 Ala. App. 263, 64 So. 154.

§ 88 (6) Ownership or Possession of Property.

While, on a trial of the right of property, declarations by defendant in execution in the absence of claimant are inadmissible, declarations of persons in possession, claiming or disclaiming ownership of the property, are competent as res gestæ. *Craddock v. Walden*, 184 Ala. 58, 63 So. 534.

Declarations made by defendant in execution to a constable, on their way to a stable where a mule levied on was located, that H., the owner of the stable, had a claim on the mule held inadmissible as res gestæ. *Craddock v. Walden*, 184 Ala. 58, 63 So. 534.

In trials of the title to realty, a party may prove the claim or disclaimer of a party in possession to show the intent with which possession is held; such declarations being admissible as of the res gestæ and explanatory of the actual possession otherwise proved. *Dent v. Stovall* (Ala.), 75 So. 941.

Where it was claimed that a horse in the possession of defendant belonged to the estate of deceased, the seller of the animal may testify that when he sold it he informed defendant that he would not

sell to deceased. *Warten v. Black*, 195 Ala. 93, 70 So. 758.

§ 88 (9) Sale or Conveyance.

Statements of the sellers, pending negotiations of a sale of a horse, as to its qualities and where they got it, being res gestæ, is admissible in an action for breach of warranty. *Brown & Co. v. Matthews*, 14 Ala. App. 428, 70 So. 287.

§ 88 (12) Personal Injuries.

In passenger's action for personal injury from falling over a suit case, full length upon the floor of a car, claiming special damages for mortification, evidence that when plaintiff fell the other passengers were much amused held admissible as part of the res gestæ. *Alabama, etc., R. Co. v. Johnson*, 14 Ala. App. 558, 71 So. 620.

§ 89. — Before Transaction or Event.

Where decedent was killed at a station whence he went to take a train, his declarations before setting out on his journey as to where he was going, and how, were admissible as res gestæ. *Central, etc., R. Co. v. Bell*, 187 Ala. 541, 65 So. 835, cited in note in *L. R. A.* 1915D, 505.

That a married woman in the absence of the mortgagee refused to sign a mortgage, stating to justice that it was for the debt of the husband, held not part of the res gestæ of the execution and acknowledgment of the mortgage the following day, and hence inadmissible as against the mortgagee. *Bley v. Lewis*, 189 Ala. 335, 66 So. 454.

§ 90. — After Transaction or Event.**§ 90 (1) Particular Issues and Relation of Acts or Statements Thereto, in General.**

Where plaintiff and her companion were thrown from a buggy by their horse becoming frightened by an automobile, evidence of a statement immediately after the injury that witness told defendant that plaintiff and her companion were coming, and that he should stop, was not res gestæ. *McCray v. Sharpe*, 188 Ala. 375, 66 So. 441.

In an employee's action for personal injuries by a lever carrying a steel rail falling upon him, evidence that the em-

ployee who was operating the derrick exclaimed immediately upon the happening of the accident that "The damn thing was about wore out anyhow, and that they would keep running it until they killed somebody," was admissible as *res gestæ*. *Illinois Cent. R. Co. v. Lowery*, 184 Ala. 443, 63 So. 952, 49 L. R. A., N. S., 1149.

§ 90 (3) Acts or Statements by Agents or Employees, in General.

In action for delay in delivering telegram testimony of defendant's operator as to report of messenger returning with an undelivered message after having tried to find addressee was admissible as part of the *res gestæ*. *Jordan v. Western Union Tel. Co.*, 197 Ala. 28, 72 So. 339.

Action for Insulting Language.—Remark by Third Person. — *Interstate Amusement Co. v. Martin*, 8 Ala. App. 481, 62 So. 404. See the title EVIDENCE, § 90 (3), vol. 6, p. 106.

§ 90 (6) Assault.

Evidence as to where wife went and how long she stayed, and what was done for her by others after assault, held inadmissible, such acts not being spontaneous, but possibly calculated, and resting upon inferences from the wife's declarations and conduct. *Johnson v. Johnson (Ala.)*, 77 So. 335.

Arrest of Third Parties. — *Republic Iron, etc., Co. v. Passafume*, 181 Ala. 463, 61 So. 327. See the title EVIDENCE, § 90 (6), vol. 6, p. 107.

§ 90 (7) Personal Injuries in General.

In an action against a railroad for injuries to a woman passenger while alighting, objection to plaintiff's offered proof of protest she made to the flagman after alighting from the train was properly sustained, not being a part of the *res gestæ*. *Franklin v. Southern R. Co.*, 196 Ala. 118, 72 So. 11.

Where it was sought to show that a team which collided with plaintiff was owned by defendant and driven by a negro boy in his employ, subsequent acts of the negro boy after the collision were incompetent. *Monarch Livery Co. v. Luck*, 184 Ala. 518, 63 So. 656.

§ 90 (8) Acts and Statements of Agents or Employees in Relation Thereto.

In an action by corporation for the price of gasoline, where the defense is breach of warranty as to quality, declarations of plaintiff's agents subsequent to the sale are no part of the *res gestæ*. *Meador & Son v. Standard Oil Co.*, 196 Ala. 365, 72 So. 34.

In an action against a railroad company for the running down of plaintiff's intestate, evidence of a statement by the engineer after the accident that deceased ought to have been killed, though engineer denied it, is inadmissible; the statement not being part of *res gestæ*. *Southern R. Co. v. Fricks*, 196 Ala. 61, 71 So. 701.

In action for the running down of plaintiff's intestate, statements made by those in charge of the train some time after the accident are inadmissible, not being admissions binding on a railroad company because not *res gestæ*. *Southern R. Co. v. Fricks*, 196 Ala. 61, 71 So. 701.

Exclamations of Motorman.—*Bessierre v. Alabama City, etc., R. Co.*, 179 Ala. 317, 60 So. 82. See the title EVIDENCE, § 90 (8), vol. 6, p. 106.

Statement of Engineer.—*Southern R. Co. v. Smith*, 177 Ala. 367, 58 So. 429, cited in notes in 42 L. R. A., N. S., 931; *Ann. Cas.* 1915A, 1043. See the title EVIDENCE, § 90 (8), vol. 6, p. 108.

§ 91. Acts and Statements of Person Sick or Injured.

§ 92. — In General.

Evidence as to where wife went and how long she stayed after assault by husband held inadmissible, such acts and conduct not being spontaneous, but possibly calculated. *Johnson v. Johnson (Ala.)*, 77 So. 335.

§ 93. — Statements as to Cause of Injury.

At or Near Time or Place of Injury.—A statement by the injured passenger, in narrating the circumstances of the accident, that, after the deadening sensation felt in his neck after the jerk of the train, he called a passenger's attention to the jerk, was admissible as *res gestæ*.

Empire Coal Co. v. Gravlee, 9 Ala. App. 657, 64 So. 207.

A statement, made by plaintiff after she had fallen on the sidewalk in front of defendant's store to one who came from the store to help her up, held not admissible as part of the *res gestæ*. *Walker v. Smith* (Ala.), 74 So. 451.

Statement of Plaintiff as to Disposition of Horse.—*Alabama City, etc., R. Co. v. Heald*, 178 Ala. 636, 59 So. 461. See the title EVIDENCE, § 93 (1); vol. 6, p. 110.

§ 94. — Statements as to and Expressions of Personal Injury or Suffering.

In a servant's action for injury, testimony of his uncle, who had been well acquainted with him before and after the accident and had known him all his life, that after the injury he heard plaintiff complain that his head and back pained him, was competent. *Woodward Iron Co. v. Spencer*, 194 Ala. 285, 69 So. 902.

A question as to whether witness heard a passenger, who claimed to have contracted a cold through a railroad company's negligence, complain of being sick, held not to call for narration of past conditions. *Louisville, etc., R. Co. v. Jones*, 194 Ala. 334, 70 So. 133.

In action on accident policy, declarations by insured as to present condition, pains, etc., are competent to whosoever made. *Maryland Casualty Co. v. McCallum* (Ala.), 75 So. 902.

§ 95. — Statements to Physicians.

In action on accident policy, declarations by insured subsequent to event, as to cause of injury, though made to physician, are inadmissible. *Maryland Casualty Co. v. McCallum* (Ala.), 75 So. 902.

(C) SIMILAR FACTS AND TRANSACTIONS.

§ 96. Relation to Issues in General.

§ 96 (1) In General.

In an action for the destruction of a lien on cotton claimed by plaintiff through a husband's mortgage and by defendants as purchasers from the wife, evidence as to mortgages on other crops

held admissible to show ownership. *Pelham Sitz & Co. v. Herzberg-Loveman Dry Goods Co.*, 194 Ala. 237, 69 So. 881.

Immaterial Evidence.—In a suit for the conversion of cotton, subject to a landlord's lien, evidence that on previous occasions defendant had been compelled to pay for cotton bought from tenants of the landlord is immaterial. *Worthington v. Long*, 9 Ala. App. 617, 64 So. 174.

§ 96 (3) Similar Wrongful Acts.

Breach of Warranty.—*Roden Grocery Co. v. Gipson*, 9 Ala. App. 164, 62 So. 388, cited in note in *L. R. A.* 1915B, 634. See the title EVIDENCE, § 96 (3), vol. 6, p. 116.

§ 96 (4) Similar Transactions.

In an action on a note given by defendants to take up a note of a deceased which they subsequently claimed he himself had paid, evidence of the giving of other notes by deceased to plaintiff held inadmissible. *Orr v. Stewart*, 13 Ala. App. 542, 69 So. 649.

Past Transactions.—*Batson v. Alexander City Bank*, 179 Ala. 490, 60 So. 313. See the title EVIDENCE, § 96 (4), vol. 6, p. 118.

§ 97. Exclusion as Res Inter Alios Acta.

Custom.—On question of alteration of note, notes by third parties to the same payee if offered to show conduct or custom held properly excluded. *McKinney v. Darden*, 192 Ala. 369, 68 So. 269.

In action on note which defendant asserted was given to plaintiff for commissions for liquor illegally sold, defendant setting up he was minor, and that plaintiff had been forbidden by his father to sell to him, held, that plaintiff, to discredit defendant, could not prove custom of railroad as to not employing minors. *Jeffries v. Pitts* (Ala.), 75 So. 959.

Statement as to Newspaper Article.—*Parsons v. Age-Herald Pub. Co.*, 181 Ala. 439, 61 So. 345. See the title EVIDENCE, § 97, vol. 6, p. 119.

Assumption of Payment by Third Person.—*Key v. Goodall, etc., Co.*, 7 Ala. App. 227, 60 So. 986. See the title EVIDENCE, § 97, vol. 6, p. 118.

§ 98. Similarity of Conditions.

To allow proof of an occurrence similar to one involved, substantially similar conditions must be shown, but the similarity may be presumed from the nearness of the occasions or be shown by circumstances. *Southern R. Co. v. Lefan*, 195 Ala. 295, 70 So. 249.

§ 103. Showing Knowledge.

On question whether seller knew that goods were ordered for company other than defendant, letter from seller to president of both companies relating to other goods, is admissible to show that seller knew of existence of both companies. *Oil-Well Supply Co. v. West Huntsville Cotton Mills Co.* (Ala.), 73 So. 899.

§ 107. Showing Value.

On a counterclaim for damages to land, evidence as to the crop produced on similar, but inferior, land, held admissible as the basis for estimating the damages. *International Agr. Corp. v. Abercrombie*, 192 Ala. 50, 68 So. 873.

Service.—In determining proper division of fees between attorneys and associate counsel employed by them, evidence of other employments between the parties in other similar cases, wherein the fees were equally divided, was admissible. *Smith v. Waldrop* (Ala.), 77 So. 331.

(D) MATERIALITY.

§ 108. Importance in General.

There was no error in excluding from the jury a letter from defendant to its agent, after settlement with plaintiff, which was not material to any issue in the case. *American Workmen v. James*, 14 Ala. App. 477, 70 So. 976.

§ 109. Certainty.

A question whether it was "possible" for a building to burn completely down without burning another 10 or 20 feet away did not call for an answer of any value to the jury. *Hamilton v. Cranford Mercantile Co.* (Ala.), 78 So. 401.

§ 112. Negative Evidence.

In action against a county to recover for publishing the poll list, it was competent for the clerk of the probate court

to testify that he did not know of a contract with plaintiff, or that plaintiff received the list, and did not remember that the probate office received a copy of plaintiff's paper containing the list. *Deal v. Houston County* (Ala.), 78 So. 809.

In an action on a note, testimony of signers that they never heard any of the makers say that they signed the notes individually is inadmissible, except as it may tend to contradict plaintiff's evidence that such makers signed individually. *Planters' Chemical, etc., Co. v. Stearnes*, 189 Ala. 503, 66 So. 699.

(E) COMPETENCY.

§ 113. Nature and Source of Evidence in General.

In an action against a livery company for injuries from a collision of a team with one driven by plaintiff, evidence that the wife of a third person, who boarded his team at the livery, had telephoned to have it sent to him, held competent. *Monarch Livery Co. v. Luck*, 184 Ala. 518, 63 So. 656, cited in note in *Ann. Cas.* 1916E, 977.

§ 115. Testimony as to Intent, Motive, or Condition of Mind.

§ 115 (1) In General.

In an action for injuries to a minor in being caught by a wringer in a knitting mill, evidence by defendant's superintendent that he would not have employed the boy had he understood that he was not to work at the wringer was properly excluded. *Huntsville Knitting Mills Co. v. Butner*, 194 Ala. 317, 69 So. 960.

Uncommunicated Purposes or Motives.

—A witness can not testify to his uncommunicated purposes or motives. *Williams v. Shows*, 197 Ala. 596, 73 So. 99.

A question asked the plaintiff's agent as to what he put a check in the bank for was objectionable as calling for an undisclosed intention or motive. *Bank v. Arnold & Co.*, 13 Ala. App. 462, 68 So. 699.

It is not permissible to examine one's own witness as to his reasons for his acts. *Rothrock v. Alabama, etc., R. Co.* (Ala.), 78 So. 84.

Effect of Occurrences upon Mind.—*Interstate Amusement Co. v. Martin*, 8 Ala. App. 481, 62 So. 404. See the title EVIDENCE, § 115 (1), vol. 6, p. 129.

§ 115 (3) Wrongful Acts in General.

In a passenger's action for injury from the derailment of a car on a down-grade, a question calling for the motorman's judgment, as of the time of starting on the trip, of his ability to bring the car down under control, held inadmissible, since it called for the recital of a long-past mental status. *Birmingham R., etc., Co. v. Friedman*, 187 Ala. 562, 65 So. 939.

Frightening Animals.—In an action for injuries at a highway crossing by frightening plaintiff's mule, evidence by the engineer that he had no intention of frightening the mule by blowing off steam, etc., was admissible. *Boan v. Smith Lumber Co.*, 184 Ala. 535, 63 So. 564.

Assault.—In an action against a master for an assault and battery by his superintendent, testimony of the superintendent as to his motives or purposes held inadmissible. *Central Foundry Co. v. Laird*, 189 Ala. 584, 66 So. 571.

In an action for an assault on plaintiff by a third party, it was error to permit the party who committed the assault to state his secret and uncommunicated motive or reason for the assault; it being a mere conclusion. *Southern R. Co. v. Haynes*, 186 Ala. 60, 65 So. 339.

In an action by a passenger for an assault upon him while in defendant's depot, the negligence charged against defendant being that its agent knew of the impending assault, and refused to intervene to protect plaintiff, it was error to permit the party who committed the assault to testify as to his motive or reason for the assault. *Southern R. Co. v. Haynes*, 186 Ala. 60, 65 So. 339.

In action for false imprisonment and assault by a watchman, the watchman could not state his reason for carrying a pistol, nor that two previous watchmen had been shot. *Du Pont de Nemours Powder Co. v. Hyde* (Ala.), 77 So. 733.

§ 115 (4) Negligence and Contributory Negligence.

It was not erroneous to decline to al-

low a witness to state what he would have done had he been in the employee's position at the time of injury, as it involved the admission in evidence of the uncommunicated motive of the witness. *Alabama, etc., R. Co. v. Flinn* (Ala.), 74 So. 246.

Mistake in Transmission of Telegram.

—Testimony by plaintiff that news of her sister's death made her sad held not proper way of proving mental anguish in action for mistake in transmission of telegram. *Western Union Tel. Co. v. Hughston*, 191 Ala. 424, 67 So. 670.

§ 115 (5) Malicious Prosecution.

In an action for malicious prosecution, defendant's agent, who instituted the prosecution, can not testify that he had no malice against plaintiff. *Birmingham Bottling Co. v. Morris*, 193 Ala. 627, 69 So. 85.

§ 115 (6) Fraud and Misrepresentations.

In ejectment, where the question whether plaintiff's wife had signed the deed under which defendants claimed through fraud or duress was in issue, held that it was not competent for her to testify that she did not want to sign the deed. *Gilley v. Denman*, 185 Ala. 561, 64 So. 97.

In suit to set aside a fraudulent conveyance, intent can not be proved or disproved by oath of the party to whom it is imputed, and its existence vel non is a matter of inference to be drawn from the facts. *Dothan Nat. Bank v. Moore-Handley Hdw. Co.* (Ala.), 76 So. 317.

§ 116. Evidence Admissible by Reason of Admission of Similar Evidence of Adverse Party.

§ 116 (1) In General.

Where, in an action for defendant's breach of agreement to sell cotton seed oil, the court allowed defendant to prove its broker's offer to sell to another at a price in excess of the contract price as claimed by plaintiff, it was error to decline to allow plaintiff to show answer, and the error was reversible. *Portsmouth Cotton Oil Refining Corp. v. Madrid Cotton Oil Co.*, 195 Ala. 256, 71 So. 111.

In an action on an accident policy,

where a witness was merely interrogated as to fact of a conversation between himself and a physician, but not what was said, defendant was not on this predicate entitled to show what physician said in such conversation. *Provident Life, etc., Ins. Co. v. Black* (Ala. App.), 73 So. 757.

Where plaintiff proved part of conversation between himself and widow from whom he claimed to have purchased, it was competent for defendant to prove all that was said therein relating to subject matter. *Windham v. Hydrick*, 197 Ala. 125, 72 So. 403.

Defendant, who pleads a release from liability for injuries in a crossing accident negotiated by the agent of an indemnity company in which she was insured, could not complain when the plaintiff's attorney inquired whether she was insured in such a company, having opened up that issue herself. *Beatty v. Palmer*, 196 Ala. 67, 71 So. 422.

§ 116 (3) Title, Ownership, or Possession of Property.

In a suit for trover for fixtures removed, where a lease did not provide what was to become of houses erected by the lessee after its termination, and lessee introduced evidence that the houses were trade fixtures, held, the lessor could show an agreement that the houses were not removable. *Middleton v. Alabama Power Co.*, 196 Ala. 1, 71 So. 461.

§ 116 (4) Admission of Similar Evidence When First Evidence Was Inadmissible.

While a hearsay declaration may be rebutted by evidence of a similar nature, the rebutting evidence must be directed, not to the ultimate fact, but to the hearsay declaration. *Bank v. Taylor*, 196 Ala. 665, 72 So. 264.

§ 116 (5) Documentary Evidence.

In action for defendant's breach of its agreement to sell cotton seed oil where sale was made through a broker, defendant having introduced a telegram as evidence of broker's efforts to sell the oil to third persons, plaintiff was entitled to introduce the answer to the tele-

gram as bringing out all that was done in that connection. *Portsmouth Cotton Oil Refining Corp. v. Madrid Cotton Oil Co.*, 195 Ala. 256, 71 So. 111.

In an action to recover for fertilizer, where defendant introduced part of writings relating to tenant's alleged liability to pay, all such writings were admissible to corroborate or contradict the conflicting testimony of the witnesses. *Wheat v. Union Springs Guano Co.*, 195 Ala. 180, 70 So. 631.

V. BEST AND SECONDARY EVIDENCE.

§ 118. Necessity and Admissibility of Best Evidence.

Evidence that a bank which indorsed a draft against a ship and her freight had never seen the draft until it was in plaintiff's hands is not inadmissible as not the best evidence of the payment of the draft. *Corry v. Sylvia y Cia*, 192 Ala. 550, 68 So. 891.

Parol Evidence of Employer's Rule.—In the absence of anything to show that an employer's rule had been printed or reduced to writing, the rule could be shown by parol. *Louisville, etc., R. Co. v. Gray*, 191 Ala. 514, 67 So. 687.

Evidence that guaranty sued on was made after dissolution of injunction, and appeal to the supreme court, held not objectionable as secondary evidence, as the principal fact sought to be shown could not have been shown by the record. *Norvell v. Gilreath*, 189 Ala. 452, 66 So. 635.

A witness who heard a debtor admit the correctness of a book account against him can testify to the amount of the account. *Wise v. Fuller*, 11 Ala. App. 427, 66 So. 827.

Matter Required to Be Recorded.—*Milbra v. Sloss-Sheffield Steel, etc., Co.*, 182 Ala. 622, 62 So. 176. See the title EVIDENCE, § 118 (6), vol. 6, p. 139.

§ 119. Facts or Transactions Described in or Evidenced by Writings.

§ 119 (1) In General.

In the absence of a proper predicate, a copy of a written notice to a mortgagee to discharge the mortgage of record was

improperly admitted. *Royal Lumber Co. v. Elsberry*, 185 Ala. 462, 64 So. 71.

§ 119 (5) Judicial Acts, Proceedings, and Records in General.

In action for damages for wrongfully altering minute record of circuit court, objection to questions propounded to judge of such court was properly sustained, since record must speak for itself. *Wilder v. Bush* (Ala.), 75 So. 143.

In an action for malicious prosecution, accused may, though the court records are the best evidence, on the theory that the questions called for collective facts, testify that he had been arrested and tried in the courts. *Birmingham Bottling Co. v. Morris*, 193 Ala. 627, 69 So. 85.

Proof of the pendency of a suit between a third party and defendant at time of agreement sued upon by plaintiff should have been made by producing entire record, identified by the oath of its proper custodian, or a certified copy thereof. *Williams v. Shows*, 197 Ala. 596, 73 So. 99.

§ 119 (6) Recovery, Entry, or Enforcement of Judgment.

In action of assumpsit, the best evidence, of the result of suit between third party and defendant was judgment entry made therein, so that court properly refused to allow a witness to state how that suit terminated. *Williams v. Shows*, 197 Ala. 596, 73 So. 99.

§ 119 (11½) Pleadings, Process and Evidence.

The best evidence as to what plaintiff had sued for in action was such part record in that cause as showed the fact, presumably, the complaint, so that evidence as to how many bales of cotton were being sued for was inadmissible. *Williams v. Shows*, 197 Ala. 596, 73 So. 99.

§ 119 (12) Official Acts, Proceedings, and Records in General.

Evidence that regulation of Interstate Commerce Commission prohibited use of scrip between points was properly excluded as secondary. *Central, etc., R. Co. v. Lanier* (Ala.), 73 So. 821.

§ 119 (13) Assessment, Levy, and Collection of Taxes.

Poll tax receipts, although admissible in evidence, are not the best evidence of such payment so as to forbid parol proof; the ordinary rules of law governing receipts being applicable. *Shepherd v. Sartain*, 185 Ala. 439, 64 So. 57.

§ 119 (18) Conveyances, Contracts, and Other Instruments.

Contract of Sale.—A contract for the sale of a stock subscription being in writing, the contract is the best evidence of its terms, and parol testimony is inadmissible to establish it. *Barbour v. Cantrell*, 193 Ala. 154, 69 So. 67.

A seller held entitled to testify as to the time the contract became binding, as against an objection that the contract was the best evidence. *Gambill v. Fox Typewriter Co.*, 190 Ala. 36, 66 So. 655.

Mortgage of Horse.—*Hutto v. Garner*, 7 Ala. App. 412, 61 So. 477. See the title EVIDENCE, § 119 (18), vol. 6, p. 145.

§ 119 (19) Books of Account, Private Memoranda, and Correspondence.

Testimony Based on Family Bible.—Testimony of a witness relative to the marriage and death of his aunt and birth and death of her child, when based on a family Bible, held open to the objection that the Bible was the best evidence. *Duncan v. Watson* (Ala.), 73 So. 448.

Books of Account.—Under Code 1907, § 4003, books of account, when properly supported by supplementary oath, are usually best evidence of their contents. *Womack v. Myrick Lumber Co.* (Ala.), 76 So. 949.

§ 120. Fact of Making or Existence of Writing.

It was not error to overrule an objection to a question asked plaintiff as a witness whether he had made any copy of a letter which he destroyed to avoid producing it in court. *Russell v. Bush*, 196 Ala. 309, 71 So. 397.

Preliminary to Introduction of Written Instrument.—*Pickett v. Frost*, 7 Ala. App. 443, 61 So. 476. See the title EVIDENCE, § 120, vol. 6, p. 147.

Evidence as to Purchase of Ticket.

In a passenger's action for personal injuries in alighting, evidence by plaintiff that she bought a ticket from one station to the station at which she was alighting when injured, held not objectionable. *Central, etc., R. Co. v. Mathis*, 9 Ala. App. 643, 64 So. 197.

Receipt of Letter.—*McLendon v. Rubenstein*, 180 Ala. 615, 61 So. 902. See the title EVIDENCE, § 120, vol. 6, p. 147.

Lease.—It is not error to permit a party to testify that he had premises under a lease, though the lease was in writing. *Baker v. Lauderdale*, 14 Ala. App. 224, 69 So. 299.

Whether a power of attorney was executed by defendant lumber company, authorizing one to make insurance contracts in its behalf as a subscriber to a lumberman's insurance association, might be shown by parol. *Sales-Davis Co. v. Henderson-Boyd Lumber Co.*, 193 Ala. 166, 69 So. 527.

In action to recover on benefit insurance certificate, question as to whether notice of injury was given the company held properly admitted. *Southern Woodmen v. Morris*, 14 Ala. App. 464, 70 So. 952.

§ 121. Contents of Writings.**§ 121½. — In General.**

In action for balances due on account, testimony that when witness went over the account with defendant he had a statement of all the items introduced in evidence held properly admitted, not being an attempt to prove the contents of the written statement. *Baker v. Britt-Carson Shoe Co.*, 188 Ala. 225, 66 So. 475.

Maps.—In ejectment for land embraced in "River Margin" granted city's predecessor by Act Cong. May 26, 1824, where field notes of government survey, if the best evidence of the location of the tract, would not shed any light on particular lot in controversy, the admission of maps and parol testimony to identify it was not error. *Hughes v. Tuscaloosa*, 197 Ala. 592, 73 So. 90.

§ 124. — Corporate Acts, Proceedings, and Records.

If a railway company has adopted

rules charging extra passenger fare where no ticket is purchased, they should be produced when relied upon in action by passenger for wrongful ejection. *Louisville, etc., R. Co. v. Boggs (Ala.)*, 74 So. 337.

§ 125. — Conveyances, Contracts, and Other Instruments.

Ticket.—In a passenger's action for injuries sustained in falling down the steps at the carrier's station, where it appeared that the passenger had a ticket at the time of the injury, questions to the passenger as to the nature of the ticket and where it entitled him to ride were properly excluded. *Central, etc., R. Co. v. Campbell*, 10 Ala. App. 288, 64 So. 540.

Deed.—The deed was the best evidence of whether a grantor conveyed a lot to plaintiff or to another. *Harbison-Walker Refractories Co. v. Scott*, 185 Ala. 641, 64 So. 547.

Bill of Lading.—A question, inquiring of the conductor, in an action for injuries to a shipment of horses, whether any "exceptions" were noted on the bill of lading held properly excluded, since the answer would not be the best evidence. *Louisville, etc., R. Co. v. Mooror*, 195 Ala. 344, 70 So. 277.

§ 128. — Letters, Telegrams, and Other Correspondence.

A letter is the best evidence of its contents. *Farmers' Mut. Ins. Ass'n v. Tankersley*, 13 Ala. App. 524, 69 So. 410.

§ 129. — Notices.

In an action for destruction of a lien on cotton claimed by plaintiff through a mortgage executed by W. and by defendants as purchasers from W.'s wife, evidence that W. had cultivated the land on which he and his wife lived, that cotton was grown, that W.'s children hauled it to the gin and warehouse, that receipts were given in W.'s name, and that the children spoke of the cotton while in their possession as that of W.'s was admissible as material to show ownership of the cotton. *Pelham Sitz & Co. v. Herzberg-Loveman Dry Goods Co.*, 194 Ala. 237, 69 So. 881.

§ 130. Writings Collateral to Issues.

Best Evidence Rule Not Applicable.—

Where the matter sought to be proven was a collateral fact, the best evidence rule did not apply. *Shirley v. Southern R. Co.* (Ala.), 73 So. 430; *Stearnes v. Edmonds*, 189 Ala. 487, 66 So. 714.

In action for failure to erect cattle guards, testimony of person who delivered demand to defendant's roadmaster held not incompetent as parol testimony of the contents of a writing. *Atlanta, etc., R. Co. v. Fowler*, 192 Ala. 373, 63 So. 283.

In an action for assault, evidence that the individual defendant, as president of defendant land company, had provided in its conveyances against the sale of things on its premises, offered to show that he was acting in the company's business, held not objectionable; the best evidence not being required. *Hart v. Jones*, 14 Ala. App. 327, 70 So. 206, certiorari denied in *Ex parte Bellevue Highlands Co.*, 195 Ala. 695, 70 So. 1013.

Acceptance of Ditch by City.—Evidence, in a personal injury action, that a ditch which caused the injury, and which was constructed by defendant, had been accepted by a city, held not objectionable as secondary evidence. *Bush v. Seaboard, etc., R. Co.*, 192 Ala. 662, 68 So. 1011.

Evidence Relating to Insurance Policies.—Collateral testimony showing that during the interval between application and delivery of a life policy the insured, a salesman, sent in orders, held not subject to objection that the orders and envelopes were the best evidence. *Massachusetts Mut. Life Ins. Co. v. Crenshaw*, 195 Ala. 263, 70 So. 768.

In assumpsit by a general insurance agent to recover amount due on policies sold by subagent and accepted by insurer, it was not necessary for plaintiff, in proving how many and what kind of policies have been sold, to produce the policies themselves or to account for their absence, as for admission of secondary evidence. *Barnes v. Marshall*, 193 Ala. 94, 69 So. 436.

The contents of a letter relating to a collateral matter may be shown without

production of the letter itself. *Stearnes v. Edmonds*, 189 Ala. 487, 66 So. 714.

A copy of a letter merely incidental or collateral to an issue was properly admitted in evidence. *Woodward Iron Co. v. Collins* (Ala.), 76 So. 911.

Draft for Purchase Price.—In suit to recover on sale of cotton for underweight and billing at lower than true grade, draft on defendant given for price by party who bought as agent was collateral to issues of underweight and undergrading, and its production not necessary. *Georgia Cotton Co. v. Lee*, 196 Ala. 599, 72 So. 158.

Copy of Telegram. — In action for damages for failure to promptly deliver telegraphed transportation to plaintiff's dying husband, it was not error to admit in evidence a correct copy of a telegram sent by the Associated Charities where he was, stating he was ill and destitute, etc. *Southern R. Co. v. Rowe* (Ala.), 73 So. 634.

Subcontractor's Estimate of Work. — *Southern Bitulithic Co. v. Hughston*, 177 Ala. 559, 58 So. 450. See the title EVIDENCE, § 130, vol. 6, p. 152.

§ 132. Original Writing as Best Evidence.

§ 133. — In General.

Bill of Lading.—In an action for the loss of goods by a railroad company, a copy of the original bill of lading delivered to the consignor is admissible in evidence, without proof of the loss of the original; Code 1907, § 5547, requiring railroad companies to issue on the demand of the shipper duplicate bills of lading. *Southern R. Co. v. Brewster*, 9 Ala. App. 597, 63 So. 790.

Rule of Railroad Company.—In an action for death of a locomotive engineer, where a rule of the company sought to be shown in evidence was in print, the production of a copy thereof was the only way to prove it. *Louisville, etc., R. Co. v. Fleming*, 194 Ala. 51, 69 So. 125.

Report of Loss of Freight.—Where the agent of a carrier, whose duty it was to report loss of freight, furnished the consignee with a duplicate of its report of the loss of a bale of cotton, the copy

of the report is admissible to establish the loss, without any showing of the loss of the original. *Southern R. Co. v. Brewster*, 9 Ala. App. 597, 63 So. 790.

§ 134. — Public Records or Documents.

The judgment roll is the best evidence of judicial proceedings and judgments, and, under Code 1907, § 3983, a duly authenticated copy is also admissible, but, in the absence of a final record, the original files are the best evidence. *Salmon v. Salmon*, 13 Ala. App. 510, 69 So. 304.

§ 135. Grounds for Admission of Secondary Evidence.

§ 136. — In General.

In action on indemnity bond, auditor who examined books of bank held properly permitted to testify that specific amounts alleged to have been embezzled by employee were not noted or accounted on books, volume of which precluded examination in court. *Alabama Fidelity, etc., Co. v. Alabama Penny Sav. Bank (Ala.)*, 76 So. 103.

§ 137. — Destruction or Loss of Primary Evidence.

The intentional destruction of a letter creates a presumption that its contents were detrimental, which can not be rebutted by secondary evidence. *Russell v. Bush*, 196 Ala. 309, 71 So. 397.

§ 138. — Possession or Control of Primary Evidence.

§ 138 (2) Possession by Adverse Party.

Request to Enter Satisfaction of Mortgage.—*Pickett v. Frost*, 7 Ala. App. 443, 61 So. 476. See the title EVIDENCE, § 138 (2), vol. 6, p. 161.

§ 138 (3) Possession by Third Persons.

Person Holding Writings Outside of State.—*Webb v. Gray*, 181 Ala. 408, 62 So. 194, cited in note in *L. R. A.* 1917D, 530. See the title EVIDENCE, § 138 (3), vol. 6, p. 161.

§ 139. Preliminaries to Admission of Secondary Evidence.

§ 140. — In General.

Every reasonable effort which might have resulted in production of missing

paper must be shown to have been made without avail, before secondary evidence can be received. *Porter v. Watkins*, 196 Ala. 333, 71 So. 687.

§ 141. — Proof as to Existence of Primary Evidence.

Existence of Deed Must Be Shown.—*Rucker v. Jackson*, 180 Ala. 109, 60 So. 139. See the title EVIDENCE, § 141, vol. 6, p. 163.

§ 142. — Proof as to Destruction or Loss of and Search for Primary Evidence.

§ 142 (3) Weight and Sufficiency in General.

In an action on a fraternal benefit certificate, where the defense was suicide, the showing of the loss of a note found in assured's clothing held sufficient to authorize secondary evidence of its contents. *Sovereign Camp v. Ward*, 196 Ala. 327, 71 So. 404.

Evidence as to efforts made to find deed claimed to be lost held sufficient to justify admission of secondary evidence of its contents. *Roe v. Doe*, 184 Ala. 199, 63 So. 949.

§ 142 (6) Judicial Papers.

Where judge who issued warrants against defendants in detinue testified that he had filed them, but was unable to find them, testimony by deputy sheriff that a copy of one of them made by him was correct and differed from the other in certain particulars was admissible. *Weil v. Teabo*, 14 Ala. App. 575, 70 So. 957.

§ 142 (13) Letters and Telegrams.

Letters.—Evidence that after former trial, letters were delivered to defendant's counsel and never returned, though controverted, held to authorize admission of secondary evidence. *Pollak v. Winter*, 197 Ala. 173, 72 So. 386.

§ 142 (14) Conveyances.

Failure to Find Deed in Court.—*Carter v. Tennessee Coal, etc., R. Co.*, 180 Ala. 367, 61 So. 65. See the title EVIDENCE, § 142 (14), vol. 6, p. 175.

Quitclaim Deed.—To authorize secondary evidence of a quitclaim deed claimed to be lost the preliminary proof

of the loss is sufficient if it satisfies the court of the fact of loss with reasonable certainty, though it be circumstantial, but the degree of proof may vary with the importance and value of the instrument and the surrounding circumstances. *Alexander v. Fountain*, 195 Ala. 3, 70 So. 669.

§ 143. — Proof as to Possession or Control of Primary Evidence.

Under Code 1907, § 3374, as amended by Laws 1909, p. 14, providing that, if an original conveyance is not in the party's control, a certified transcript must be received in evidence, there was no error in admitting the record of the deed where one grantee was dead, the other grantee outside the state, and one defendant, who was landlord of the other, testified that the deed had never been in his possession. *Seamans v. Blankenship* (Ala.), 73 So. 469.

§ 144. — Notice to Produce Primary Evidence.

§ 144 (1) Necessity in General.

Under Code 1907, § 5596, written notice by surety to creditor to sue principal is not collateral matter, and evidence of its contents is not admissible without notice to produce the letter. *Peterman v. Southern Cotton Oil Co.* (Ala. App.), 73 So. 991.

Secondary evidence of a letter sent to defendant is inadmissible until plaintiff has made a demand on defendant to produce the letter. *Farmers' Mut. Ins. Ass'n v. Tankersley*, 13 Ala. App. 524, 69 So. 410.

An agent making out and mailing a statement can not testify as to the contents, where the copy kept is lost, unless a proper showing is made that the adverse party has been notified and failed to produce the original. *Gillespy v. Little* (Ala. App.), 77 So. 427.

§ 144 (3) Time of Service.

Secondary evidence of the contents of a document is not admissible, where the notice to produce it as required by Code 1907, § 4058, did not give sufficient time to procure it from where it had been sent. *Sovereign Camp v. Ward*, 196 Ala. 327, 71 So. 404.

§ 145. Character and Degrees of Secondary Evidence.

§ 145 (1) In General.

In an action to recover land claimed by defendant under a tax sale, where the record of the sale was lost and no copy of the notice thereof existed at the time of trial, the court might permit witnesses who knew the contents of the lost record to testify to their recollection of the contents. *Bedsole v. Davis*, 189 Ala. 325, 66 So. 491, cited in note in *Ann. Cas.* 1916D, 251.

§ 145 (6) Copies and Counterparts.

Under Code 1907, §§ 3979, 3980, a certified copy of a tract book, showing a homestead entry, final certificate, and issuance of patent, admitted in evidence in ejectment, established *prima facie* that the patentee had a perfect title. *Perryman v. Wright*, 189 Ala. 351, 66 So. 648.

§ 145 (9) Records and Abstracts.

Admission in evidence of record in supreme court, correctness of which is not questioned, instead of original bill of exceptions, setting out letters ought to be introduced, is not error. *Pollak v. Winter*, 197 Ala. 173, 72 So. 386.

Execution Docket of Court.—*Williams v. Lyon*, 181 Ala. 531, 61 So. 299. See the title EVIDENCE, § 145 (9), vol. 6, p. 183.

§ 146. Determination of Question of Admissibility.

Where plaintiff intentionally destroyed a letter, it was error to require him to state only so much of the contents as was material to the issues. *Russell v. Bush*, 196 Ala. 309, 71 So. 397.

Judicial Discretion.—When best evidence rule as relaxed should be accorded, application is a matter of judicial discretion. *Alabama Fidelity, etc., Co. v. Alabama Penny Sav. Bank* (Ala.), 76 So. 103.

VI. DEMONSTRATIVE EVIDENCE.

§ 147½. Weapons, Missiles and Other Instruments.

In action on accident policy, it was proper for jury to know weight and size

of sticks used in assault on insured, and sticks, produced and identified, would have been admissible. *Maryland Casualty Co. v. McCallum* (Ala.), 75 So. 902.

§ 148. Articles Subject to or Connected with Controversy.

Pieces of Cross Ties. — *Adams v. Crimm*, 177 Ala. 279, 283, 58 So. 442. See the title EVIDENCE, § 148, vol. 6, p. 183.

Clothes.—Where the fact of injury was uncontroverted, admission in evidence of clothes worn by plaintiff at the time of the accident was improper. *Alabama, etc., R. Co. v. Bell* (Ala.), 76 So. 920.

Cinders which set fire to the witness' grass and were picked up by her held properly admitted in evidence when produced by her at the trial. *Louisville, etc., R. Co. v. Bouchard*, 190 Ala. 157, 67 So. 265.

§ 149. Writings Submitted for Comparison.

In suit to foreclose, where execution of the mortgage and notes was denied by respondent, the admission in evidence, over respondent's objection, of genuine specimens of her handwriting, for purposes of comparison with the signatures of the mortgage and notes, was erroneous, since a comparison of handwriting may not be instituted between a writing in question and genuine extraneous papers, whether the comparison is to be by the jury trying the case, or through the expression of opinion by an expert. *Sulzby v. Palmer*, 194 Ala. 524, 196 Ala. 645, 70 So. 1.

§ 150. Experiments in Courts.

Method of Stopping Electric Car.—*Birmingham R., etc., Co. v. Saxton*, 179 Ala. 136, 59 So. 584. See the title EVIDENCE, § 150, vol. 6, p. 185.

VII. ADMISSIONS.

(A) NATURE, FORM, AND INCIDENTS IN GENERAL.

§ 152. Subject Matter.

Value of Set of Tools.—*Stamps v. Thomas*, 7 Ala. App. 622, 62 So. 314. See the title EVIDENCE, § 152, vol. 6, p. 187.

§ 156. Judicial Admissions.

§ 158. — Pleadings.

To make a verified pleading effective as an admission against the pleader in a subsequent action, it is not necessary that the pleader should have been subject to perjury if his oath were false, but only that he intended to affirm the averments. *Tumlin v. Tumlin*, 195 Ala. 457, 70 So. 254.

Pleadings not sworn to are regarded as the mere declaration of a party's counsel, and statements of fact therein are not admissible as evidence against him. *Charlie's Transfer Co. v. Leedy & Co.*, 9 Ala. App. 652, 64 So. 205, Ann. Cas. 1915C, 736.

Though the notary before whom a pleading was sworn did not have authority to administer oaths generally, and though the pleading did not state a necessary element of defense, it was admissible against the pleader in a subsequent action. *Tumlin v. Tumlin*, 195 Ala. 457, 70 So. 254.

§ 162. Offers of Compromise or Settlement.

§ 163. — In General.

§ 163 (1) In General.

An offer or agreement to pay, or a payment by way of compromise, is not an admission of indebtedness or of any fact from which indebtedness may be inferred, though an unqualified statement, conceding the validity of a claim, is admissible, though forming a part of an effort to compromise. *Hughes v. Daniel*, 187 Ala. 41, 65 So. 518.

Statement of Rule.—*Globe Tailoring Co. v. Seibold*, 9 Ala. App. 143, 62 So. 384. See the title EVIDENCE, § 163 (1), vol. 6, p. 191.

Application of Rule.—Rule that offer to compromise is inadmissible to establish amount due does not apply where there was no controversy at time offer was made. *Farabee v. Wade* (Ala.), 76 So. 941.

§ 163 (2) What Constitutes Offer.

Testimony of the plaintiff bailor that defendant had told him that the ox, the subject of the bailment, was dead, and that he had come to settle for same,

held not objectionable as an offer of compromise. *Lisenby v. Capps* (Ala.), 75 So. 332.

§ 163 (3) Persons by or to Whom Made.

Statement to Third Person.—*Alexander v. Smith*, 180 Ala. 541, 61 So. 68. See the title EVIDENCE, § 163 (3), vol. 6, p. 193.

§ 164. Statements in Writing.

Letter.—In action for balance due under cropping contract, plaintiff could testify that he received letter from defendant offering to buy his interest in the crop for a stipulated price; such letter constituting an admission of what was due when it was written. *Farabee v. Wade* (Ala.), 76 So. 941.

Mortgage.—Even if mortgage for a debt already incurred be regarded as without consideration, it is competent evidence as an admission by mortgagor of the indebtedness. *Rogers v. Whittle* (Ala. App.), 74 So. 96.

§ 169. Acquiescence or Silence.

§ 169 (1) In General.

Testimony by the sender of a cablegram that he thereafter sent a letter stating that he had sent the message, and had never been notified that the message was not received, is relevant as an admission of receipt. *Corry v. Sylvia y Cia*, 192 Ala. 550, 68 So. 891.

Defendants who gave a note to take up one given by a deceased and did not object to the statement of his account with plaintiff did not admit the account's correctness, where they were not conversant with the matter. *Orr v. Stewart*, 13 Ala. App. 542, 69 So. 649.

A question to a witness as to what he wrote another is improper, where there was no offer to prove the contents of the letters in reply or that there was a diligent search for them. *Lefkovits v. Lester*, 11 Ala. App. 504, 66 So. 894.

§ 169 (7) Failure to Answer Letter or Statements Therein.

The failure of seller to answer letter by buyer, held not an admission of assent to a proposed cancellation; letter being a declaration instead of a request for cancellation. *Curjel & Co. v. Hallett Mfg. Co.* (Ala.), 73 So. 938.

(B) BY PARTIES OR OTHERS INTERESTED IN EVENT.

§ 170. Parties of Record.

§ 171. — In General.

Coparties.—Statement of one defendant, in absence of other, to third person, that other signed contract, while possibly admissible to contradict witness, was incompetent to establish fact that other signed contract. *Ferlesie v. Cook* (Ala.), 78 So. 915.

§ 173½. Interest in Suit of Persons Not Parties.

In an action against three persons, as partners, for services rendered, declarations by a defendant not served and eliminated from the case by amendment, made pending the work, to the effect that plaintiff was working for him alone, held properly excluded as against the claim that the declarations were admissible as against the interest of declarant at the time. *Potter v. Shauf*, 187 Ala. 128, 65 So. 778.

(C) BY GRANTORS, FORMER OWNERS, OR PRIVIES.

§ 176. Privies and Former Owners in General.

On the issue of adverse possession, declarations of a life tenant while in possession are not admissible to the prejudice of the remaindermen, nor are declarations made by a predecessor in title after parting with possession. *Gibson v. Gaines* (Ala.), 73 So. 929.

§ 177. Grantors, Vendors, or Mortgagors of Real Property.

Before Conveyance.—In ejectment by heirs against adverse possessor, it was proper for plaintiffs to show declarations of one of defendant's grantors inconsistent with any claim of rights by such grantor hostile to the title of the heirs, etc., plaintiff's ancestor. *Street v. Shadix*, 197 Ala. 446, 73 So. 73.

After Conveyance.—Declarations of a husband as to the title to land, made to secure credit after conveying to his wife in good faith, held not imputable to the wife to affect her title. *McCrory v. Donald*, 192 Ala. 312, 68 So. 306.

§ 183. Testators and Intestates.

Admission of Indebtedness.—In action against executor on account alleged to have been stated to the deceased, where defendant sought to show confidential relation to raise presumption that services were gratuitous, witness was properly allowed to say whether she had ever heard deceased mention paying for the services involved. *Nance v. Countess* (Ala. App.), 78 So. 464.

(D) BY AGENTS OR OTHER REPRESENTATIVES.**§ 185. Agents or Employees.****§ 186. — In General.**

In an action for the price of timber sold, the testimony as to a conversation between the seller and the representatives of the buyer as to the sale is admissible. *Monogram Hardwood Co. v. Thrower*, 10 Ala. App. 414, 65 So. 89.

In action for conversion of mortgaged crops, it being important for plaintiffs to prove amount and value of crops grown on certain lands that had gone into possession of defendant or his agent, declarations of agent were competent. *Harmner & Son v. Johnson* (Ala. App.), 77 So. 446.

§ 188. — Admissions before or after Transaction or Event.

Statements made to defendant by her superintendent during the construction of a building as to work and materials incorporated into the building were not admissible against her as admissions or declarations, unless she in some way assented to their correctness. *Beitman v. Birmingham Paint, etc., Co.*, 185 Ala. 313, 64 So. 600.

Where seller of sewing machines was not party to its agent's agreement to furnish a salesman to the buyer to resell the machines, agent's letter concerning such agreement held properly excluded in action for price of the machines. *Forehand v. White Sewing Mach. Co.*, 195 Ala. 208, 70 So. 147.

That a doctor employed by defendant, when calling on plaintiff the morning after her injury on defendant's depot platform, said 'hat the place was dangerous, and that he had told defendant

so, is not competent evidence. *Western Railway v. Turrentine*, 197 Ala. 603, 73 So. 40.

§ 189. Corporate Officers or Agents.**§ 189 (1) Competency of Admissions in General.**

Statement of Railroad Agent. — Louisville, etc., R. Co. *v. Kay*, 8 Ala. App. 562, 62 So. 1014. See the title EVIDENCE, : 189 (1), vol. 6, p. 220.

§ 189 (1½) Scope and Extent of Agency or Employment in General.

Declarations of agents or officers of a corporation are not evidence against the principal, unless made within the scope of their authority and while in the discharge of their duties in the particular transaction, so as to constitute *res gestæ*. *Meador & Son v. Standard Oil Co.*, 196 Ala. 365, 72 So. 34.

§ 189 (2) Statements by Officers of Banks.

In an action against a bank to recover a deposit alleged to have been made, evidence of a statement by the cashier to a witness that such deposit had been made held inadmissible. *Bank v. Taylor*, 196 Ala. 665, 72 So. 264.

§ 189 (4) Statements by Agents and Employees in General.

In an action against a telephone company for failure to render service to a patron, a statement by the manager of the company some time thereafter to show the qualification of the operator in charge at the time was inadmissible. *Vinson v. Southern Bell Tel., etc., Co.*, 188 Ala. 292, 66 So. 100.

§ 189 (8) To Establish Liability of Carrier for Loss of or Injury to Property.

In an action against a carrier for the loss of a bale of cotton, evidence of the declaration and report of a compress company, which was the carrier's agent, to check up cotton and report all shortages is admissible to establish the loss. *Southern R. Co. v. Brewster*, 9 Ala. App. 597, 63 So. 790.

§ 189½. Public Officers or Agents.

Probate Judge.—Since a probate judge

has authority, under Gen. Acts 1915, p. 242, § 14, to authorize publication of poll lists, his declarations are admissible to show who in fact has received such authority, and their admission in evidence does not offend Code 1907, § 4007, as to admissions of officials offered by one affected by interest. *Deal v. Houston County* (Ala.), 78 So. 809.

§ 193. Partners and Joint Contractors.

Statements Made after Dissolution — Correctness of Claim.—*Smith v. Allen*, 7 Ala. App. 397, 62 So. 296. See the title EVIDENCE, § 193 (2), vol. 6, p. 226.

§ 194. Principal or Surety.

The principal's admission of indebtedness after breach of contract is res inter alios acta, incompetent against guarantor. *Rawleigh Medical Co. v. Hooks* (Ala. App.), 78 So. 310.

§ 195. Trustee or Beneficiary.

In ejectment, where both parties claimed from a common grantor, defendant under a sale from the executor of the common grantor, it was error to permit plaintiff to introduce in evidence newspaper advertisements of the executor's sale, purporting to show that the land in controversy was excepted. *Kyle v. Jordan*, 187 Ala. 355, 65 So. 522.

§ 196. Conspirators and Persons Acting Together.

In ejectment, where a scheme on the part of plaintiff and his grantee to coerce plaintiff's wife to sign the deed was shown, the acts of plaintiff in that behalf were admissible against the grantee or his privies, whether he was present or not. *Gilley v. Denman*, 185 Ala. 561, 64 So. 97.

(E) PROOF AND EFFECT.

§ 198. Preliminary Evidence.

§ 199. — In General.

Letters Containing Hearsay Statements.—*Webb v. Gray*, 181 Ala. 408, 62 So. 194. See the title EVIDENCE, § 199, vol. 6, p. 229.

§ 200. — Existence and Extent of Agency or Authority.

A written statement by defendant's agent was not admissible against her,

where it did not appear that it was made in the course of the agent's employment, or that it was not made long after his employment terminated. *Beitman v. Birmingham Paint, etc., Co.*, 185 Ala. 313, 64 So. 600.

Where plaintiff was a corporation, a conversation between defendant and an individual over a telephone is inadmissible against the corporation, without proof that such individual was authorized to bind the corporation. *Crosswhite v. Chattanooga Brewing Co.*, 10 Ala. App. 425, 65 So. 298, cited in note in Ann. Cas. 1916E, 977.

Where fact of agency rests in parol, or is inferable from principal's conduct, and there is evidence of agency, the agent's acts or declarations are admissible as to waiver vel non of contract provisions, notwithstanding a policy provision against unwritten waiver. *Insurance Co. v. Williams* (Ala.), 77 So. 159; *Fire Ass'n v. Williams* (Ala.), 77 So. 166.

There being independent proof tending to show agency of one and extent of his authority which would warrant jury in finding that agency existed, if jury so found, agent's admissions were admissible against his principal. *Hamner & Son v. Johnson* (Ala. App.), 77 So. 446.

Weight and Sufficiency.—Where defendant wrote that its agent would adjust a claim, letter from the agent named was properly admitted over objection that it was not shown that agent had authority to write the letter. *American Workmen v. James*, 14 Ala. App. 477, 70 So. 976, cited in note in Ann. Cas. 1917D, 925.

Evidence as to B.'s connection with corporation held sufficient to render admissible statement furnished by him as to quantity of logs cut by plaintiffs for the corporation. *Hitt Lumber Co. v. McCormack*, 13 Ala. App. 453, 68 So. 696.

§ 201½. Determination of Question of Admissibility.

Where a written statement by defendant's superintendent was offered as an admission by her, the party offering it had the burden of showing that it was made within the scope of the superin-

tendent's authority, and in the course of the particular transaction in which he was engaged on behalf of defendant. *Beitman v. Birmingham Paint, etc., Co.*, 185 Ala. 313, 64 So. 600.

§ 204. Explanation or Limitation.

Contrary Statements Made at a Different Time.—Where declarations made after declarant had parted with possession of the property were admitted on the issue of adverse possession, it was permissible to rebut that evidence by testimony of a third party denying the declarations and detailing the conversations which took place. *Gibson v. Gaines (Ala.)*, 73 So. 929.

§ 206. Conclusiveness and Effect.

§ 206 (1) In General.

On a bill against a tenant in common for an accounting for timber cut and removed from the land, where plaintiff offered no certain, definite evidence as to the amount removed, a logbook introduced by defendant, purporting to show the amount cut and removed held to amount to an admission that he had removed the amount therein shown. *Gulf Red Cedar Co. v. Crenshaw*, 188 Ala. 606, 65 So. 1010.

§ 206 (3) As to Indebtedness.

Against Another Creditor.—*Smith v. Allen*, 7 Ala. App. 397, 62 So. 296. See the title EVIDENCE, § 206 (3), vol. 6, p. 234.

§ 206 (5) As to Title or Possession.

Father's Title to Land at Time of Death.—*Mays v. Burleson*, 180 Ala. 396, 61 So. 75. See the title EVIDENCE, § 206 (5), vol. 6, p. 234.

§ 206 (9) Conclusiveness as against Privies, Codefendants, and Persons Represented by or Jointly Interested with Declarant.

Acts and declarations of defendant, not sanctioned by other defendant, expressly or impliedly, and not involving other defendant in sale in litigation, were not admissible against other defendant. *Weil Bros. v. Hanks (Ala.)*, 77 So. 333.

Concessions of property owner defendant, who did not appeal, as to loca-

tion of stakes causing injury to pedestrian, was not binding on city which appealed. *Birmingham v. McKinnon (Ala.)*, 75 So. 487.

VIII. DECLARATIONS.

(A) NATURE, FORM, AND INCIDENTS IN GENERAL.

§ 207. Nature and Grounds for Admission in General.

In action for assault, evidence that magistrate to whom plaintiff complained refused to issue warrant, and evidence of his reasons, held incompetent and properly excluded. *Johnson v. Johnson (Ala.)*, 77 So. 335.

§ 208. Making of Statement Fact in Issue.

Proof of an admission by a debtor that a fixed sum is due, which was claimed of him on an account by the creditor, supports a count on a stated account, though the admission was made in response to the assertion of a claim by the creditor, unaccompanied by a statement of the items comprising the account. *Smith v. Allen*, 7 Ala. App. 397, 62 So. 296.

§ 209. Statements Showing Physical or Mental Condition.

While it might be error to permit one to testify as to what he said or did indicative of pain, it would be proper for him to testify whether he suffered pain. *Birmingham R., etc., Co. v. Gray*, 196 Ala. 42, 71 So. 689.

Expressions of pain, and of the locality, nature, extent, and character of it, are usually admissible in action for personal injuries, but the rule does not include declarations as to the cause of the pain or narrations of past conditions. *Birmingham R., etc., Co. v. Gray*, 196 Ala. 42, 71 So. 689.

§ 210. Statements Showing Intent, Motive, or Nature of Act.

Statements by Persons Since Deceased.—In widow's action of statutory ejectment to recover homestead, what was intention of deceased husband with reference to homestead character, and whether he had abandoned land as part of homestead, were inquiries on which

those competent to testify might retail his statements disclosing intention. *Hodges v. Hodges* (Ala.), 77 So. 741.

Desire of Recovery.—Woodmen of the World *v. Wright*, 7 Ala. App. 255, 60 So. 1006, cited in note in Ann. Cas. 1918C, 1050. See the title EVIDENCE, § 210, vol. 6, p. 237.

§ 212. Self-Serving Declarations in General.

§ 212 (1) Statements by Parties of Record in General.

Failure to Do Household Work.—Birmingham R., etc., Co. *v. Cockrum*, 179 Ala. 372, 60 So. 304. See the title EVIDENCE, § 212 (1), vol. 6, p. 239.

Testimony of plaintiff's wife, in her husband's action for his damages for injuries to her, that she did her household work before the injury and did not do it afterwards was not inadmissible as self-serving. *Birmingham R., etc., Co. v. Roach*, 188 Ala. 306, 66 So. 82.

Conversations among signers of note sued on, had in the absence of the payee, held inadmissible. *Planters' Chemical, etc., Co. v. Stearnes*, 189 Ala. 503, 66 So. 699.

In detinue for cotton of which defendant claimed he and plaintiff were cotenants, evidence by defendant that he had charged himself with fertilizer used on the land held inadmissible as a mere self-serving act. *Williams v. Lay*, 184 Ala. 54, 63 So. 466.

In action against surgeon for malpractice, evidence, concerning communications between plaintiff and another doctor not brought to defendant's knowledge, held properly excluded. *Barfield v. South Highland Infirmary*, 191 Ala. 553, 68 So. 30.

§ 212 (6) Statements as to Intent, Motive, or Nature of Act.

In action for homicide, defendant's self-serving declarations of his desire to avoid difficulty with deceased are inadmissible, although testimony regarding deceased's efforts to obtain a reconciliation were admitted. *Kuykendall v. Edmondson* (Ala.), 77 So. 24.

§ 212 (12½) Statements by Persons Since Deceased in General.

Declarations of a person as to his age,

affecting favorably his own interest or that of his estate in an existing controversy, are inadmissible, although he has since died, not because hearsay, but because self-serving. *Landers v. Hayes*, 196 Ala. 553, 72 So. 106.

§ 213. Declarations against Interest in General.

Statements in disparagement of proprietary interest, when no motive for misrepresentation appears, are entitled to consideration against declarant and those in privity with him, without regard to their connection with possession or other concrete acts of ownership. *Martin v. Long* (Ala.), 75 So. 968; *Barfield v. Evans*, 187 Ala. 579, 65 So. 928; *Tumlin v. Tumlin*, 195 Ala. 457, 70 So. 254.

Statements in disparagement of proprietary interest, when no motive or misrepresentation appears, are admissible against strangers, when relevant to the fact in issue and the declarant is dead or his sworn testimony can not be held. *Barfield v. Evans*, 187 Ala. 579, 65 So. 928.

In ejectment, where record title is shown to be in one through whom plaintiff claims, statement of such person disclaiming title to land and declaring it to be in her mother, who was in possession of land by virtue of dower interest in it, is admissible. *Martin v. Long* (Ala.), 75 So. 968.

§ 214. Declarations of Persons in Possession or Control as to Title or Possession.

§ 214 (2) Real Property in General.

Declarations by one executing crop mortgage as to his tenancy of land, made in absence of lessors, are inadmissible to establish mortgagor's rights in the land. *Shotts v. Cooper* (Ala.), 74 So. 353.

Source of Title.—Declarations as to the source of title are not admitted in any form of action. *Dent v. Stovall* (Ala.), 75 So. 941.

The declarations by one in possession of land as to source of his title are competent only to show that he claims possession, not that he claims as purchaser under a proper conveyance from the former owner, or under color of title.

Stewart Bros. v. Ransom (Ala.), 76 So. 70.

Ownership.—In ejectment, where a defense of adverse possession was set up, expressions of a witness as to his ownership were properly excluded, when not brought to the knowledge of the true owner. *Haley v. Miller*, 193 Ala. 482, 69 So. 564.

Declarations of a party in possession of land, claiming or disclaiming ownership, are admissible in an issue of disputed ownership, no matter who may be parties to the suit. *Stewart Bros. v. Ransom* (Ala.), 76 So. 70.

§ 214 (3) Self-Serving Declarations Relating to Real Property.

In an action of forcible entry and detainer, declarations of an alleged tenant in possession claiming to own the property were inadmissible. *Dent v. Stovall* (Ala.), 75 So. 941.

One claiming by adverse possession can give in evidence declarations of ownership made by his ancestor and by plaintiffs' ancestor while they were in possession to explain the nature of the possession. *Gibson v. Gaines* (Ala.), 73 So. 929.

§ 214 (4) Declarations against Interest Relating to Real Property.

Where defendant claiming by adverse possession had given in evidence declarations of his and plaintiffs' ancestors to show the nature of the possession, plaintiffs can in rebuttal prove contradictory declarations made while declarants were in possession. *Gibson v. Gaines* (Ala.), 73 So. 929.

§ 214 (5) Personal Property.

In an action for destruction of a lien on cotton claimed by plaintiff through a husband's mortgage and by defendants as purchasers from the wife, declarations of children as to the character of their possession while ginning and warehousing the cotton were admissible as to the disputed ownership. *Pelham Sitz & Co. v. Herzberg-Loveman Dry Goods Co.*, 194 Ala. 237, 69 So. 881.

§ 215. Declarations as to Boundaries.

§ 215 (1) In General.

In action involving correctness of sur-

vey as locating west boundary of section, evidence that defendant moved fence along south side to correspond to such survey, thereby adopting it where it was to his interest to do so, held properly admitted. *Smith v. Bachus*, 195 Ala. 8, 70 So. 261.

§ 215 (2) Title or Interest at Time of Declaration.

Declarations of Defendant.—*Hornsby v. Tucker*, 180 Ala. 418, 61 So. 928. See the title EVIDENCE, § 215 (2), vol. 6, p. 253.

§ 215 (5) Declarations by Former Owners.

Evidence that plaintiffs' predecessor claimed land to a "stob" and was present when it was driven and that he pointed out the lines to his grantees and located the corner and put them in possession to the line claimed, held admissible. *Smith v. Bachus*, 195 Ala. 8, 70 So. 261.

In action involving dispute as to location of boundary of government section, evidence as to whether predecessors of parties recognized a fence or hedge-row as marking the government survey held improperly excluded. *Smith v. Bachus*, 195 Ala. 8, 70 So. 261.

(B) BY DECEDENTS AGAINST INTEREST.

§ 217. Declarations against Interest in General.

In an action for death due to a gas explosion in a coal mine, declarations of deceased tending to show that he was negligent held admissible as declarations against interest. *Alverson v. Little Cahaba Coal Co.* (Ala.), 77 So. 547.

§ 219. Statements as to Fact or Nature of Transfer or Gift.

Declaration of Grantor of Grantee's Possession of Deeds.—*Napier v. Elliott*, 177 Ala. 113, 58 So. 435. See the title EVIDENCE, § 219, vol. 6, p. 54.

(C) AS TO PEDIGREE, BIRTH AND RELATIONSHIP.

§ 219½. Nature of Questions of Pedigree and Matters Relating Thereto.

Hearsay evidence is always admissible

to prove "pedigree," which term embraces not only questions of descent and relationship, but also the particular facts of birth, marriage, and death, and the time when these events may have happened. *Landers v. Hayes*, 196 Ala. 533, 72 So. 106.

§ 220. General and Family Reputation.

Age may be proved by testimony of person himself, and fact that his knowledge is derived from parents or family reputation does not render his testimony inadmissible. *Landers v. Hayes*, 196 Ala. 533, 72 So. 106.

§ 221. Declarations by Members of Family.

§ 223. — By Deceased Members.

In ejectment, where age of plaintiff's deceased father was a material issue, proof of the statements of such father as to his age, all made before suit was brought, was admissible. *Landers v. Hayes*, 196 Ala. 533, 72 So. 106.

§ 224. — Necessity That Declarant Be Dead.

As a predicate for the admission of hearsay evidence of members of a family as to matters of pedigree, it must appear that declarant has died since making his declaration. *Landers v. Hayes*, 196 Ala. 533, 72 So. 106.

There is no error in excluding evidence as to whether witness heard another person saying anything about the death of still another person, or when he died, since to render admissible the declarations of a member of a family as to pedigree, family history, or repute, it must appear that the declarant member is dead, insane, or permanently or indefinitely beyond the jurisdiction of the court. *Perolio v. Woodward Iron Co.*, 197 Ala. 197, 73 So. 197.

§ 225. — Relationship to Family.

Hearsay declarations of members of a family, admissible on matters of pedigree, whether in writing or by word of mouth, should be confined to some members of the family, as distinguished from a general rumor or neighborhood reputation. *Landers v. Hayes*, 196 Ala. 533, 72 So. 106.

IX. HEARSAY.

§ 226. In General.

§ 226 (1) Nature of Hearsay Evidence and Admissibility in General.

Since legal title to land can not be established by reputation, a reference in the minutes of a town council to a W. lot at the corner of certain streets, which was about the location of a grant to W., is not evidence of title of such lot in W. *Moore v. Roe*, 185 Ala. 581, 64 So. 586.

As to Mortgage in Issue. — Hearsay evidence of witness as to mortgage in issue in action for loss under fire policy held properly excluded. *Exchange Underwriters' Agency v. Bates*, 195 Ala. 161, 69 So. 956.

Earning of Money by Wife. — *Batson v. Alexander City Bank*, 179 Ala. 490, 60 So. 313. See the title EVIDENCE, § 228 (1), vol. 6, p. 258.

Purchase of Land by Wife. — *Elam v. Brewer Lumber Co.*, 176 Ala. 48, 57 So. 483. See the title EVIDENCE, § 228 (1), vol. 6, p. 258.

Testimony of one assisting a surveyor in locating a corner as to such corner is hearsay as against one not notified of the survey as required by Code 1907, § 6023, unless the witness knows of his own knowledge that the location was correct. *May v. Willis (Ala.)*, 76 So. 941.

§ 228 (2) Hearsay Evidence of Opinions.

Criticism of County Official. — *Batson v. Alexander City Bank*, 179 Ala. 490, 60 So. 313. See the title EVIDENCE, § 228 (2), vol. 6, p. 260.

§ 228 (3) Evidence of Death.

Hearsay evidence that the mother of insured had died of tuberculosis is inadmissible. *Mutual Life Ins. Co. v. Witte*, 190 Ala. 327, 67 So. 263.

§ 228 (4) Information Acted on by Witness.

Testimony of one who saw fire was not rendered hearsay by the fact that he testified that his attention was called to it by the remark of another. *Hamilton v. Cranford Mercantile Co. (Ala.)*, 78 So. 401.

§ 228½. Statements by Persons Other than Parties or Witnesses.

§ 229. — Oral Statements.

§ 229 (1) Conversations with Third Persons.

In an action against three persons, as partners, for services, evidence of a conversation between a defendant and a third person had in the absence of plaintiff was inadmissible as hearsay, unless the conversation was an admission against interest of defendant. *Potter v. Shauf*, 187 Ala. 128, 65 So. 778.

Conversation between Conductor and Passenger.—*Louisville, etc., R. Co. v. Dilburn*, 178 Ala. 600, 59 So. 438. See the title EVIDENCE, § 229 (1), vol. 6, p. 260.

Statements of Plaintiff's Foreman.—*Owen v. Alabama, etc., R. Co.*, 181 Ala. 552, 61 So. 924, cited in note in *Ann. Cas.* 1915A, 1042. See the title EVIDENCE, § 229 (1), vol. 6, p. 260.

Statements Regarding Newspaper Publication.—*Parsons v. Age-Herald Pub. Co.*, 181 Ala. 439, 61 So. 345. See the title EVIDENCE, § 229 (1), vol. 6, p. 260.

§ 229 (2) Statements in General.

Statement of a third person relative to a letter purporting to have been written by defendant, and by which it is sought to show defendant's connection with a firm, is not competent unless made in defendant's presence and not disputed by him. *White Trunk, etc., Co. v. Brantley* (Ala. App.), 75 So. 182.

Evidence Held Inadmissible.—In an action for breach of contract, testimony that an agent of the corporate sellers stated he thought the buyer was going to fall down on his agreement is hearsay and inadmissible. *Curjel & Co. v. Hallett Mfg. Co.* (Ala.), 73 So. 938.

In an action for slander in that defendant imputed that plaintiff was unchaste, plaintiff's testimony, that she had heard a report that defendant had told that a man was keeping her, held inadmissible to show special damages for mental distress. *Donaldson v. Robertson* (Ala. App.), 73 So. 223.

In an action by the assignee of a lease against the lessor, the court properly refused to permit plaintiff to testify as

to statements made by his assignor concerning the lease, such being hearsay and not binding on the lessor. *Streit v. Wilkerson*, 186 Ala. 88, 65 So. 164.

In a suit for loss of goods, the declaration of a depot agent that the goods were short and would arrive is but hearsay, and not a verbal act within the scope of duty then being performed. *Louisville, etc., R. Co. v. Lynne*, 196 Ala. 21, 71 So. 338.

In a servant's action for injury, a question to a witness examined by defendant, as to whether he had ever heard of anybody having an accident of that kind before or since, was objectionable as calling for hearsay testimony. *Woodward Iron Co. v. Spencer*, 194 Ala. 285, 69 So. 902.

Declarations of Partner in Crime.—*Webb v. Gray*, 181 Ala. 408, 62 So. 194. See the title EVIDENCE, § 229 (2), vol. 6, p. 261.

Act Not in Presence of Party.—*Webb v. Gray*, 181 Ala. 408, 62 So. 194. See the title EVIDENCE, § 229 (2), vol. 6, p. 261.

Statements of Person in Audience.—*Interstate Amusement Co. v. Martin*, 8 Ala. App. 481, 62 So. 404. See the title EVIDENCE, § 229 (2), vol. 6, p. 261.

Reason for Failure to Run Train.—In an action for damages for wrongfully conspiring to prevent plaintiff from running an excursion train to a point near defendant's property, hearsay testimony of the reason for the refusal of the railroad company to run the train on the appointed day is admissible. *Brooks v. Ingram*, 186 Ala. 106, 65 So. 138.

§ 229 (4) Writings, Contracts, Agreements, and Transaction.

In suit to enjoin unfair competition, evidence that defendant's customer pointed out defendant's fertilizer as that of plaintiff and said he was selling it as plaintiff's held inadmissible as hearsay. *Empire Guano Co. v. Jefferson Fertilizer Co.* (Ala.), 78 So. 53.

§ 229 (5) Ownership and Possession.

Evidence that the cashier of defendant bank told the witness that a deposit was made, not for the benefit of plaintiff, but for the benefit of the one delivering

the money, held inadmissible in an action for the deposit. *Bank v. Taylor*, 196 Ala. 665, 72 So. 264.

In an action for the death of plaintiff's intestate run down by an automobile which defendant admitted having owned, but claimed that she had sold to J., who through the agency of a driver selected by defendant was operating it for hire, testimony by the driver as to declarations by J. prior to the accident as to his ownership of the machine was properly rejected. *Barfield v. Evans*, 187 Ala. 579, 65 So. 928.

Statements by driver of automobile that it belonged to defendant held not admissible to establish that fact, though admissible to contradict the driver. *Patterson v. Millican*, 12 Ala. App. 324, 66 So. 914.

§ 229 (7) Indebtedness and Payment.

In action against administrator on alleged account stated, question whether witness ever heard of any claim on the estate for nursing was properly excluded, as calling for hearsay testimony. *Nance v. Countess* (Ala. App.), 78 So. 464.

§ 229 (8) Cause.

The statement of an injured railroad passenger to his physician at the time of consultation, after leaving the train, as to who was responsible for the injury, and how it occurred, was not admissible, being hearsay. *Empire Coal Co. v. Gravlee*, 9 Ala. App. 657, 64 So. 207.

In an action on a fraternal benefit certificate, where the defense was suicide, testimony that "they said he died from taking carbolic acid" was properly excluded as hearsay. *Sovereign Camp W. O. W. v. Ward*, 196 Ala. 327, 71 So. 404.

§ 229 (9) Due Care and Nature of Act.

In a switch engine conductor's action for injuries under federal Employers' Liability Act, testimony of a witness as to what three members of crew operating engine which injured plaintiff said about accident held narrative of a then past transaction and hearsay, and inadmissible. *Southern R. Co. v. Fisher* (Ala.), 74 So. 580.

Conversation between Husband of Plaintiff and Flagman of Defendant.—

Louisville, etc., R. Co. v. Cornelius, 183 Ala. 203, 62 So. 710. See the title EVIDENCE, § 229 (9), vol. 6, p. 264.

§ 229 (11) Representative Character and Relationship.

Declarations of one person as to existence of partnership between himself and another are not admissible against such other to prove partnership unless made in his presence or within the exception to exclusion of hearsay evidence. *Guin v. Grasselli Chemical Co.*, 197 Ala. 117, 72 So. 413.

§ 229 (15) Statements by Person Since Deceased.

Statements of a deceased member of a fraternal insurance order that he had told an officer of the lodge to make a change in the beneficiary are hearsay, and must be excluded in determining whether a change was made. *Slaughter v. Slaughter*, 186 Ala. 302, 65 So. 348.

To Show Nondelivery of Deed.—*Napier v. Elliott*, 177 Ala. 113, 58 So. 435. See the title EVIDENCE, § 229 (15), vol. 6, p. 267.

§ 230. — Writings.

A conductor's testimony, if given in an action for injuries to a shipment of horses, that "exceptions" were noted on the bill of lading held hearsay. *Louisville, etc., R. Co. v. Moorner*, 195 Ala. 344, 70 So. 277.

In assumpsit, defended on the ground that plaintiff had converted defendant's lumber, the exclusion from evidence, on plaintiff's objection, of certain waybills alleged to have been issued by a railroad, was proper. *Steverson v. Agee & Co.*, 14 Ala. App. 448, 70 So. 298.

Newspaper Account.—In action for diversion of water by a railroad company maintaining an embankment, a newspaper account of the flood during which the diversion occurred was hearsay. *Nashville, etc., Railway v. Yarbrough*, 194 Ala. 162, 69 So. 582.

§ 231. Evidence Founded on Hearsay.

§ 232. — In General.

Balance Due on Mortgage.—*Plott v. Foster*, 7 Ala. App. 402, 62 So. 299. See the title EVIDENCE, § 232, vol. 6, p. 269.

§ 234. — Reputation as to Persons.

Proof of paternity can not be made by evidence of its notoriety or general acceptance as a fact, where the establishment of such relationship will convict the parents of criminal conduct. *Stephens v. Richardson*, 189 Ala. 360, 66 So. 497.

§ 235. — Market Value Shown by Sales, Offers to Purchase or Sell, or Market Quotations.

Although agreements between the parties for the sale of property are not alone evidence of the market value thereof, they are evidence that the property had some market value, and can be considered along with the other evidence, being in the nature of admissions. *National Surety Co. v. Citizens' Light, etc., Co. (Ala.)*, 78 So. 834.

§ 236. — Repute as to Facts.

Character of Possession.—*Williams v. Lyon*, 181 Ala. 531, 61 So. 299. See the title EVIDENCE, § 236 (2), vol. 6, p. 272.

X. DOCUMENTARY EVIDENCE.

(A) PUBLIC OR OFFICIAL ACTS, PROCEEDINGS, RECORDS, AND CERTIFICATES.

§ 239. Laws.

§ 240. — Ordinances.

Where an ordinance, limiting speed of train in city, was included in the book of ordinances promulgated by governing authorities as official code, the court's exclusion of it from evidence can not be justified on the question of its legal passage and publication, in view of Code 1907, § 1259. *Douglass v. Central, etc., R. Co. (Ala.)*, 78 So. 457.

Under Code 1907, §§ 1259, 3989, printed code of ordinances purporting to have been published by authority of the council held admissible in evidence. *Hill v. Condon*, 14 Ala. App. 332, 70 So. 208.

§ 242. Judicial Acts and Records.

In a suit by creditors to set aside a conveyance by a deceased debtor, as fraudulent, the itemized statement of the decedent's indebtedness made by trustees who held his property by gen-

eral assignment for the benefit of creditors is inadmissible as against the grantees. *Davis v. Stovall & Bro.*, 185 Ala. 173, 64 So. 586.

Record Showing Criminal Prosecution.—*Brown v. Alexander*, 7 Ala. App. 452, 60 So. 975. See the title EVIDENCE, § 242, vol. 6, p. 276.

§ 244. Official Certificates.

Certificate of License.—Under Code 1907, § 26, proof of license to sell fertilizer must be by printed record or certified copy of the record, and a certificate of the commissioner that a certain party had a license for certain years was not admissible. *Planters' Chemical, etc., Co. v. Castillow*, 10 Ala. App. 385, 64 So. 473.

Certificate of Inspection.—In action by applicant for electric service for company's failure to extend lines as contracted for, certificate of city electrician was competent evidence to show that plaintiff had complied with his obligation to make ready his premises for the use of electricity. *Birmingham R., etc., Co. v. Littleton (Ala.)*, 77 So. 565.

§ 246. Records of Conveyances and Other Private Writings.

The record of a chattel mortgage is admissible in support of the allegation that the mortgage was recorded, though it was not produced. *Denton Bros. v. Foster*, 195 Ala. 53, 70 So. 152.

(B) EXEMPLIFICATIONS, TRANSCRIPTS, AND CERTIFIED COPIES.

§ 248. Statutory Provisions.

The purpose of Code 1907, § 3374, as amended by Acts Sp. Sess. 1909, p. 14, making admissible duly recorded deeds or certified transcripts, is to facilitate the evidential availability of conveyances. *Burnett v. Roman*, 192 Ala. 188, 68 So. 353.

§ 249. Judicial Records and Proceedings.

Of Federal Courts in State Courts.—Under Code 1907, § 3983, petition to reopen bankrupt's estate, order of reference, decree reopening estate, decree of discharge properly certified, held admissible in evidence. *Duncan v. Watson (Ala.)*, 73 So. 448.

§ 250. Official Documents, Records, and Proceedings in General.

Printed tariff schedule of railroad rates produced by the railroad company under subpoena duces tecum, and shown to be identical with their posted rates, held admissible to show the existence of a milling in transit privilege as an admission by the company. *Priebe v. Southern R. Co.*, 189 Ala. 427, 66 So. 573.

Code Provisions. — *Williams v. Lyon*, 181 Ala. 531, 61 So. 299. See the title EVIDENCE, § 250, vol. 6, p. 284.

§ 252. Records of Conveyances and Other Private Writings.

Application for Automobile License.—

In view of Acts 1911, p. 634, under Code 1907, § 3983, in action for injuries in collision with automobile, copy of defendant's application for automobile license, properly certified by custodian of original, was admissible, though original was not verified, and did not conform to requirements of law. *Windham v. Newton* (Ala.), 76 So. 24.

Deeds.—Under Acts 1907, § 3374, as amended by Acts Sp. Sess. 1909, p. 14, a certified copy of a deed conveying lands in two counties and recorded in one county is admissible notwithstanding § 3372, requiring record in the county in which the land is situated. *Burnett v. Roman*, 192 Ala. 188, 68 So. 353.

Under Code 1907, § 3374, as amended by Acts Sp. Sess. 1909, p. 14, a certified transcript of a deed was properly received in evidence of proof of the absence of possession or control of the deed by the party offering the transcript. *Ballard v. Bank*, 187 Ala. 335, 65 So. 356.

§ 254. Requisites of Exemplification or Certificate.

§ 254 (1) In General.

Authority to Make.—Under Code 1907, § 3983, the secretary of the Railroad Commission, if he was the appropriate custodian of its records, was authorized to make a proper certificate. *Adams v. Central, etc., R. Co.* (Ala.), 73 So. 650.

In absence of valid authorization, official custodian can not certify to anything not copied from documents or records, and can not deduce his conclusions of fact and give them any force as evi-

dence. *Adams v. Central, etc., R. Co.* (Ala.), 73 So. 650.

Copies Indefinite and Improperly Authenticated.—Where copies of Public Service Commission orders authorizing railway to charge extra passenger fare where no ticket is purchased were indefinite and improperly authenticated, they were properly excluded as evidence in action for ejecting passenger. *Louisville, etc., R. Co. v. Boggs* (Ala.), 74 So. 337.

Certificate Containing Inadmissible Matters.—That certificate by official custodian contains extra official, inadmissible assertions of fact or conclusions, will not deprive it of effect so far as certificate was authorized. *Adams v. Central, etc., R. Co.* (Ala.), 73 So. 650.

Certificate Held Inadmissible.—Under Code 1907, § 5521 et seq., certificate of secretary of Railroad Commission that tariff filed showed a certain fare; no date of filing of the tariff being shown, held inadmissible. *Adams v. Central, etc., R. Co.* (Ala.), 73 So. 650.

Under Code 1907, § 5521 et seq., in absence of efficiently certified copy of schedule, though schedule was admitted without objection to it as distinguished from certificate, and though conductor testified that it was the schedule sent him, there was no evidence that it was the duly filed and published schedule. *Adams v. Central, etc., R. Co.* (Ala.), 73 So. 650.

Certificate of Probate Judge—Joint Certificate.—The fact that the certificate of the probate judge to copies of a deed and power of attorney offered in evidence was joint instead of separate would not exclude the instruments, where the certificate sufficiently designated each instrument as if it had been made separately by each. *Turner v. Davis*, 186 Ala. 77, 64 So. 958.

§ 254 (2) Judicial Acts, Records, and Proceedings.

In assumpsit, wherein defendant pleaded discharge in bankruptcy, referee's notation, on copy of transcript of docket transmitted to bankruptcy court, of allowance of amendment of defendant's schedule by including plaintiff as creditor, was sufficient to admit in evidence

certificate from referee showing amendment after suit brought, etc. *Davis v. Findley* (Ala.), 78 So. 869.

Under Code 1907, § 3983, an order appointing a trustee of an estate in bankruptcy, the trustee's notice of acceptance and a copy of his bond, where each are a proceeding in bankruptcy after reopening of the bankrupt's estate, should be certified by the referee in bankruptcy to authorize their introduction in evidence in a subsequent suit in ejectment. *Duncan v. Watson* (Ala.), 73 So. 448.

§ 255. Acts, Records, and Judicial Proceedings of Other States.

§ 257. — Requisites of Exemplification of Certificate.

Sufficiency of Certificate.—Where the clerk's certificate to a judgment rendered in another state certified* that the judgment was a matter of record in the court, it sufficiently appeared that it was an adjudication of the court. *Forbes v. Davis*, 187 Ala. 71, 65 So. 516.

The sufficiency, in respect of form, of the certificate of authentication of a foreign judgment is to be determined with reference to that prescribed for the court of the state rendering the judgment, and the judge's certificate that the clerk's attestation is in due form is conclusive. *Forbes v. Davis*, 187 Ala. 71, 65 So. 516.

Certificate Containing Unnecessary Statements.—Transcript of proceedings in which judgment was rendered in another state and authentication thereof held sufficient to entitle the judgment to full faith and credit, though the certificates contained unnecessary statements. *Forbes v. Davis*, 187 Ala. 71, 65 So. 516.

(C) PRIVATE WRITINGS AND PUBLICATIONS.

§ 259. Unofficial Writings in General.

"Inscriptions designedly placed on bottles, boxes, or other packages, in the ordinary way, for the obvious purpose of indicating their nature or contents, may in general be regarded as competent evidence thereof, at least against those persons who have such objects in their possession, or who dispense them to others. Their external indicia are some evidence, stronger or weaker according

to accompanying circumstances, of their internal contents.' *Kennedy v. State*, 182 Ala. 10, 62 So. 49." *Herring v. State*, 11 Ala. App. 202, 65 So. 707.

§ 261. Corporate Records and Proceedings.

Parties against Whom Admissible.—In action on note against bank whose cashier indorsed it affixing "cashier" to his name in a personal transaction, minute book kept by bank directors respecting cashier's authority to make loans held admissible, in view of evidence showing that plaintiff was a stockholder. *Choctaw Bank v. Gewin* (Ala. App.), 78 So. 96.

§ 262. Conveyances, Contracts, and Other Instruments.

Acknowledgment.—Recitals in certificate of acknowledgment that lands conveyed by husband and wife were not their homestead held admissible on the issue of homestead. *Perkinson v. Gibson*, 194 Ala. 648, 70 So. 117.

Deed.—Since Code 1907, § 3374, does not require an instrument such as a deed to be recorded within any particular time, a deed was admissible in evidence, though it was not recorded within a year after execution. *Turner v. Davis*, 186 Ala. 77, 64 So. 958.

§ 263. Books of Account.

§ 263 (½) In General.

Must Be Trustworthy.—Books of account must appear to the court to be trustworthy in order to be competent. *Sharp v. Blanton*, 194 Ala. 460, 69 So. 889.

§ 263 (4) Ledgers.

Under Code 1907, § 4003, original leaf from plaintiff's loose-leaf ledger held admissible. *Shepherd v. Butcher Tool, etc., Co.* (Ala.), 73 So. 498.

In an action of assumpsit, the leaves of a ledger which was a book of original entry kept by plaintiff in due course of business were properly admitted in evidence. *McDonough v. Commercial State Bank* (Ala. App.), 73 So. 754.

§ 263 (8) Form, Regularity, and Sufficiency of Entries in General.

Daily reports, made in the regular course of business, in the nature of orig-

inal entries, are admissible in evidence. *Ex parte Barrett Bros. Shipping Co.*, 196 Ala. 655, 72 So. 259, denying certiorari *Minge & Co. v. Barret Bros. Shipping Co.*, 14 Ala. App. 468, 70 So. 962.

§ 263 (9) By Whom Entries Are Made.

A witness who did not make the entries and who disclosed no knowledge of an account or its correctness can not testify merely from the books that the account was correct. *Walker v. Trotter Bros.*, 192 Ala. 19, 68 So. 345.

§ 263 (11) Entries Made from Memoranda or Other Information.

Where ledger entries were transferred regularly from blotters on which original entries were made, by persons having knowledge of transactions, they are admissible in evidence. *White v. Bean & Co.* (Ala. App.), 77 So. 924.

In suit against railroad for death on track, entries on pay roll of coal mine relevant to issue of whereabouts of witnesses at time as to which they testified held competent, though pay roll was made up by timekeeper from reports of others, and not from personal knowledge. *Shirley v. Southern R. Co.* (Ala.), 73 So. 430.

§ 263 (14) Purposes of Proof in General.

Regular entries made by party in book kept for the purpose from data furnished or memoranda kept by employee to assist his memory in making report are admissible in evidence to aid jurors in recalling testimony of witnesses who testified to correctness of account. *Floyd v. Pugh* (Ala.), 77 So. 323.

§ 263 (17) Entries by Decedents in General.

The shop-book rule, an exception to the rule against hearsay, is not founded on the principle that the entries are part of the *res gestæ*, but on that of necessity; such evidence being the best available after the death of the party who made the entries. *Sharp v. Blanton*, 194 Ala. 460, 69 So. 889.

Under Code 1907, §§ 3975, 4003, the account books of a deceased physician or other person who conducted a regular business in his lifetime are admissible as

evidence of services rendered. *Sharp v. Blanton*, 194 Ala. 460, 69 So. 889.

Entries in the books of original account of a deceased physician, proved to be in his handwriting, tending to show the date of a litigant's birth, which was in issue, and as to which the physician, if living, would have been a competent witness, were admissible in evidence for that purpose. *Sharp v. Blanton*, 194 Ala. 460, 69 So. 889.

§ 264. Private Memoranda and Statements in General.

In action for materials, where it was disputed whether they were sold to defendant or defendant's contractor, a written statement by defendant's superintendent as to transactions under the contract held not admissible, in the absence of testimony as to when it was made, that it was true when made, or that the party making it recognized it as stating the facts truly at the time of the trial. *Beitman v. Birmingham Paint, etc., Co.*, 185 Ala. 313, 64 So. 600.

Hospital Charts or Records. — In action for malpractice in treating hospital patient, charts or records kept by the nurses for surgeon's information held properly admitted. *Barfield v. South Highland Infirmary*, 191 Ala. 553, 68 So. 30.

Memorandum of Parol Contract. — Testimony by plaintiff's agent as to sale of material to defendant, amount thereof and memorandum made by such agent was competent as tending to show to whom credit was extended. *Shepherd v. Butcher Tool, etc., Co.* (Ala.), 73 So. 498.

Sheet of paper on which person scaling logs made entries each night from memorandum in book carried in his pocket held the permanent record of the scaling and admissible as original. *Hitt Lumber Co. v. McCormack*, 13 Ala. App. 453, 68 So. 696, cited in note in *L. R. A.* 1916B, 636.

§ 265. Letters, Telegrams, and Other Correspondence.

Where letters are properly identified, they are competent evidence in a suit for divorce tending to show the alleged illicit relationship of the wife with a third

person. *Coleman v. Coleman* (Ala.), 73 So. 473.

Admission of note from contestant to testatrix held not error, where there was some evidence of its receipt and return by the testatrix to the proponent. *Gaither v. Phillips* (Ala.), 75 So. 295.

§ 266. Maps, Plats, and Diagrams.

Map.—It was not error to admit a map to show the location and surroundings of a track complained of. *Sudduth v. Central, etc., R. Co.* (Ala.), 77 So. 350.

§ 267. Photographs and Other Pictures.

In action for assault and battery, photographs, together with testimony of person who took them, were admissible to reproduce plaintiff's condition shortly after alleged injury. *Greenwood Café v. Walsh* (Ala. App.), 74 So. 82.

§ 268. Books and Other Printed Publications.

§ 271. — Scientific and Technical Works.

Relevant extracts from medical treatises recognized and approved by the medical profession as standard may be read to the jury in evidence. *Barfield v. South Highland Infirmary*, 191 Ala. 553, 68 So. 30, cited in note in Ann. Cas. 1916E, 358.

Reading from a medical work of the case of a man who was fatally poisoned by taking a pound of salt was improper evidence in an action against a druggist for selling common salt to one who asked for Epson Salts, and whose cow was killed by administration of the goods received. *Gorman-Gammill Drug Co. v. Watkins*, 185 Ala. 653, 64 So. 350, cited in note in Ann. Cas. 1916A, 796.

§ 272. — Mortality Tables and Tables of Expectancy of Life.

In action for loss of eye, as injury was permanent, held, that mortality tables were admissible in connection with evidence of decreased earning capacity. *Louisville, etc., R. Co. v. Carter*, 195 Ala. 382, 70 So. 655.

(D) PRODUCTION, AUTHENTICATION, AND EFFECT.

§ 275. Compelling Production by Adverse Party.

Defendant not having followed Code

1907, §§ 4058, 4059, relating to production of writings, his presentation of notice served on plaintiff to produce writings and motion to require production merely entitles him to introduce secondary evidence in case of nonproduction. *Sherill v. Merchants', etc., Sav. Bank*, 195 Ala. 175, 70 So. 723.

Effect of Failure to Produce. — Under Code 1907, § 4058, nonsuit can not be rendered against plaintiff for failure to produce a letter intentionally destroyed by him, no notice to produce which was given. *Russell v. Bush*, 196 Ala. 309, 71 So. 397.

§ 276. Preliminary Evidence for Authentication.

§ 277. — Necessity in General.

§ 277 (1) In General.

Agreement by bank, assuming debts of its predecessor, not being self-proving, was improperly admitted in evidence, without formal proof of execution. *People's Sav. Bank v. Jordan* (Ala.), 76 So. 442.

Book Recording Condition of Telegraph Line.—In an action for delay in transmission of a telegram, a book kept by the company, wherein it recorded the condition of the line, was not admissible in evidence, in the absence of preliminary proof. *Western Union Tel. Co. v. Hawkins*, 14 Ala. App. 295, 70 So. 12.

§ 277 (3) Conveyances, Contracts, and Other Writings in General.

Deed.—A deed being offered as a muniment of title, and not being limited to color of title, there was no error in excluding it, in the absence of proof of its execution; it not having been recorded, and the certificate of acknowledgment as to one of the signers being defective. *Swindall v. Ford*, 184 Ala. 137, 63 So. 651.

By provision of Code 1907, § 3374, making a conveyance duly acknowledged and recorded self-proving, a recordation after the bringing of the action in which it is offered is sufficient. *Swindall v. Ford*, 184 Ala. 137, 63 So. 651.

Mortgage.—In action for conversion of mortgaged crops, mortgage was not self-proving, and it was necessary for

plaintiff to prove execution by mortgagor before it became admissible. *Pearson v. Hancock & Son* (Ala. App.), 77 So. 934.

Written assignments of certain claims are inadmissible in evidence, where their execution is not proven. *Stouts Mountain Coal, etc., Co. v. Pollak*, 195 Ala. 556, 70 So. 846.

§ 277 (9) Proof of Execution of Original to Authorize Introduction of Copy.

Under Code 1907, § 3382, providing that when a validly executed instrument, not properly acknowledged and recorded, has for 20 years been of record, etc., a duly certified transcript thereof shall have the same force and effect as if it had been duly acknowledged and recorded, and § 3374, as to transcripts of duly recorded conveyances, a certified transcript of the record of a deed which was *prima facie* validly executed and which had been recorded for over 20 years, dispensed with proof of its execution. *Veitch v. Hard* (Ala.), 75 So. 405.

§ 278. — Writings Collateral to Issues.

In action on indemnity bond, books regularly kept by the bookkeeper from entries made by teller held admissible, though collateral to teller's infidelity *vel non*, without showing that they were kept by or under direction of teller, or that they were correctly kept. *Alabama Fidelity, etc., Co. v. Alabama Penny Sav. Bank* (Ala.), 76 So. 103.

§ 279. — Ancient Documents.

§ 279 (1) Admissibility in General.

Deed or Copy.—The absence of an acknowledgment did not prevent the admissibility of a deed or certified copy, thereof, without proof of execution, when offered more than 50 years after execution; curative statutes making such a deed self-proving. *Turner v. Davis*, 186 Ala. 77, 64 So. 958.

The trial court did not err in overruling plaintiff's objections to the record copy of a deed nearly 80 years old, which was not in defendant's possession and had been attested by two witnesses, probated, and proven. *Sudduth v. Central, etc., R. Co.* (Ala.), 77 So. 350.

§ 279 (5) Ancient Maps, Plans, and Surveys.

Map.—In ejectment for land embraced in "River Margin" granted city's predecessor by Act Cong. May 26, 1824, ancient map purporting to describe and locate the property as of the time when the act was passed and an ancient copy according to which land had been conveyed for years, were admissible. *Hughes v. Tuscaloosa*, 197 Ala. 592, 73 So. 90.

§ 279 (6) Defects and Irregularities in Instrument.

In view of Code 1907, §§ 3355, 3382, an instrument properly certified as transcript from record of an agreement between predecessors in title of parties containing covenant for payment by then owner of defendant's lot of a portion of cost of a party wall when he should use it, purporting to be signed by defendant's predecessor in title and attested in writing by a witness, was properly admitted in evidence. *Leek v. Meeks* (Ala.), 74 So. 31.

§ 280. — Form and Sufficiency in General.

§ 280 (1) In General.

Identification of Mortgages.—*Plott v. Foster*, 7 Ala. App. 402, 62 So. 299. See the title EVIDENCE, § 280 (1), vol. 6, p. 334.

A shipping order not signed by the carrier or its agent held inadmissible to show the contract of shipment, where the only evidence of authenticity was that it was sent to the consignee by the shipper. *Southern R. Co. v. Langley*, 184 Ala. 524, 63 So. 545.

Evidence that defendant attached her signature to written contract sued on, which was unattested, held a sufficient authentication thereof to justify its admission in evidence. *Norton v. Woodwood & Co.*, 185 Ala. 344, 64 So. 609.

§ 280 (3) Joint Instruments.

Under Code 1907, § 4006, a chattel mortgagor may prove the execution by him of the mortgage, but he can not prove execution by his comortgagors. *Baker v. Lauderdale*, 14 Ala. App. 224, 69 So. 299.

§ 281. — Attesting Witnesses.

Under Code 1907, § 4006, providing that the execution of any instrument attested by witnesses may be proved by the testimony of the maker, "execution" includes not only the signing but the required attestation, so that proof of the signing alone is not sufficient. *Swindall v. Ford*, 184 Ala. 137, 63 So. 651.

Testimony of Parties to Instrument.—A transfer of a chattel mortgage, including a note, was sufficiently shown by the transferror's testimony identifying the paper and showing his signature thereto by mark and that he saw the attesting witnesses sign their names thereto. *Houston Nat. Bank v. Edmonson & Co. (Ala.)*, 75 So. 568.

§ 283. — Books of Account.

§ 283 (1) In General.

Where there is no evidence of its being correct, account is inadmissible. *White v. Bean & Co. (Ala. App.)*, 77 So. 924.

Necessity of Producing Person Who Made Entry.—Under Code 1907, § 4003, in suit against railroad for death, where employees of coal mine testified they saw decedent on track, entries on pay roll of mine in handwriting of time-keeper held competent evidence of collateral fact of witnesses' whereabouts at time; the entrant being beyond the jurisdiction. *Shirley v. Southern R. Co. (Ala.)*, 73 So. 430.

Account books, admitted to be correct by a debtor, are admissible without further proof of correctness. *Wise v. Fuller*, 11 Ala. App. 427, 66 So. 827.

§ 283 (6) Knowledge of Witness in General.

Hearsay Evidence as to Correctness of Items.—*Plott v. Foster*, 7 Ala. App. 402, 62 So. 299. See the title EVIDENCE, § 283 (6), vol. 6, p. 344.

§ 284. — Memoranda and Statements.

Evidence going to show that the amount of lumber specified in receipts of a third party, based on a consolidated report of the daily reports, to show that such amount of lumber was actually placed in the shed for the account of defendant, was incompetent, without

proof that the daily reports from which it was made were correct. *Minge & Co. v. Barret Bros. Shipping Co.*, 14 Ala. App. 468, 70 So. 962, certiorari denied in *Ex parte Barrett Bros. Shipping Co.*, 196 Ala. 655, 72 So. 259.

§ 285. — Letters, Telegrams, and Other Correspondence.

§ 285 (1) Authentication of Letters in General.

A copy of a letter, purporting to have been written by defendant, by which it is sought to show his connection with a certain firm, is not competent unless the defendant wrote or authorized the letter. *White Trunk, etc., Co. v. Brantley (Ala. App.)*, 75 So. 182.

A letter or telegram received in due course is not admissible against the purported sender thereof, without proof that he sent it or proof of his handwriting, unless it is in reply to a communication sent to him by the addressee thereof. *Rike v. McHugh*, 188 Ala. 237, 66 So. 452.

A telegram was properly admitted where it was shown that it was in response to a telegram sent to the purported sender thereof, and a letter of the same date fully covered and confirmed the matter set forth in the telegram. *Rike v. McHugh*, 188 Ala. 237, 66 So. 452, cited in note in *Ann. Cas.* 1917D, 925.

§ 285 (2) Proof of Authority of Person Writing for Alleged Sender.

A letter received by plaintiff in response to letter written to defendant is properly admitted in evidence. *American Workmen v. James*, 14 Ala. App. 477, 70 So. 976, cited in note in *Ann. Cas.* 1917D, 925.

§ 285 (3) Proof of Handwriting.

Insufficient Signatures. — *Southern States Fire, etc., Co. v. DeLong*, 178 Ala. 110, 59 So. 61. See the title EVIDENCE, § 285 (3), vol. 6, p. 347.

§ 289. Conclusiveness and Effect.

§ 289 (4) Private Contracts and Other Writings.

The recital in the body of the deed, that grantors were heirs of I., deceased,

is no evidence against defendants, not parties to or privies under it, that they were such heirs. *Swindall v. Ford*, 184 Ala. 137, 63 So. 651.

In suit to redeem land from mortgage foreclosure sale, wherein complainants sought to enforce claim as vendor's lien by setting it off against any balance due on mortgage, burden was on complainants to overcome prima facie effect of recital of payment in their ancestor's deed to defendant's ancestor. *O'Neal v. Lovett*, 197 Ala. 628, 73 So. 329.

§ 289 (5) Books of Account.

Daily reports, made in the regular course of business, in the nature of original entries, admissible in evidence, are prima facie correct. *Ex parte Barrett Bros. Shipping Co.*, 196 Ala. 655, 72 So. 259, denying certiorari *Minge & Co. v. Barret Bros. Shipping Co.*, 14 Ala. App. 468, 70 So. 962.

Where a party uses books of account against the adverse party, he makes them evidence for the latter on the same subject, and where a part is used the whole is admissible. *Vandiver v. American Can Co.*, 190 Ala. 352, 67 So. 299.

Where plaintiff introduced a page of defendant's ledger showing on the debit side plaintiff's debt, an entry on the credit side containing a suggestion of a pending settlement was properly excluded. *Vandiver v. American Can Co.*, 190 Ala. 352, 67 So. 299.

XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.

(A) CONTRADICTING, VARYING, OR ADDING TO TERMS OF WRITTEN INSTRUMENT.

§ 290. Grounds for Exclusion of Extrinsic Evidence.

In action for conversion of mortgaged crops, witness having testified rental contract between landlord and mortgagor was not in writing, he could testify mortgagor had rented premises and was in possession when mortgage was executed. *Pearson v. Hancock & Son* (Ala. App.), 77 So. 934.

§ 291. Writings Excluding Extrinsic Evidence in General.

The doctrine that forbids parol evi-

dence to vary, alter, or contradict a written contract necessarily rests upon the existence of a valid "written" instrument expressing the obligations of the parties. *Sellers v. Dickert*, 185 Ala. 206, 64 So. 40.

§ 293. Official Records and Documents.

Payment of Taxes.—Parol evidence is competent to show the payment of poll taxes and thus contradict the records. *Shepherd v. Sartain*, 185 Ala. 439, 64 So. 57.

§ 294. Deeds.

A grant upon a condition to be fulfilled in the future, whether precedent or subsequent, is a present grant, and its effect can not be altered by parol evidence. *Bethea v. McCullough*, 195 Ala. 480, 70 So. 680.

§ 299. Bills and Notes.

Where after delivery, the payee of a note which made no provision as to interest, filled in the blank at the legal rate, parol evidence is not admissible to contradict such interest stipulation. *Haas v. Commerce Trust Co.*, 194 Ala. 672, 69 So. 894.

§ 300. Indorsements and Transfers of Bills or Notes.

An indorsement on a promissory note can not be contradicted by any contradictory parol agreement. *People's Bank v. Moore* (Ala.), 78 So. 789.

§ 304. Receipts.

A receipt was open to explanation. *Williams v. Shows*, 197 Ala. 596, 73 So. 99.

In detinue to recover a mower, receipt which plaintiff introduced, reciting consideration of some hundreds of dollars for all the property in gross purchased by him of a widow, including the mower, was open to explanation by parol evidence. *Windham v. Hydrick*, 197 Ala. 125, 72 So. 403.

§ 307½. Evidence Extrinsic to Writing in General.

A receipt was open to explanation, and it was competent for creditor to show that the debtor owed him as much as the sum presently paid, plus value of the

cotton received from debtor. *Williams v. Shows*, 197 Ala. 596, 73 So. 99.

§ 311. Matters Not Included in Writing or for Which It Does Not Provide.

Delivery of Deed.—Parol evidence is admissible upon the question of delivery of a deed, since the deed does not of itself import delivery. *Tumlin v. Tumlin*, 195 Ala. 457, 70 So. 254.

Contract of Sale.—In suit to establish complainant's interest in a partnership, in construing contract between complainant and his alleged partners, court will treat, as competent, evidence going to show circumstances surrounding parties at the time of the transaction, and will consider object to be accomplished. *Reeves v. Jordan*, 197 Ala. 64, 72 So. 322.

§ 313. Nature of Consideration.

§ 313 (1) In General.

C.'s testimony that it was part of the consideration of his written contract transferring his interest in the estate of R., which included C.'s note to R., that he was to be released from all indebtedness to the estate, is inadmissible; it contradicting the contract. *Reynolds v. Reynolds*, 10 Ala. App. 420, 65 So. 194, certiorari denied in *Ex parte Reynolds*, 187 Ala. 672, 65 So. 1034.

§ 313 (2) Deeds in General.

Where deed from husband to wife recites money consideration of \$100, it is proper to admit evidence to show payment of greater sum or value. *London v. Anderson Brass Works*, 197 Ala. 16, 72 So. 359.

§ 313 (7) Mortgages.

That mortgage was given to secure future advances for prosecution of mortgagor's business, not expressed on face of mortgage, may be shown by parol to make instrument operate as such security. *Manchuria S. S. Co. v. Donald & Co. (Ala.)*, 77 So. 12.

§ 313 (10) Bills and Notes.

The parties to a note are not bound by its terms as to the amount of money loaned, which was the consideration for the note. *Smith v. Yancey (Ala.)*, 73 So. 477.

Between the immediate parties parol

evidence is competent to show the consideration for a note and the conditions on which it is payable, if the terms of a written contract are not thereby varied. *Jefferson County Sav. Bank v. Compton*, 192 Ala. 16, 68 So. 261, cited in notes in *L. R. A. 1917C*, 311, 316.

Where a note does not express on its face for what it is given, it is permissible to show the real consideration. *Dillworth v. Holmes Furniture, etc., Co. (Ala. App.)*, 73 So. 288.

§ 314. Existence of Condition or Contingency.

§ 314 (1) Deeds.

Conditional Delivery of Instrument.—*Loyal v. Wolf*, 179 Ala. 505, 60 So. 298. See the title EVIDENCE, § 314 (1), vol. 6, p. 380.

§ 314 (3) Bills and Notes or Indorsement Thereof.

Note for Purchase of Goods.—*Cochran v. Burdick Bros.*, 7 Ala. App. 274, 61 So. 29, cited in notes in *L. R. A. 1917C*, 311, 315, 316. See the title EVIDENCE, § 314 (3), vol. 6, p. 381.

§ 317. Nature and Extent of Liability.

Plaintiff could show by parol that, although defendant's name was signed on the back of the note, he was in fact liable as maker and signed the note as such, and defendant could show that he was liable, if at all, only as indorser. *Long v. Gwin*, 188 Ala. 196, 66 So. 88.

(B) INVALIDATING WRITTEN INSTRUMENT.

§ 321. Matters Affecting Validity in General.

Attempted substitution of lost court papers and records may be shown by parol. *State v. Powell*, 184 Ala. 46, 63 So. 542, cited in note in *Ann. Cas. 1916D*, 248.

§ 325. Mistake.

Parol evidence was properly admitted to show mistake of the vendor in overstating the acreage. *Manning v. Carter (Ala.)*, 77 So. 744.

§ 326. Fraud.

In Contracts of Sale.—In action for price of goods sold under contract,

where testimony showed that the contract of sale signed by the buyer was not the one made by him and was signed upon the misrepresentations of the seller's salesman, testimony of the buyer as to what articles he contracted to purchase was relevant. *Commercial Finance Co. v. Cooper Bros.*, 196 Ala. 285, 71 So. 684.

In action by seller upon written contract of sale, procured by seller through fraudulently representing contract to contain certain warranties, buyer can introduce parol evidence as to negotiations prior to execution of contract, to prove warranties. *Adams Hdw. Co. v. Wim-bish (Ala.)*, 78 So. 902.

Overstating Acreage.—Parol evidence was properly admitted to show fraud of the vendor in overstating the acreage. *Manning v. Carter (Ala.)*, 77 So. 744.

§ 328. Illegality.

It may be shown by parol evidence that note was given in consideration of payee's promise not to prosecute maker's brother for embezzlement. *People's Bank, etc., Co. v. Floyd (Ala.)*, 75 So. 940.

(C) SEPARATE OR SUBSEQUENT ORAL AGREEMENT.

§ 330. Prior and Contemporaneous Collateral Agreements.

§ 331. — In General.

§ 331 (1) In General.

The implication is that an executed writing contains all stipulations, and that all previous negotiations are merged in the terms of the instrument. *Sellers v. Dickert*, 185 Ala. 206, 64 So. 40.

A plea in an action on a written contract set out in the complaint, which sets up plaintiff's breach of an extraneous agreement alleged to be part of the consideration of the contract, is demurrable. *Baker v. Lehman, etc., Co.*, 186 Ala. 493, 65 So. 321.

§ 331 (3) Leases.

In action for rent, it was permissible for tenant, on cross-examination of plaintiff, to show execution of plaintiff's agreement to repair, made and delivered contemporaneously with the lease.

Buerger v. Mabry (Ala. App.), 73 So. 135.

A written lease dealing with the subject of fixtures can not be varied by oral agreement as to fixtures. *Middleton v. Alabama Power Co.*, 196 Ala. 1, 71 So. 461.

§ 331 (5) Sale or Exchange of Real Property and Deeds.

A condition of repurchase can not be subsequently ingrafted on an absolute deed by parol. *Everett v. Estes*, 189 Ala. 60, 66 So. 615.

§ 331 (6) Sale of Personal Property.

Evidence of a conversation between one of the buyer's agents and plaintiff's salesman is inadmissible to show a parol agreement different from the written contract of sale. *Manchester Sawmills Co. v. Arundel Co.*, 197 Ala. 505, 73 So. 24.

Time to Remove Timber.—*Vizard v. Robinson*, 181 Ala. 349, 61 So. 959. See the title EVIDENCE, § 331 (6), vol. 6, p. 395.

§ 331 (10) Contracts of Carriage.

Bill of lading, under which livestock was shipped from a town in Kentucky without stipulation that it should not be unloaded at Nashville, Tenn., held to constitute the contract of shipment, not to be varied by a parol offer to the shippers' agent by the agent of defendant railroad that the shipment might be made so as to escape unloading. *Nashville, etc., Railway v. Farrell*, 14 Ala. App. 380, 70 So. 986.

§ 332. — Completeness of Writing.

Where the duebill sued on was payable as provided by "the original contract," parol evidence was admissible as to the terms of "the original contract," though there was a prior written contract between the parties, which contained only a portion of "the original contract." *Sellers v. Dickert*, 185 Ala. 206, 64 So. 40.

A written contract for drilling a well, which declared it contained all the terms, can not be modified by evidence of an additional parol agreement. *Parker v. Law & Sons*, 194 Ala. 693, 69 So. 879.

§ 334. — Condition Precedent to Obligation under Writing.

Parol evidence is not admissible to show that a note was payable only on certain conditions, where the note was given in payment of a written subscription for corporate stock which contained no condition. *Jefferson County Sav. Bank v. Compton*, 192 Ala. 16, 68 So. 261, cited in notes in *L. R. A.* 1917C, 311, 316.

§ 335. Subsequent Agreements.

§ 335 (1) In General.

That policy is written does not prevent its change or waiver of its conditions by subsequent parol agreement, notwithstanding a provision against unwritten waivers. *Insurance Co. v. Williams* (Ala.), 77 So. 159; *Fire Ass'n v. Williams* (Ala.), 77 So. 166.

§ 335 (5) Extension of Time for Performance.

Extension of Time for Payment.—*Starr Piano Co. v. Baker*, 8 Ala. App. 449, 62 So. 549. See the title EVIDENCE, § 335 (5), vol. 6, p. 406.

(D) CONSTRUCTION OR APPLICATION OF LANGUAGE OF WRITTEN INSTRUMENT.

§ 336. Grounds for Admission of Extrinsic Evidence.

Where doubt arises as to the sense and meaning of words or their application, in construing contracts, their import may be shown by parol proof outside the instrument. *Mobile County v. Linch* (Ala.), 73 So. 423.

Where a deed contains everything necessary for a correct understanding of the intention of the parties, and there is no uncertainty or ambiguity therein, parol evidence is not admissible to control its construction or add to its provisions. *Pendrey v. Godwin*, 188 Ala. 565, 66 So. 43.

§ 337. Nature of Ambiguity or Uncertainty in Instrument.

§ 338. — In General.

§ 338 (3) Leases.

In action for rent, parol evidence held admissible to show circumstances under

which landlord's contract to repair, executed and delivered contemporaneously with the lease, was made, and subject matter to which parties referred. *Buerger v. Mabry* (Ala. App.), 73 So. 135.

§ 338 (4) Contracts in General.

A contract which provides that a party is to have the use of mules, wagon, and corn for a year and cultivate land, and that the other party shall receive a half of the crop, is ambiguous, and parol evidence is admissible. *Tate v. Cody-Henderson Co.*, 11 Ala. App. 350, 66 So. 837.

Where the record of board of commissioners which was a part of appellee's contract, and the contract itself, contained mere recitals and uncertain provisions making contract ambiguous, parol and extrinsic evidence was admissible to determine the real contract. *Mobile County v. Linch* (Ala.), 73 So. 423.

§ 338 (8) Bills and Notes.

Showing Amount of Note.—*Bell v. Birmingham*, 9 Ala. App. 212, 62 So. 971. See the title EVIDENCE, § 338 (8), vol. 6, p. 408.

§ 339. — Patent Ambiguity.

Where the ambiguity in a written instrument is patent, parol evidence can not be admitted to supply the deficiency. *Garrow v. Toxey*, 188 Ala. 572, 66 So. 443.

§ 340. — Latent Ambiguity.

Where the ambiguity in a written instrument is latent, parol evidence is admissible to supply the deficiency. *Garrow v. Toxey*, 188 Ala. 572, 66 So. 443.

In ejectment, deed held improperly excluded from evidence for uncertainty of description; ambiguity being latent and explicable by parol. *Reynolds v. Trawick*, 197 Ala. 165, 72 So. 378.

§ 342. Meaning of Words, Phrases, Signs, or Abbreviations.

§ 343. — In General.

Where meaning of words in a contract or their application to the particular circumstances is in doubt, resort may be had to parol evidence. *Tate v. Cody-Henderson Co.*, 11 Ala. App. 350, 66 So. 837.

In action for price of flour, where de-

defendant sought to recoup for plaintiff's breach of contract in failing to deliver certain other flour, testimony as to meaning of phrase "guaranteed basis 70c," used in contract, by plaintiff miller, is admissible to indicate intent of parties. *Lysle Milling Co. v. North Alabama Grocery Co. (Ala.)*, 77 So. 748.

§ 347. Identification of Parties.

§ 347 (1) In General.

Where parol evidence is admissible to show the capacity in which the signers of a note signed same, such evidence is governed by the general rules of evidence. *Planters' Chemical, etc., Co. v. Stearnes*, 189 Ala. 503, 66 So. 699.

§ 347 (2) Personal, Official, or Representative Capacity.

Where a note was ambiguous as to whether defendants signed individually or as agents of a corporation, parol evidence was admissible to show in what capacity they signed. *Planters' Chemical, etc., Co. v. Stearnes*, 189 Ala. 503, 66 So. 699.

When it is doubtful from the face of a contract, not under seal, whether it was intended to operate as a personal engagement of the party signing, or to impose an obligation upon some third person as his principal, parol evidence is admissible to show the true character of the transaction. *Lutz v. Van Heynigen Brokerage Co. (Ala.)*, 75 So. 284.

In action on charter party against one who defended on the ground that he signed merely as agent for the true owner, evidence was admissible of the circumstances surrounding the parties to the engagement, including the fact that defendant had an interest in the vessel, and of a previous similar contract of charter for the vessel, together with the instrument itself, and of the acts of the parties with respect to the recognition and observance of the obligations thereof. *Lutz v. Van Heynigen Brokerage Co. (Ala.)*, 75 So. 284.

A charter party held to raise such doubt as to whether it bound the agent signing it individually as to render admissible parol evidence to discover the true intent of the parties. *Lutz v. Van*

Heynigen Brokerage Co. (Ala.), 75 So. 284.

§ 347 (5) Mistake or Variance in Name.

"Milburn" for "Milbra."—*Milbra v. Sloss-Sheffield Steel, etc., Co.*, 182 Ala. 622, 62 So. 176. See the title EVIDENCE, § 347 (5), vol. 6, p. 416.

§ 348. Identification of Subject Matter.

§ 348 (2) In Conveyances, Contracts, and Writings in General.

Mortgage.—Parol evidence is admissible to show that a particular article is included in the general words of a description in a mortgage. *Gossett v. Morrow*, 187 Ala. 387, 65 So. 826.

§ 348 (3) Of Real Property in General.

Parol evidence held admissible to explain an erroneous description; the ambiguity not being patent, and there being nothing to identify the land. *Garrow v. Toxey*, 188 Ala. 572, 66 So. 443.

Description of premises conveyed by a deed in view of plat recorded to complete description, held an uncertain description, which might be aided by parol. *Nolen v. Henry*, 190 Ala. 540, 67 So. 500.

Where the exception in a conveyance referred to numbered lots in the plan of a town, and not to lots in the grantor's addition thereto, parol evidence that the lots intended to be excepted were lots of the designated number in the plan of the addition was inadmissible. *Thrasher v. Royster*, 187 Ala. 350, 65 So. 796.

§ 348 (4) Application of Description to Subject Matter.

Identity of Land Conveyed.—*Bender v. Barton*, 182 Ala. 181, 62 So. 732. See the title EVIDENCE, § 348 (4), vol. 6, p. 419.

§ 348 (7½) Reference to Other Instruments.

In an action on a duebill, payable as "provided by the terms of the original contract," parol evidence was admissible to identify the contract meant, though there was a prior written contract between the parties. *Sellers v. Dickert*, 185 Ala. 206, 64 So. 40.

Where a number of mortgages with-

out particular description were assigned to plaintiff, testimony that mortgage involved was included in assignment was properly received, being identification of instrument referred to in written assignments and not a construction thereof. *Roy v. Greil* (Ala. App.), 77 So. 64.

§ 349. Showing Intent of Parties as to Subject Matter.

§ 349 (1) In General.

In action by telephone company's employee against defendant electric company for injury from contact with its wires, admitting testimony of attesting witness that, when release was signed to telephone company, there was no understanding that it released electric company, was proper. *Dwight Mfg. Co. v. Word* (Ala.), 75 So. 979.

Proof of Surrounding Circumstances.

—*Smith v. Webb*, 176 Ala. 596, 58 So. 913. See the title EVIDENCE, § 349 (1), vol. 6, p. 422.

Meaning of "Property" and "Things."

—*Napier v. Elliott*, 177 Ala. 113, 58 So. 435. See the title EVIDENCE, § 349 (1), vol. 6, p. 422.

Agreement to Exchange Lands.—In action for breach of agreement to exchange lands, evidence as to a mistake in the description of the land or as to a parol understanding not in the agreement held inadmissible, as the writing should be corrected, if at all, by a court of chancery. *Moore v. Whitmire*, 189 Ala. 615, 66 So. 601.

Note.—That the note sued on was ambiguous as to capacity in which defendants signed did not render admissible their testimony as to their undisclosed intentions in signing. *Planters' Chemical, etc., Co. v. Stearnes*, 189 Ala. 503, 66 So. 699.

Sale of Timber.—Where a contract for the sale of standing timber was the sole evidence of the intention of the parties, it was not permissible for the purchaser to state his undisclosed or secret intention. *Baskett Lumber, etc., Co. v. Gravelle* (Ala. App.), 73 So. 291.

§ 349 (2) In Construction of Deeds in General.

Where a conveyance definitely de-

scribes a tract or plot of land, evidence of the grantor's intent to convey such other tract can not be received in a court of law. *McMillan v. Aikin*, 189 Ala. 330, 66 So. 624.

Interpretation of Acknowledgment.

—*Bowles v. Lowery*, 181 Ala. 603, 62 So. 107. See the title EVIDENCE, § 349 (2), vol. 6, p. 423.

In aid of interpretation of acknowledgment to conveyance, evidence that signers of deed were all of children of a grantor is admissible, not contravening rule against admission of direct parol evidence to show intention. *Townley v. Corona Coal, etc., Co.* (Ala.), 77 So. 1.

§ 349 (4) In Extent or Interest Conveyed.

Where there was no ambiguity on face of a conveyance of a telephone plant and system, but it was developed by parol testimony that a third party owned part of property described in conveyance and warranted to be the property of grantor, parol evidence was admissible to show that it was not within contemplation of parties that conveyance should carry title to property thus owned. *Wilder v. Tatum* (Ala. App.), 73 So. 833.

XII. OPINION EVIDENCE.

(A) CONCLUSIONS AND OPINIONS OF WITNESSES IN GENERAL.

§ 354. Grounds for Admission.

As a general rule it is not permissible to examine witnesses as to their opinions or conclusions, and such questions as will elicit facts should be asked. *Briggs v. Birmingham R., etc., Co.*; 194 Ala. 273, 69 So. 926.

§ 355. Conclusions and Matters of Opinion or Facts.

§ 355 (1) In General.

As a general rule, a witness should not be allowed to state his conclusions or opinions. *Alabama, etc., R. Co. v. Flinn* (Ala.), 74 So. 246.

A witness should not be permitted to testify to his conclusions of fact or his reasons for his conclusions. *Louisville, etc., R. Co. v. Moorner*, 195 Ala. 344, 70 So. 277.

Parts of depositions shown by answers

to cross-interrogatories to have been mere conclusions of witness, and not based on personal knowledge, are properly excluded. *Rawleigh Medical Co. v. Hooks* (Ala. App.), 78 So. 310.

In action against a livery stable keeper for loss by fire of a horse and buggy bailed with him for hire, objections to questions to a witness as calling for a conclusion, held properly sustained. *Bricken v. Sikes*, 14 Ala. App. 187, 68 So. 801, certiorari denied in *Ex parte Bricken*, 194 Ala. 148, 69 So. 425.

Whether Another Mistaken.—It is not proper to ask one witness if another is mistaken. *Newberry v. Atkinson*, 184 Ala. 567, 64 So. 46.

Opinion Must Represent Recollection of Facts—Payment of Taxes.—A witness can not testify as to his opinions or belief that he has paid a poll tax, unless his opinion represents his recollection on facts. *Shepherd v. Sartain*, 185 Ala. 439, 64 So. 57.

§ 355 (2) Opinions and Conclusions in General.

In an action by a depositor to recover money which the bank had forwarded to another on check from defendant's agent, a question asked the cashier as to how he expected the money to get to the person intended was objectionable as calling for a surmise by the witness. *Bank v. Arnold & Co.*, 13 Ala. App. 462, 38 So. 699.

Undisclosed Mental Conclusions.—Where a witness testified to the circumstances, it was improper for him to testify as to his undisclosed mental operations by which he concluded that a certain person was his landlord. *Lefkovits v. Lester*, 11 Ala. App. 504, 66 So. 894.

In an action on a life policy which required insured before delivery to furnish a certificate that his health had continued good since application, insured's general agent can not testify that had the certificate shown insured had suffered from headaches, etc., the policy would not have been delivered, being mere mental conclusions not communicated to insured. *Massachusetts Mut. Life Ins. Co. v. Crenshaw*, 195 Ala. 263, 70 So. 768.

Official Conduct.—*Batson v. Alexander City Bank*, 179 Ala. 490, 60 So. 313. See the title EVIDENCE, § 353 (2), vol. 6, p. 429.

Answer to a Guess.—*Bachelder v. Morgan*, 179 Ala. 339, 60 So. 815. See the title EVIDENCE, § 355 (2), vol. 6, p. 427.

Meaning of Words in Due Bill.—In an action on a due bill, payable as provided by the "original contract," it was error to allow a witness to be asked to "interpret" the reference in the due bill. *Sellers v. Dickert*, 185 Ala. 206, 64 So. 40.

§ 355 (3) Facts in General.

The question to the plaintiff, "State how you came to leave the Pullman car?" was not improper, as calling for opinion; it being intended to elicit what occurred just before she left. *Southern R. Co. v. Hayes*, 194 Ala. 194, 69 So. 641.

In a suit to determine the location of a boundary line, the court properly permitted defendant, on cross-examination of a witness, offered to discredit the B. survey, to show that B., when making the survey, had his field notes with him. *Ward v. Lane*, 189 Ala. 340, 66 So. 499.

Reliance on Statement.—In an action for deceit in misrepresenting value of stock of goods, plaintiff could properly testify that he relied on defendant's statement as essential fact and not conclusion. *Hockensmith v. Winton* (Ala. App.), 77 So. 918.

Sale Price.—Testimony by a witness that he sold cotton "at 8½¢ in round lots" held not inadmissible as a conclusion. *Hooper v. Herring*, 14 Ala. App. 455, 70 So. 308.

Terms of Contract Referred To.—In determining what was the "original contract" referred to in the duebill sued on, it was proper to ask the witnesses what "the terms of the original contract" were. *Sellers v. Dickert*, 185 Ala. 206, 64 So. 40.

False Imprisonment—Detained against Will.—In an action for false imprisonment, it was proper to permit plaintiff to testify that he was kept or detained against his will. *Birmingham Ledger Co. v. Buchanan*, 10 Ala. App. 527, 65 So. 667.

A question to a servant as to who had superintendence over him under the rules of the master, is not objectionable as calling for a mere conclusion of the witness. *Choctaw Coal, etc., Co. v. Moore*, 184 Ala. 449, 63 So. 558.

Question as to where survey ran with reference to certain lands, boundary be-

tween which was in dispute, and answer thereto, held proper; the question not calling for an opinion. *Smith v. Bachus*, 195 Ala. 8, 70 So. 261.

§ 355 (8) Knowledge of Other Person.

While ordinarily a witness can not testify as to the knowledge of another, plaintiff, who claimed that defendant held herself out as a member of a firm for which he rendered services, may testify that defendant saw him while rendering such services. *Conner v. Ray*, 195 Ala. 170, 70 So. 130, cited in note in *Ann. Cas.* 1918A, 947.

Knowledge of Particular Fact.—*Louisville, etc., R. Co. v. Williams*, 183 Ala. 138, 62 So. 679. See the title EVIDENCE, § 355 (9), vol. 6, p. 434.

Testimony that plaintiff's alleged partner knew of defendant's transfer of his stock subscription to another is inadmissible, being the conclusion of the witness, and will not defeat recovery for effecting a sale. *Barbour v. Cantrell*, 193 Ala. 154, 69 So. 67, cited in note in *Ann. Cas.* 1918A, 947.

Lack of Knowledge.—In an action by a passenger for an assault while in the carrier's depot, it was not error to refuse to allow defendant to show that its agent knew nothing of any ill feeling between plaintiff and the third party. *Southern R. Co. v. Haynes*, 186 Ala. 60, 65 So. 339.

§ 355 (9) Motive and Intent.

Trial court properly declined to allow plaintiff to ask witness to explain why president of plaintiff bank was taking such an interest in his debts and was not taking any interest in him, as it called for the mere reason, conclusion, or opinion. *Aniston Banking, etc., Co. v. Green*, 197 Ala. 567, 73 So. 81.

§ 355 (10) Ability to See or Hear.

Ability to See Objects from Given Point.—*Republic Iron, etc., Co. v. Passafume*, 181 Ala. 463, 61 So. 327. See the title EVIDENCE, § 355 (10), vol. 6, p. 436.

§ 355 (11) Knowledge of Witness.

A question asked a witness, as to whether he knew that an amount due on a mortgage was correct, calls for personal knowledge of the witness and is not

objectionable. *Baker v. Lauderdale*, 14 Ala. App. 224, 69 So. 299.

§ 355 (13) Bodily Appearance or Condition.

Testimony of plaintiff that his injury had disabled him to perform his usual service, and could not perform service requiring constant use of his injured foot, held not objectionable as a conclusion. *Southern R. Co. v. Fisher (Ala.)*, 74 So. 580.

In an action for personal injury where plaintiff was asked whether his hand ever got well, his reply was "No, sir; it gets stiff yet," was a statement of a fact and not of an opinion. *Central, etc., R. Co. v. Stephenson*, 189 Ala. 553, 66 So. 495.

The testimony of a witness, familiar with the physical condition of an injured person before and after the injury, that she was very much worse after the accident, and was never thereafter a robust woman, was not a conclusion, but a shorthand rendering of the facts. *Perline v. Southern Bitulithic Co.*, 190 Ala. 96, 66 So. 705.

In an action on life policy, issue being whether insured died of heart trouble, held, court properly admitted testimony of insured's appearance; it not being opinion evidence. *National Order v. Lile (Ala.)*, 76 So. 450.

§ 355 (14) Mental Condition or Capacity.

Mental Condition before and after Injury.—In servant's action for injury involving liability and its extent, testimony of witnesses familiar with him as to his mental condition before and after the injury was admissible as conclusions of fact. *Woodward Iron Co. v. Spencer*, 194 Ala. 285, 69 So. 902.

Ability to Take Down and Assemble Automobile.—*Roden Grocery Co. v. Gipson*, 9 Ala. App. 164, 62 So. 388. See the title EVIDENCE, § 355 (14), vol. 6, p. 438.

§ 355 (17) Due Care and Proper Conduct.

In action for injuries by employee of company manufacturing ice, testimony of plaintiff that there was no dog on windlass used in drawing ice from plant held admissible, being simply descriptive of machine. *Caravella Shoe Co. v. Hubbard (Ala.)*, 78 So. 899.

In an action for wrongful death due to

an explosion of gas in a coal mine, testimony by witness that he was satisfied from the examination that intestate knew how to use a safety lamp required by Acts 1911, p. 518, § 50, held inadmissible as a conclusion. *Alverson v. Little Cahaba Coal Co. (Ala.)*, 77 So. 547.

Testimony as to whether it was a foreman's duty to warn employees as to the probability of their being injured was proper; it not invading the function of the jury. *Alabama, etc., R. Co. v. Flinn (Ala.)*, 74 So. 246.

Negligent Hand'ing of Train.—*Louisville, etc., R. Co. v. Bogue*, 177 Ala. 349, 58 So. 302. See the title EVIDENCE, § 355 (17), vol. 6, p. 439.

§ 355 (18) Nature, Condition, and Relation of Objects.

In an action for killing cow found buried on right of way, there was no error in allowing witness to testify whether he saw anything else had been buried on right of way, and what kind of a looking place it was, particularly where actual conditions were described by witnesses. *Louisville, etc., R. Co. v. Hayward (Ala.)*, 75 So. 22.

§ 355 (19) Value.

In an action on a fire policy, a question to a witness as to how much the property was diminished in value held not objectionable as calling for opinion as to amount recoverable. *Exchange Underwriters' Agency v. Bates*, 195 Ala. 161, 69 So. 956.

§ 355 (20) Quantity, Space, or Distance.

Distance.—Evidence as to distance in which a street car was stopped related to a fact, and was not opinion evidence. *Birmingham R., etc., Co. v. Drennen*, 190 Ala. 176, 67 So. 386.

§ 355 (21) Time.

Length of Time Necessary for Passengers to Alight.—*Birmingham R., etc., Co. v. Glenn*, 179 Ala. 263, 60 So. 111. See the title EVIDENCE, § 355 (21), vol. 6, p. 444.

Lack of Time to Stop Car.—*Alabama City, etc., R. Co. v. Heald*, 178 Ala. 626, 59 So. 461. See the title EVIDENCE, § 355 (21), vol. 6, p. 444.

Time to Leave Car.—In an action against a railroad for injuries to a con-

signee of freight while unloading a car, a witness, qualified by due observation and experience, was properly allowed to state that the consignee had no time to leave the car, after she received notice of an approaching train, before it was pushed up the track. *Alabama, etc., Railway v. Foley*, 195 Ala. 391, 70 So. 726.

§ 355 (23) Cause and Effect.

In landlord's action for rent, wherein defendant set up breach of agreement to repair, question to witness, "What caused its trouble?" referring to rusty condition of defendant's cookstove, did not call for a conclusion. *Buerger v. Mabry (Ala. App.)*, 73 So. 135.

Cause of Suicide.—*Woodmen of the World v. Wright*, 7 Ala. App. 255, 60 So. 1006. See the title EVIDENCE, § 355 (23), vol. 6, p. 445.

§ 355 (24) Performance or Breach of Contract.

Question to plaintiff, whether, at any time before suit, he paid or caused to be paid all claims against insurance company whose stock he had sold, did not call for conclusion, but for fact of payment. *Floyd v. Pugh (Ala.)*, 77 So. 323.

Claim of Land at Specified Time.—*Napier v. Elliott*, 177 Ala. 113, 58 So. 435. See the title EVIDENCE, § 355 (24), vol. 6, p. 446.

§ 355 (35) Title and Ownership.

Personal Property.—Ownership of personal property is a fact to which a witness may testify. *Dickey v. Vaughn (Ala.)*, 73 So. 507; *Ex parte Shoaf*, 186 Ala. 394, 64 So. 615, denying certiorari *Hagin v. Shoaf*, 9 Ala. App. 300, 63 So. 764, cited in note in *Ann. Cas.* 1916D, 259.

Ownership of House.—A plaintiff suing for the removal of the house on his land may testify that the house was his. *Snead v. Patterson*, 190 Ala. 43, 66 So. 664, cited in note in *Ann. Cas.* 1916D, 289.

Title to Land.—Possession is a fact to which a witness may testify or upon which he may give an opinion or conclusion, though this is not true as to title to land. *Blair v. Blair (Ala.)*, 74 So. 947.

Ownership after Deed.—*Middlebrooks v. Sanders*, 180 Ala. 407, 61 So. 898. See the title EVIDENCE, § 355 (25), vol. 6, p. 447.

§ 355 (26) Possession.

Exclusive Control.—*Ashford v. McKee*, 183 Ala. 620, 62 So. 879. See the title EVIDENCE, § 355 (26), vol. 6, p. 448.

Occupancy and Control.—*Ashford v. McKee*, 183 Ala. 620, 62 So. 879. See the title EVIDENCE, § 355 (26), vol. 6, p. 448.

In ejectment, where plaintiff relied upon the previous possession of his grantors, it is erroneous to allow witnesses to state that one of the grantors controlled possession of the land; the statement being a mere conclusion. *Hicks v. Burgess*, 185 Ala. 584, 64 So. 290.

A plaintiff suing for the removal of a house from his real estate may prove that he was in possession of the land as against the objection that the testimony was a conclusion. *Snead v. Patterson*, 190 Ala. 43, 66 So. 664, cited in note in Ann. Cas. 1916D, 289.

Possession at Specified Time.—*Ashford v. McKee*, 183 Ala. 620, 60 So. 879. See the title EVIDENCE, § 355 (26), vol. 6, p. 448.

Opinion as to Actual Condition of Property.—*Ashford v. McKee*, 183 Ala. 620, 62 So. 879. See the title EVIDENCE, § 355 (26), vol. 6, p. 448.

§ 355 (29) Agency in General.

In an action for the price of a car of beer, defendant's opinion or conclusion that a person was the agent of the plaintiff was properly excluded. *Colley v. Atlanta Brewing, etc., Co.*, 196 Ala. 374, 72 So. 45.

§ 355 (31) Partnership.

See ante, "Knowledge of Other Person," § 355 (8).

It was not competent for witness to state he had bought cotton from claimed partnership by estoppel "through Coughlin" (one of claimed partners), nor that they were engaged in cotton business as partners, etc., testimony being but conclusions. *Weil Bros. v. Hanks* (Ala.), 77 So. 333.

In suit to establish complainant's interest in a partnership, court will consider only legal evidence, leaving out of view testimony of witnesses who testified only as to their general understanding or opinion. *Reeves v. Jordan*, 197 Ala. 64, 72 So. 322.

§ 355 (32) Indebtedness.

See ante, "Knowledge of Witness," § 355 (11).

In an action where defense was that an account and note were usurious, testimony that defendant owed more interest at 8 per cent. than the note called for held admissible as a statement of fact. *Dominney v. Dowling-Martin Grocery Co.* (Ala.), 76 So. 977.

§ 355 (33) Damages.

Damage to Credit—Extent.—A witness having knowledge of the collective fact of credit may testify to the inferential fact of damage to credit, but not to its extent. *Bell v. Seals Piano, etc., Co.* (Ala.), 78 So. 806.

Condition of Property.—*Sloss-Sheffield Steel, etc., Co. v. Mitchell*, 181 Ala. 576, 61 So. 934, 938. See the title EVIDENCE, § 355 (33), vol. 6, p. 452.

§ 356. Matters Directly in Issue.

§ 356 (1) In General.

Exclusion of those portions of deposition which contain mere conclusions of witness on merits of ultimate issue to be tried by the jury is proper. *Karpeles v. City Ice Delivery Co.* (Ala.), 73 So. 642.

Evidence Held Inadmissible.—Refusal to allow engineer to state on cross-examination, that if he had sounded the whistle deceased would not have had time to get up was not error; it not being a matter for expert testimony. *Central, etc., R. Co. v. Ellison* (Ala.), 75 So. 159.

In an action for damages to an automobile from a collision, where the question whether defendant's crippled chauffeur could handle the car was for the jury, admission of lay opinion that one could run a car of that type as effectively with the hands as with the feet held error. *Blalack v. Blacksher*, 11 Ala. App. 545, 66 So. 863.

A bank cashier can not be asked, for the purpose of showing the extent of an agent's authority, who had charge of plaintiff's account in the bank, since such question called for a conclusion as to the fact in issue. *Bank v. Arnold & Co.*, 13 Ala. App. 462, 68 So. 699.

In proceedings to test the validity of a betterment assessment, a witness should

not be allowed to state directly whether the property has been damaged or benefited; that question being for the jury. *Tuscaloosa v. Hill*, 14 Ala. App. 541, 69 So. 486, certiorari denied in *Ex parte Hill*, 194 Ala. 559, 69 So. 598.

Questions propounded to plaintiff's manager on cross-examination in a suit in detinue, calling for his conclusions as to what the suit was based on and as to whether plaintiff's claim of title was based solely on a certain bill of sale, were properly excluded where the witness had testified as to the facts relative to the transactions. *Page v. Haas Bros. Packing Co.*, 9 Ala. App. 445, 63 So. 691.

Character of Possession of Land.—*Ashford v. McKee*, 183 Ala. 620, 62 So. 879. See the title EVIDENCE, § 356 (1), vol. 6, p. 454.

Nondelivery of Deed.—Where the only issue was whether a deed was delivered, a witness' conclusion that it was not delivered is incompetent, where she was allowed to state all facts bearing upon the issue. *Love v. Lee (Ala.)*, 75 So. 24.

Sufficiency of Drain Pipe.—A witness may not give his opinion as to the sufficiency of a drain pipe to carry off ordinary rainfall, where the sufficiency is in issue. *Nashville, etc., Railway v. Yarbrough*, 194 Ala. 162, 69 So. 582.

Which Car Caused Collision.—In an action for damages by automobile collision at a street intersection, answer to a question calling for witness' opinion whether plaintiff's car ran into defendant's or vice versa, was properly excluded. *Ray v. Brannan*, 196 Ala. 113, 72 So. 16.

Opportunity to Poison Dogs.—Question whether there was opportunity for any one to administer poison to dogs while in baggage room held improper, as calling for guess on issue which was for jury. *Louisville, etc., R. Co. v. Dickson (Ala. App.)*, 73 So. 750, certiorari denied in 74 So. 1005.

Whether Anything of Value Received for Note.—In a suit on a note, where defendant was allowed great freedom in showing that the note had been obtained by fraud and was without consideration, it was not improper to exclude his conclusions as to whether he had ever received anything of value for the note.

Bruce v. Citizens' Nat. Bank, 185 Ala. 221, 64 So. 82.

That Duebill Given for Balance of Purchase Price.—In an action on a duebill, payable as provided in the "original contract," it was error to admit testimony that it was given for the balance of the purchase price of certain property, since the witness could not state his conclusion upon a question which was for the jury to decide. *Sellers v. Dickert*, 185 Ala. 206, 64 So. 40.

Prompt Performance of Work.—In an action for mental suffering from delay in delivery of a telegram, held proper to exclude conclusions of defendant's agents as to whether they had performed their work promptly. *Western Union Tel. Co. v. Holland*, 11 Ala. App. 510, 66 So. 926.

§ 356 (2) Damages.

A question as to what in defendant's judgment he had been damaged by the defective and improper condition in which the guttering was done on his residence held improper as calling for witness' conclusion. *Troy Lumber, etc., Co. v. Boswell*, 186 Ala. 409, 65 So. 141.

§ 356 (4) Due Care and Proper Conduct.

It was proper for the court to decline to compel employee to express opinion as to whether under existing conditions his work was dangerous, or whether danger was obvious, or whether he was discharged on account of a fight. *Alabama, etc., R. Co. v. Flinn (Ala.)*, 74 So. 246.

In an action for death of a locomotive engineer, testimony of one who had left a locomotive, other than deceased's, where it caused the accident, as to whether his action was proper, was an opinion as to a fact in issue. *Louisville, etc., R. Co. v. Fleming*, 194 Ala. 51, 69 So. 125.

Whether Certain Acts Would Constitute Negligence.—It was erroneous to refuse to allow a witness to give his opinion as to whether certain acts would constitute negligence. *Alabama, etc., R. Co. v. Flinn (Ala.)*, 74 So. 246.

§ 356 (7) Mental Condition or Capacity.

In a will contest, nonexpert witness can not give an opinion whether testator was mentally competent to execute will. *Wear v. Wear (Ala.)*, 76 So. 111.

§ 356 (8) Nature, Condition, and Relation of Objects.

Injury from Falling Timber.—Alabama, etc., R. Co. v. Neal, 8 Ala. App. 591, 62 So. 554. See the title EVIDENCE, § 356 (8), vol. 6, p. 459.

§ 356 (10) Cause and Effect.

Cause of Fire.—In action for destruction of building by fire from defendant's locomotives, refusing to allow plaintiff's witnesses to state opinions of cause of fire was not error, since on this issue the jury only could find from all the evidence. Douglass v. Central, etc., R. Co. (Ala.), 78 So. 457.

Suicide as Cause of Death.—A statement by a physician that assured committed suicide held a statement as to the material fact in inquiry and was properly excluded. Sovereign Camp W. O. W. v. Ward, 196 Ala. 327, 71 So. 404.

Cause of Odor.—A witness, who testified that an obnoxious odor came from a creek in which defendant was dumping refuse may testify what produced the odor. Stouts Mountain Coal, etc., Co. v. Tedder, 189 Ala. 637, 66 So. 619.

Effect of Eating Oysters.—Travis v. Louisville, etc., R. Co., 183 Ala. 415, 62 So. 851. See the title EVIDENCE, § 356 (10), vol. 6, p. 459.

§ 357. Inferences or Impressions from Collective Facts.

Whether Another Witness Mistaken.—It is not permissible to ask witness if another witness was not mistaken in his statement of certain language used. Georgia Cotton Co. v. Lee, 196 Ala. 599, 72 So. 158.

That Bank Suspended Business.—A witness in a position to know may properly testify that a bank suspended business without stating the facts on which he based his statement of the collective fact, one objecting having the privilege of cross-examination as to the subsidiary facts. Bank v. Taylor, 196 Ala. 665, 72 So. 264.

Whether Malicious Proceedings Begun by Advice of Attorney.—In an action for malicious prosecution, a question to a witness to state whether the proceedings were taken out under the advice of an attorney held properly excluded, since

the inference was not for the witness, but for the jury. Fowlkes v. Lewis, 10 Ala. App. 543, 65 So. 724.

Circumstances Surrounding Injury from Car.—Birmingham R., etc., Co. v. Saxon, 179 Ala. 136, 59 So. 584. See the title EVIDENCE, § 357, vol. 6, p. 462.

Persons Crossing Railroad Track.—Louisville, etc., R. Co. v. Williams, 183 Ala. 138, 62 So. 679. See the title EVIDENCE, § 357, vol. 6, p. 460.

Damaged "Mighty Bad."—Witnesses in answer to a question to the extent of damages to a house may state that it looked as if it was damaged "mighty bad"; this seeming to be the only answer that they can give. Louisville, etc., R. Co. v. Lynne (Ala.), 75 So. 14.

§ 358. Special Knowledge as to Subject Matter.

§ 358 (1) In General.

In assumpsit, defended on the ground that plaintiff had converted defendant's timber, objection to defendant's question to a witness as to how much timber there was on certain land in his judgment was properly sustained, in absence of showing of witness' experience in such matters or his knowledge of the vicinity. Steverson v. Agee & Co., 14 Ala. App. 448, 70 So. 298.

§ 358 (2) Bodily Condition.

A witness, shown to be familiar with the physical condition of an injured person before and after the injury, was competent to state whether there was a change in her condition after the accident. Perrine v. Southern Bitulithic Co., 190 Ala. 96, 66 So. 705.

§ 358 (3) Mental Condition or Capacity.

Opportunity to Form Judgment.—To authorize a nonexpert to give his opinion of the existence of an unsound condition of mind, he must have had the opportunity to form a judgment. Melvin v. Murphy, 184 Ala. 188, 63 So. 546.

Opinion of a nonexpert witness as to sanity is admissible when based upon his own personal knowledge, observation, acquaintance, and experience. Woodward Iron Co. v. Spencer, 194 Ala. 285, 69 So. 902; Melvin v. Murphy, 184 Ala. 188, 63 So. 546.

A nonexpert witness who had known testator for 40 years, but had seen him frequently and had business transactions with him during the last 10 or 20 years, is competent to express an opinion as to the mental condition of testator. *Cummings v. McDonnell*, 199 Ala. 96, 66 So. 717.

Absence of Indications of Insanity.—Witness shown to have known the person inquired about may testify that he never saw indications or evidence of his insanity. *Woodward Iron Co. v. Spencer*, 194 Ala. 285, 69 So. 902.

Opinion of stepson of testatrix as to her mental condition when he visited her when will was made was admissible, he having known her intimately for years. *Barnett v. Freeman*, 197 Ala. 142, 72 So. 395.

Opinion of Wife.—Wife of grantor in a questioned deed by reason of her long association with her husband, together with facts detailed by her of her own personal knowledge, evidencing husband's mental derangement, was competent to express her opinion based on such facts as to unsound condition *vel non* of her husband's mind. *Bates v. Oden* (Ala.), 73 So. 921.

On the issue of defendant's insanity at the time of his execution of a mortgage, his wife, detailing unusual circumstances as to his conduct thereafter, held competent to state her opinion of his sanity at that time. *Melvin v. Murphy*, 184 Ala. 188, 63 So. 546.

§ 358 (6) Railroadings.

Where a witness stated his experience of 12 years in loading oil tank cars, sufficient predicate was laid to permit his testimony that a car was properly loaded. *Atlantic, etc., Railway v. Enterprise Cotton Oil Co.* (Ala.), 74 So. 232.

Where plaintiff showed that defendant was negligent in loading cars on an inclined track without tightening the brakes, held proper to permit witnesses to testify that to so load cars had a tendency to release the brakes. *American Oak Leather Co. v. Atwood*, 191 Ala. 450, 67 So. 663.

§ 358 (11) Nature, Condition, and Relation of Objects.

Ancient Surveyor's Marks Showing Correct Line.—*Ashford v. McKee*, 183

Ala. 620, 62 So. 879. See the title EVIDENCE, § 358 (11), vol. 6, p. 472.

§ 358 (14) Value of Real Property.

Witness, who showed acquaintance with property in question in proceedings to condemn right of way and general situation in neighborhood, was properly allowed to testify to his opinion that property was suitable for building of dwellings. *Ensign Yellow Pine Co. v. Hohenberg* (Ala.), 75 So. 897.

§ 358 (15) Value of Personal Property.

In trover plaintiff, who was acquainted with the property and knew the prices at which it and similar property had been sold and rented, held qualified to testify as to its value and its rental value. *Hodges v. Kyle*, 9 Ala. App. 449, 63 So. 761.

In action for purchaser's breach of contract to buy cotton seed, where proof showed there was at time specified for delivery open market for seed at point of delivery, testimony of witness who did not know market value at that point, but only at other places, was inadmissible. *Georgia Cotton Oil Co. v. Carlisle Seed Co.* (Ala.), 75 So. 984.

Where witness in action for breach of contract to sell cotton seed disclosed that he was not familiar with prices, and the questions were not confined to prices at time and place involved, his testimony was properly excluded. *Whitehead v. Jasper Oil, etc., Co.* (Ala.), 77 So. 42.

§ 359. Subjects of Opinion Evidence in General.

In a suit against a railroad company for burning plaintiff's property in a building adjacent to the tracks, the question whether matches found within three feet of the building would have been consumed by its heat held objectionable. *Knowlton v. Central, etc., R. Co.*, 192 Ala. 456, 68 So. 281.

§ 362. Bodily Appearance or Condition.

Painful Injury to Witness.—Where a passenger fell down a flight of steps leading to the carrier's depot, the passenger may testify that his side was injured and hurt him badly. *Central, etc.*

R. Co. v. Campbell, 10 Ala. App. 288, 64 So. 540.

Appearance of Anger.—Long v. Seigel, 177 Ala. 338, 58 So. 380. See the title EVIDENCE, § 362 (1), vol. 6, p. 478.

Appearance of Being Very Sick.—Graduate and experienced nurse held properly permitted to testify that person appeared very sick. Barfield v. South Highland Infirmary, 191 Ala. 553, 68 So. 30.

One Leg Longer than Other.—A witness, though not an expert, may testify that one leg is longer, larger, or straighter than another. Sloss-Sheffield Co. v. Ross (Ala.), 77 So. 686.

§ 363. Mental Condition or Capacity.

In ejectment testimony showing mental and physical condition of grantor of deed was admissible. Langley v. Shanks (Ala.), 75 So. 924.

§ 370. Value.

§ 371. — In General.

A nonexpert can give an opinion as to value. Alabama, etc., R. Co. v. Love-man Compress Co., 196 Ala. 683, 72 So. 311.

§ 373. — Real Property.

In suit for work done and material furnished, refusal to permit defendant's witness to state his opinion as to value of house as constructed was not error, where witness was not shown to be qualified to give an opinion of such value. Catanzano v. Jackson (Ala.), 73 So. 510.

The rental value of real estate is a collective fact, provable by any person possessing a requisite knowledge of the conditions that influence such value. Pratt Consol. Coal Co. v. Morton, 14 Ala. App. 194, 68 So. 1015.

Value can be proved by a nonexpert, and in an ejectment suit opinion of a witness who knew the land as to its rental value was unobjectionable. Landers v. Hayes, 196 Ala. 533, 72 So. 106.

§ 374. — Personal Property.

In detinue to recover for saw and planer mill machinery, a witness, shown to be qualified was properly allowed to give his opinion of the value of the property, and of the hire and use thereof;

its weight being for the jury. Gossett v. Morrow, 187 Ala. 387, 65 So. 826.

Knowledge of Another.—On an issue as to the value of mules, a question calling for the witness' opinion as to what some other person would know was properly excluded. Jones v. White, 189 Ala. 622, 66 So. 605.

§ 376. Time.

In an action by a passenger for an assault on him by a third party while in defendant's depot, it was not error to refuse to allow a witness to give his opinion that there was not sufficient time for the agent to interfere after the third party addressed plaintiff, and before he struck him. Southern R. Co. v. Haynes, 186 Ala. 60, 65 So. 339.

Length of Time Train Stopped at Station.—Louisville, etc., R. Co. v. DiIburn, 178 Ala. 600, 59 So. 438. See the title EVIDENCE, § 376, vol. 6, p. 490.

Time to Stop Electric Car.—Billingsley v. Nashville, etc., Railway, 177 Ala. 342, 58 So. 433. See the title EVIDENCE, § 376, vol. 6, p. 489.

§ 377. Rate of Speed.

Of Automobile.—Nonexpert testimony is admissible to show the speed of an automobile at the time of an accident. Cedar Creek Store Co. v. Steadham, 187 Ala. 622, 65 So. 984, cited in note in Ann. Cas. 1917D, 613.

Nonexpert witnesses riding in motorcar at time of accident are competent to testify as to its speed. Galloway v. Perkins (Ala.), 73 So. 956.

Of Train.—Nonexpert witness who has observed speed of trains may give his opinion of speed a train is running, and the fact that he was in direct line of approaching train, even if bearing upon his credibility, would not affect admissibility of his opinion. Louisville, etc., R. Co. v. Rayburn (Ala.), 73 So. 461; Seaboard, etc., Railway v. Roy, 14 Ala. App. 202, 69 So. 233, certiorari denied in Ex parte Seaboard, etc., R. Co., 193 Ala. 679, 69 So. 1019.

§ 378. Cause and Effect.

Animal Injured by Train.—Nashville, etc., Railway v. Bingham, 182 Ala. 640,

62 So. 111. See the title EVIDENCE, § 378, vol. 6, p. 490.

§ 379. Damages.

§ 379½. — In General.

In action for damages to credit from wrongful attachment, where witness testified that the business of the defendant in attachment was conducted largely on credit, and in the course thereof the company guaranteed musical instruments sold, and that it was a benefit that such vendor should have the reputation of being willing and able to stand back of its guaranties, he was properly permitted to give an opinion that the business had been damaged. *Bell v. Seals Piano, etc., Co.* (Ala.), 78 So. 806.

§ 381. — Injuries to Property.

Amount of Damage to Crop.—It was error, in an action for injury to land by the breaking and overflow of a dam on defendant's land, to permit plaintiff to testify as to the amount of damages to his crop; the proper course being to testify to the facts showing the amount of damage. *Sloss-Sheffield Steel, etc., Co. v. Webb*, 184 Ala. 452, 63 So. 518.

Whether Property Damaged or Benefited by Public Improvement.—Where the question is whether property has been either damaged or benefited by a public improvement, the proper form of inquiry should be as to its value before and after the damage or benefit, and a witness can not be asked to state generally whether it has been damaged. *Huntsville v. Pulley*, 187 Ala. 367, 65 So. 405.

Effect of Impounding Water by Dam.—One having no knowledge, practical or theoretical, of the effect of the impounding of water by a dam on a particular tract is incompetent to testify as to the value of the land after the taking. *Alabama Power Co. v. Carden*, 189 Ala. 384, 66 So. 596.

§ 383. Determination of Question of Competency.

Discretion of Court.—Whether nonexpert witness is qualified to give an opinion upon soundness of testator's mind rests in sound judicial discretion of trial

court. *Wear v. Wear* (Ala.), 76 So. 111; *Melvin v. Murphy*, 184 Ala. 188, 63 So. 546.

The determination of the qualification of a witness to give an opinion not expert by one sufficiently informed to have an opinion is a preliminary inquiry, resting in the sound discretion of the court, under the evidence. *Hamilton v. Cranford Mercantile Co.* (Ala.), 78 So. 401.

§ 384. Examination of Witnesses.

§ 385. — Testimony in General.

In suit for work done and material furnished, refusal to permit defendant's witness to state his opinion as to value of house as constructed was not error, where the question was framed to elicit an answer as to value at time of trial, and not at completion of work. *Catanzano v. Jackson* (Ala.), 73 So. 510.

§ 386. — Facts Forming Basis of Opinion.

§ 386 (1) In General.

Though a witness, for whose negligence an action is brought, should be required to state the facts before being asked whether he did all that he could to avoid the injury, there was no error in allowing an engineer to be asked such question before stating the facts as to what he did to stop a train, where, before he left the stand, he stated all the facts. *Blackmon v. Central, etc., R. Co.*, 185 Ala. 635, 64 So. 592.

Duration of Fire and Chance of Saving Building.—A fireman, not an expert, may give an opinion as to length and duration of a fire and chances of saving a building in the absence of an explosion of dynamite, where he is examined as to facts on which he bases his opinion. *Hamilton v. Cranford Mercantile Co.* (Ala.), 78 So. 401.

Expressions of Pain—Impairment of Hearing—Change in Mental Condition.

—In a servant's action for injury, held, that his mother, with whom he had lived from childhood, might testify to expressions of pain from the injury, his impairment of hearing, and to a change in his mental condition, together with facts on which she based such statements. *Wood-*

ward Iron Co. *v.* Spencer, 194 Ala. 265, 69 So. 902.

False Imprisonment—Fact of Arrest.—In a false imprisonment action, the answer of a witness, that he thought plaintiff was arrested, is admissible where his subsequent testimony supports such statement. *Central, etc., R. Co. v. Carlock*, 196 Ala. 659, 72 So. 261.

Use and Occupation—Looking to Defendants as Tenants.—In an action for use and occupation of premises of which defendants had agreed to take a lease, held not reversible error for the court to allow plaintiff's rental agent to testify that he looked to defendants as tenants, he having stated the facts on which the conclusion was based. *Haas Bros. v. Craft*, 9 Ala. App. 404, 64 So. 163.

§ 386 (3) Mental Condition or Capacity.

To authorize a nonexpert to give his opinion of the existence of an unsound condition of mind, the facts upon which he bases such judgment should be stated. *Melvin v. Murphy*, 184 Ala. 188, 63 So. 546.

Nonexpert witness' opinion that testator was mentally incapable of transacting ordinary business is inadmissible, where facts upon which such opinion was based were not stated. *Wear v. Wear* (Ala.), 76 So. 111.

In will contest for lack of mental capacity, properly qualified nonexpert witness may state whether testator was capable of transacting ordinary business, provided, if his answer be negative, the facts upon which his opinion is based are stated. *Wear v. Wear* (Ala.), 76 So. 111.

§ 387. — Cross-Examination and Re-Examination.

In assumpsit to recover on sale of cotton for underweight and undergrading, plaintiff held to have been properly allowed to cross-examine a witness as to his experience of cotton losses in time he had been in business. *Georgia Cotton Co. v. Lee*, 196 Ala. 599, 72 So. 158.

On cross-examination of witnesses to value of buildings destroyed by fire set out by a railroad locomotive, it was competent to inquire as to items and present value of materials incorporated in build-

ing. *Southern R. Co. v. Slade*, 192 Ala. 568, 68 So. 867.

Answer Not Strictly Responsive.—Where a witness on cross-examination was pressed to state the reasons for her conclusion, her answer, though not strictly responsive, held properly admitted. *Southern Bitulithic Co. v. Perrine*, 191 Ala. 411, 67 So. 601.

(B) SUBJECTS OF EXPERT TESTIMONY.

§ 388. Matters of Opinion or Facts.

Map—Location and Surroundings of Railway Track.—It was not error to admit testimony of an expert, in connection with a map, to show the location and surroundings of a railway track. *Sudduth v. Central, etc., R. Co.* (Ala.), 77 So. 350.

In action for leaving pus drainage tube in plaintiff's body, question to and reply of other surgeon held not improper as opinion as to how witness would have secured tube in plaintiff's body. *Talley v. Whitlock* (Ala.), 73 So. 976.

In action for malpractice in leaving pus drainage tube in plaintiff's body after operation, question to medical witness and his answer held competent as mere statement of fact of condition of tube when later taken from plaintiff's body. *Talley v. Whitlock* (Ala.), 73 So. 976.

§ 389. Matters Directly in Issue.

Opinion Affirming or Denying Material Issue.—The fact that a question to an expert will elicit an opinion which practically affirms or denies a material issue will not render the question improper. *Harbison-Walker Refractories Co. v. Scott*, 185 Ala. 641, 64 So. 547.

Cause of Illness.—*Travis v. Louisville, etc., R. Co.*, 183 Ala. 415, 62 So. 851, cited in notes in L. R. A. 1915A, 1073, 1078. See the title EVIDENCE, § 389, vol. 6, p. 497.

Mental Condition.—In a will contest, expert witness can not give opinion whether testator was mentally competent to execute will. *Wear v. Wear* (Ala.), 76 So. 111.

Inefficiency of Machinery.—*Walshe Mfg. Co. v. Smith Lumber Co.*, 178 Ala

472, 59 So. 455. See the title EVIDENCE, § 389, vol. 6, pp. 497, 498.

Competency of Employee.—*Owen v. Alabama, etc., R. Co.*, 181 Ala. 552, 61 So. 924. See the title EVIDENCE, § 389, vol. 6, p. 498.

As to Blasting.—An expert witness was properly asked in an action for damage to property from blasting, whether the blasting was heavier than was reasonably necessary to remove solid rock, and whether solid rock could be removed with less severe blasting, even if that was a question at issue. *Harbison-Walker Refractories Co. v. Scott*, 185 Ala. 641, 64 So. 547.

Necessity for Keeping Watchman.—In an action against a livery stable keeper for the loss by fire of horse and buggy bailed with him, evidence of a witness whether it was necessary for defendant to keep a watchman at his stable at night to guard against loss by fire held inadmissible. *Bricken v. Sikes*, 14 Ala. App. 187, 68 So. 801, certiorari denied in *Ex parte Bricken*, 194 Ala. 148, 69 So. 425.

Though validity of ordinance as to insulation of arc lamps was a question for the court, held, that it might elicit evidence from experts to enable it to intelligently pass upon the question. *Briggs v. Birmingham R., etc., Co.*, 194 Ala. 273, 69 So. 926.

§ 390. Matters of Common Knowledge or Observation.

Proper Method of Examining Oysters.—*Travis v. Louisville, etc., R. Co.*, 183 Ala. 415, 62 So. 851. See the title EVIDENCE, § 390, vol. 6, p. 499.

§ 391. Matters Involving Scientific or Other Special Knowledge in General.

Time Necessary to Become Expert Lineman.—*Citizens' Light, etc., Co. v. Lee*, 182 Ala. 561, 62 So. 199. See the title EVIDENCE, § 391, vol. 6, p. 500.

Ptomaine Poisoning.—In action against café keepers for serving tainted food, opinion of physician of long experience in general practice concerning ptomaine poisoning and detection of taint in meats held admissible. *Greenwood Café v. Lovinggood*, 197 Ala. 34, 72 So. 354.

Testimony of Surveyor.—Where a sur-

veyor had qualified as an expert in a boundary line dispute, he was properly permitted to state that in his opinion a certain "corner" was a "government corner," and that certain trees were "witness trees." *Ward v. Lane*, 189 Ala. 340, 66 So. 499.

§ 391½. Bodily Conditions.

Duration of Disability.—In action on health policy, a qualified physician familiar with plaintiff's ailment and who had actually treated him may express his opinion regarding probable duration of plaintiff's disability. *National Life Ins. Co. v. Hedgecoth* (Ala. App.), 77 So. 422.

Prevention of Blood Clot.—Experts held properly permitted to testify as to whether there was any way known to the medical profession by which a blood clot in certain cases could be prevented. *Barfield v. South Highland Infirmary*, 191 Ala. 553, 68 So. 30.

§ 394. Due Care and Proper Conduct in General.

Proper Method of Mining.—*Warrior-Pratt Coal Co. v. Shereda*, 183 Ala. 118, 62 So. 721. See the title EVIDENCE, § 394, vol. 6, p. 501.

§ 395. Construction and Repair of Structures, Machinery, and Appliances.

Safety of Place or Appliance.—An expert witness may give his opinion as to the safety of a place or appliance. *Burnwell Coal Co. v. Setzer*, 191 Ala. 398, 67 So. 604.

Insulation and Reasonableness of Ordinance Relating Thereto.—In action for death, testimony of experts held admissible on questions as to insulation of electric arc lamps and reasonableness of an ordinance relative to their insulation. *Briggs v. Birmingham R., etc., Co.*, 194 Ala. 273, 69 So. 926.

Conditions Rendering Insulation Useless.—Particular physical conditions if any, under which insulation may become entirely useless, are matters for expert opinion. *Dwight Mfg. Co. v. Word* (Ala.), 75 So. 979.

Whether it was necessary to clean an engine while the steam was on or to place the servant's hand where it would be injured if the engine started, was a

subject for expert testimony. *Sloss-Sheffield Steel, etc., Co. v. Reid*, 184 Ala. 647, 64 So. 334.

§ 396. Management and Operation of Vehicles, Machinery, and Appliances.

§ 396 (1) In General.

In an action for the death of a child struck by an automobile, question asked defendant whether there was time for him to do anything after the child started across the road held properly permitted. *Reaves v. Maybank*, 193 Ala. 614, 69 So. 137.

How many men were necessary to handle the timbers which caused the injury presents a proper subject for expert opinion. *Sloss-Sheffield Steel, etc., Co. v. Smith*, 185 Ala. 607, 64 So. 337.

§ 396 (3) Railroads in General.

A merchant tailor without experience in operation of cars was properly denied the opportunity to state whether, if a car on a steep up grade should start backwards, it would cause a violent movement of the car to apply the brake or the power. *Erwin v. Birmingham R., etc., Co. (Ala.)*, 76 So. 915.

Testimony of expert locomotive engineer that train running 25 miles an hour as it approached decedent on the track "ought to be stopped by using all means of emergency in 90 to 110 feet" was admissible, where it appeared that word "ought" was used in sense of "could." *Louisville, etc., R. Co. v. Rayburn (Ala.)*, 73 So. 461.

Methods of Stopping Train.—Where it was claimed that an engineer did not take all possible steps to avoid running down plaintiff's intestate, after discovering his peril, expert testimony as to methods of stopping the engine was properly received. *Walker v. Alabama, etc., Railway*, 194 Ala. 360, 70 So. 125.

Exercise of Proper Care to Stop Train.—It was proper for defendant railroad company to ask its engineer and conductor, both experts, if they did all they could to stop the train and avert the accident. *Choate v. Southern R. Co.*, 119 Ala. 611, 24 So. 373.

That No Unnecessary Noises Made.—In an action for injuries at a highway

crossing by frightening plaintiff's mule, the trainmen could testify as experts that no unusual or unnecessary noises were made at the time of the injury. *Boan v. Smith Lumber Co.*, 184 Ala. 535, 63 So. 564.

§ 396. Custom or Usage.

Whether it was customary to clean the engine while in operation, was a subject for expert testimony. *Sloss-Sheffield Steel, etc., Co. v. Reid*, 184 Ala. 647, 64 So. 334.

§ 402. Cause and Effect.

§ 404. — Injuries to the Person.

§ 404 (1) Cause.

An expert may testify that hypothesized facts could produce the physical effects shown. *Pullman Co. v. Meyer*, 195 Ala. 397, 70 So. 763.

Cause of Death.—*Pacific Mut. Life Ins. Co. v. Shields*, 182 Ala. 106, 62 So. 71, cited in note in L. R. A. 1915A, 1071; *Empire Life Ins. Co. v. Gee*, 178 Ala. 492, 60 So. 90, cited in note in L. R. A. 1915A, 1071. See the title EVIDENCE, § 404 (1), vol. 6, p. 505.

Whether insured died from violence or accidental cause or from bodily infirmity or disease held a proper question for expert evidence. *National Life, etc., Ins. Co. v. Singleton*, 193 Ala. 84, 69 So. 80.

Cause of Pain.—In a servant's action for injuries, where the issues were the negligence of the employer and the extent of the injury, it was not error to permit a physician who examined the plaintiff to state his conclusion on the facts in the case as to the cause of plaintiff's pain. *Lusk v. Britton (Ala.)*, 73 So. 492.

Cause of Wreck.—In an action against a mining company for injuries to its employee through a defect in the track of a tramroad, what caused the wreck of the tram car was not a proper subject for expert testimony. *Birmingham Fuel Co. v. Stocks*, 14 Ala. App. 136, 68 So. 368, certiorari denied in *Ex parte Birmingham Fuel Co.*, 193 Ala. 675, 69 So. 1017.

§ 404 (2) Effect.

In action for homicide, where defendant pleaded self-defense, testimony of

physicians after examining body that certain wounds caused paralysis and instant death is admissible. *Kuykendall v. Edmondson* (Ala.), 77 So. 24.

In an action for wrongful ejection of a passenger, testimony of a physician as to plaintiff's physical condition and as to the probable result of the wrongful ejection and of plaintiff's carrying valises held proper. *Central, etc., R. Co. v. Gross*, 192 Ala. 354, 68 So. 291.

§ 404½. Damages.

Injuries to Crops.—In an action for damages to growing crops caused by sulphurous fumes, experts may testify as to the crop production, and the amount it should have been and was on similar land, where no fumes were present. *International Agr. Corp. v. Abercrombie*, 184 Ala. 244, 63 So. 549, 49 L. R. A., N. S., 415.

(C) COMPETENCY OF EXPERTS.

§ 405. Necessity of Qualification.

Locomotive Engineer.—*Louisville, etc., R. Co. v. Bogue*, 177 Ala. 349, 58 So. 392. See the title EVIDENCE, § 405, vol. 6, p. 505.

§ 406. Knowledge, Experience, and Skill in General.

A general knowledge of the department to which a specialty belongs qualifies a witness to testify thereto. *Louisville, etc., R. Co. v. Lovell*, 196 Ala. 94, 71 So. 995.

Medical Experts.—In action on accident policy, witness, who did not say he was physician, but said he was surgeon, was properly allowed to testify as medical expert. *Maryland Casualty Co. v. McCallum* (Ala.), 75 So. 902.

Tracking and Identity of Automobile.—Where a witness has given special attention to tracking automobiles by the marks of their tires, the admission of his opinion as to the identity of an automobile which he tracked is not error. *Beatty v. Palmer*, 196 Ala. 67, 71 So. 422.

As to Oysters.—Medical men, cooks, and persons long accustomed to handling and preparing oysters for the table may testify as experts in respect thereto.

Louisville, etc., R. Co. v. Travis, 192 Ala. 453, 68 So. 342.

Injury from Falling Block.—Alabama, etc., *R. Co. v. Neal*, 8 Ala. App. 591, 62 So. 554. See the title EVIDENCE, § 406, vol. 6, p. 506.

§ 406. Machinery and Mechanical Devices and Appliances.

In action for damages to an automobile from a collision, witness engaged in automobile business, and who had sold the car to defendant, held not qualified as an expert on its mechanism or mechanical operation. *Blalack v. Blacksher*, 11 Ala. App. 545, 66 So. 863.

Master Mechanic.—*Caldwell-Watson Foundry, etc., Co. v. Watson*, 183 Ala. 326, 62 So. 859, cited in note in 51 L. R. A., N. S., 571. See the title EVIDENCE, § 409, vol. 6, p. 509.

§ 410. Construction and Operation of Railroads.

As to Sparks from Locomotive.—A witness who admitted he did not know how proper locomotive spark arresters were constructed should not be questioned as to how far sparks might be seen on the ground when emitted through a proper one. *Knowlton v. Central, etc., R. Co.*, 192 Ala. 456, 68 So. 281.

Method of Stopping Car or Train.—*Birmingham R., etc., Co. v. Saxon*, 179 Ala. 136, 59 So. 584. See the title EVIDENCE, § 410 (1), vol. 6, p. 510.

Proper Method of Loading Cattle.—*Nashville, etc., Railway v. Hinds* (Ala. App.), 60 So. 409. See the title EVIDENCE, § 410 (1), vol. 6, p. 510.

§ 413. Value.

Services in Repair of House.—Contractor of long experience, acquainted with valuation in his line in neighborhood where work was done, was competent to give his opinion as to reasonable value of work and material contributed by plaintiff to the repair of defendant's house. *Denson v. Acker* (Ala.), 78 So. 76.

Value of Attorney's Services.—*Faulk & Co. v. Hobbie Grocery Co.*, 178 Ala. 524, 59 So. 450, cited in notes in Ann. Cas., 1914D, 369, 371. See the title EVIDENCE, § 413 (1), vol. 6, p. 514.

§ 415. Cause and Effect.

Cause of Loss by Fire.—Where plaintiff asserted that a loss by fire resulted from the defendant street railway company running its car upon the hose, firemen present at the fire and familiar with the conditions are qualified to give expert testimony that if car had not been run on the hose the loss would have been avoided. *Birmingham, etc., R. Co. v. Williams*, 190 Ala. 53, 66 So. 653.

Cause of Miscarriage.—In an action against a railroad for miscarriage resulting to plaintiff by being searched on defendant's premises for a stolen watch, physician's opinion evidence as to whether an abortion had been performed on plaintiff, held admissible. *Nashville, etc., Railway v. Crosby*, 194 Ala. 338, 70 So. 7.

Cause of Wreck.—In an action against a mining company for injuries to its employee in the wreck of a car on a tramroad, a witness shown to have been working in mines for 19 years with experience in track work and driving was qualified as an expert to answer what, in his judgment, caused the wreck. *Birmingham Fuel Co. v. Stocks*, 14 Ala. App. 136, 68 So. 568, certiorari denied in *Ex parte Birmingham Fuel Co.*, 193 Ala. 675, 69 So. 1017.

§ 416. Preliminary Evidence as to Competency.

Where surgeon sued for malpractice testified as expert, evidence as to his age, residence, etc., held admissible, though given by another witness rather than by himself. *Barfield v. South Highland Infirmary*, 191 Ala. 553, 68 So. 30.

§ 417. Determination of Question of Competency.

Question for Court Not Jury.—Whether witnesses were qualified to testify as experts was a question for the court, and not for the jury. *Briggs v. Birmingham R., etc., Co.*, 194 Ala. 273, 69 So. 926.

Discretion of Court.—The determination of the qualification of a witness as an expert is a preliminary matter addressed to the trial court's discretion. *Burnwell Coal Co. v. Setzer*, 191 Ala. 398, 67 So. 604; *Southern Bitulithic Co. v. Perrine*, 191 Ala. 411, 67 So. 601; *Alabama City,*

R. Co. v. Bessiere, 197 Ala. 5, 72 So. 325; *Louisville, etc., R. Co. v. Lovell*, 196 Ala. 94, 71 So. 995; *Hamilton v. Cranford Mercantile Co. (Ala.)*, 78 So. 401.

The question whether an expert witness, is competent to give his opinion as to one's sanity is for the court. *Melvin v. Murphy*, 184 Ala. 188, 63 So. 546.

In action for compensation for auditing defendant's books, whether an auditor, testifying for defendant as to value of plaintiff's services, qualified as an expert, was a matter within the sound discretion of the trial judge. But where the evidence disclosed that such witness was an expert accountant of many years' experience, exclusion of his testimony, as not sufficiently qualified, was not a proper exercise of the court's discretion. *Malone-McConnell, etc., Co. v. Simpson Audit Co.*, 197 Ala. 677, 73 So. 369.

Motorman.—*Birmingham R., etc., Co. v. Saxon*, 179 Ala. 136, 59 So. 534. See the title EVIDENCE, § 417, vol. 6, p. 516.

(D) EXAMINATION OF EXPERTS.**§ 418. Mode of Examination in General.**

The forms of questions to expert witnesses are within the trial court's discretion. *Southern Bitulithic Co. v. Perrine*, 191 Ala. 411, 67 So. 601.

The extent of the examination of a physician testifying as an expert as to the personal injuries alleged to have been received by the plaintiff was largely discretionary with the trial court. *Louisville, etc., R. Co. v. Lovell*, 196 Ala. 94, 71 So. 995.

§ 419. Questions and Answers Based on Personal Knowledge of Expert.

Questions asked experts, tending to elicit evidence based upon facts of which they had actual knowledge, as well as upon abstract hypothesis, held proper. *Briggs v. Birmingham R., etc., Co.*, 194 Ala. 273, 69 So. 926.

In an action for personal injuries, refusal to permit a physician to answer a question as to whether a blow on the ribs would produce the condition of plaintiff held within the court's discretion. *Southern Bitulithic Co. v. Perrine*, 191 Ala. 411, 67 So. 601.

Surveyor.—After stating the facts of the survey, held, that surveyor might express opinion as to whether line run

by him and another made a true line between two sections. *Smith v. Bachus*, 195 Ala. 8, 70 So. 261.

Where witness' answer showed that he had examined house in question, and spoke really from knowledge acquired rather than in strict answer to hypothesis of question, possibility suggested that he spoke of some house not involved was removed. *Denson v. Acker (Ala.)*, 78 So. 76.

Where a witness, acquainted with price of the sort in controversy, was answering a hypothetical question, it was not necessary that it should be made to appear that he was speaking from knowledge. *Denson v. Acker (Ala.)*, 78 So. 76.

§ 420. Questions and Answers Based on Testimony of Others.

Question to expert witness as to distance in which train could be brought to a stop held not objectionable as not based on facts disclosed by the evidence. *Louisville, etc., R. Co. v. Rayburn (Ala.)*, 73 So. 461.

§ 421. Hypothetical Questions and Answers.

§ 422. — In General.

Discretion of Court.—The frame and substance of hypothetical questions to experts is a matter resting largely in the trial court's discretion. *Burnwell Coal Co. v. Setzer*, 191 Ala. 398, 67 So. 604.

When Answers Relevant. — Expert witnesses may answer hypothetical questions when their answers will be relevant. *National Life, etc., Ins. Co. v. Singleton*, 193 Ala. 84, 69 So. 80.

Subsequent Proof of Facts Hypothesized.—Admission of hypothetical questions without proof of all the facts hypothesized held rendered harmless by subsequent proof thereof. *Barfield v. South Highland Infirmary*, 191 Ala. 553, 68 So. 30.

Question Held Proper. — In action against railroad for injuries when mule plaintiff drove was frightened by locomotive, witness held properly permitted to answer hypothetical question relative to, how long it would have taken the engineer to cut off steam from the cylinder cocks until the engine had passed plain-

tiff. *Louisville, etc., R. Co. v. Jenkins*, 196 Ala. 136, 72 So. 68.

§ 423. — Form and Sufficiency of Questions.

§ 423 (1) In General.

While the jury may be misled by allowing the opinion of experts on hypotheses not in accordance with the evidence, each party has the right to the opinion of experts on his theory of the facts. *Briggs v. Birmingham R., etc., Co.*, 194 Ala. 273, 69 So. 926.

In an action for death from an electric shock, questions hypothesizing grounding in primary line or system held justified by the expert testimony, in connection with the doctrine of res ipsa loquitur. *Athens v. Miller*, 190 Ala. 82, 66 So. 702.

Discretion of Court.—The frame and substance of hypothetical questions is a matter largely committed to the discretion of the court. *Hamilton v. Cranford Mercantile Co. (Ala.)*, 78 So. 401; *Alabama City, etc., R. Co. v. Bessiere*, 197 Ala. 5, 72 So. 325.

Discovery of Intestate on Track.—*Louisville, etc., R. Co. v. Bogue*, 177 Ala. 349, 58 So. 392. See the title EVIDENCE, § 423 (1), vol. 6, p. 519.

Cause of Death.—In action for death of hunting dogs by poison, a hypothetical question to a doctor as to the cause of death held proper. *Louisville, etc., R. Co. v. Dickson (Ala. App.)*, 73 So. 750, certiorari denied in 74 So. 1005.

Question Indefinite as to Size of Sparks.—A hypothetical question as to the size of sparks, indicating whether an engine was equipped with a spark arrester, is properly refused, where indefinite as to the size of the sparks. *Knowlton v. Central, etc., R. Co.*, 192 Ala. 456, 68 So. 281.

§ 423 (1½) Facts Which Must Be Included.

A hypothetical question is sufficient if it is framed so as to fairly and clearly present the state of facts which the questioner claims is proved. *Massachusetts Mut. Life Ins. Co. v. Crenshaw*, 195 Ala. 263, 70 So. 768.

Facts Sufficient to Justify Opinion.—A hypothetical question is sufficient if it

incorporate enough of the facts to justify the formulation of an opinion. *Pullman Co. v. Meyer*, 195 Ala. 397, 70 So. 763; *Hamilton v. Cranford Mercantile Co. (Ala.)*, 78 So. 401.

Need Not Hypothesize Every Fact.—A hypothetical question is not objectionable because it omits to hypothesize every fact shown by the evidence. *Burnwell Coal Co. v. Setzer*, 191 Ala. 398, 67 So. 604; *Alabama City, etc., R. Co. v. Bessiere*, 197 Ala. 5, 72 So. 325.

A hypothetical question may omit evidence which does not conform to questioner's theory. *Hamilton v. Cranford Mercantile Co. (Ala.)*, 78 So. 401.

A question to an expert need not incorporate every fact in evidence, but the questioner may take his view of the facts as a proper basis for the question. *Birmingham R., etc., Co. v. O'Brien*, 185 Ala. 617, 64 So. 343; *Southern Bitulithic Co. v. Perrine*, 191 Ala. 411, 67 So. 601.

In action against a carrier for personal injury, question to plaintiff's attending physician held not objectionable on the ground that it was not based on all the facts in evidence. *Birmingham R., etc., Co. v. O'Brien*, 185 Ala. 617, 64 So. 343.

Same—Facts in Support of Opponents' Theory.—A hypothetical question need not hypothesize facts in support of opponents' theory of the case. *Alabama City, etc., R. Co. v. Bessiere*, 179 Ala. 5, 72 So. 325; *Massachusetts Mut. Life Ins. Co. v. Crenshaw*, 195 Ala. 263, 70 So. 768.

§ 423 (3) Facts Unsupported by Evidence.

A hypothetical question must be based on the facts. *Massachusetts Mut. Life Ins. Co. v. Crenshaw*, 195 Ala. 263, 70 So. 768.

A hypothetical question containing facts not shown in evidence is objectionable. *Hamilton v. Cranford Mercantile Co. (Ala.)*, 78 So. 401; *Pullman Co. v. Meyer*, 195 Ala. 397, 70 So. 763; *Burnwell Coal Co. v. Setzer*, 191 Ala. 398, 67 So. 604; *Alabama City, etc., R. Co. v. Bessiere*, 197 Ala. 5, 72 So. 325.

Hypothetical questions, having no basis in the evidence, should be rejected. *Knowlton v. Central, etc., R. Co.*, 192 Ala. 456, 68 So. 281.

§ 423½. — Scope and Sufficiency of Answers.

That expert's answer to questions assumed the form of conclusion held not valid objection thereto. *Briggs v. Birmingham R., etc., Co.*, 194 Ala. 273, 69 So. 926.

§ 424. Facts Forming Basis of Opinion.

While an expert, having detailed the facts, may testify that conduct was careful or negligent, he can not so testify without giving the facts as basis for his opinion. *Knowlton v. Central, etc., R. Co.*, 192 Ala. 456, 68 So. 281.

Surgeon sued for malpractice and testifying as an expert held properly permitted to read from temperature charts kept by nurses. *Barfield v. South Highland Infirmary*, 191 Ala. 553, 68 So. 30.

In an action for compensation for auditing defendant's books, an expert could testify, from his personal examination of the books and of the audit by plaintiff, that plaintiff's audit was valueless, although his testimony did not state all the facts upon which his conclusion rested. *Malone-McConnell, etc., Co. v. Simpson Audit Co.*, 197 Ala. 677, 73 So. 369.

§ 425. Cross-Examination and Re-Examination.

§ 425 (1) Cross-Examination in General.

Question asked expert on cross-examination as to whether statement of surgical theory and practice in a medical treatise was correct held properly admitted. *Barfield v. South Highland Infirmary*, 191 Ala. 553, 68 So. 30.

As to Spark Arresters.—Where a witness professed no knowledge on how a proper spark arrester should be constructed, the court could exclude cross-examination as to whether the emission of sparks of a particular size would indicate whether the engine was not equipped with arresters. *Knowlton v. Central, etc., R. Co.*, 192 Ala. 456, 68 So. 281.

Testimony of Surveyor.—Where a surveyor testified as an expert for plaintiff that in making his survey he had the aid of the government field notes, he was properly permitted, on cross-examination, to state that in making the survey,

he did not go the distance from the northwest corner as indicated or as called for by the field notes. *Ward v. Lane*, 189 Ala. 340, 66 So. 499.

Question on Facts Not Shown by Evidence.—The court in its discretion may exclude questions on cross-examination of experts based on facts not shown by the evidence. *Barfield v. South Highland Infirmary*, 191 Ala. 553, 68 So. 30.

Time Required to Stop Train.—Question to expert locomotive engineer whether he had any idea how long a "time" it would take to stop an engine running 20 miles an hour was properly excluded, where witness' ignorance of such matter had been already stated on cross-examination. *Louisville, etc., R. Co. v. Rayburn* (Ala.), 73 So. 461.

§ 425 (3) Irrelevant, Collateral, or Immaterial Matters.

Question on cross-examination of a sanity witness, "What would you think of the sanity of a man who made a will of his property to a dead horse?" was properly excluded. *West v. Arrington* (Ala.), 76 So. 552.

On cross-examination of expert locomotive engineer, question as to the "time" required to stop trains running at various speeds, "Your education about time has been neglected?" was by the way, and properly disallowed. *Louisville, etc., R. Co. v. Rayburn* (Ala.), 73 So. 461.

(E) COMPARISON OF HANDWRITING.

§ 426. Competency of Expert.

Detective and Chief of Police.—*United States Health, etc., Ins. Co. v. Hill*, 9 Ala. App. 222, 62 So. 954. See the title EVIDENCE, § 428, vol. 6, p. 524.

§ 429. Standard of Comparison.

§ 429 (1) In General.

An expert witness can not testify as to the similarity or identity of the handwritings in two documents, where the signature of neither was admitted, conceded, or proven without dispute. *Mutual Life Ins. Co. v. Witte*, 190 Ala. 327, 67 So. 263.

Writing Signature to Show Basis of Comparison.—*United States Health, etc.,*

Ins. Co. v. Hill, 9 Ala. App. 222, 62 So. 954. See the title EVIDENCE, § 429 (1), vol. 6, p. 525.

§ 429 (3) Papers in Evidence or Relevant to Issues.

In ejectment, where defense was deed from plaintiff, it was not error to refuse to allow defendant to prove genuineness of signature to other papers by witness to deed for purpose of laying predicate for introduction of expert testimony, where it did not appear that other papers were material to controversy or that they were in evidence. *Qualls v. Qualls*, 196 Ala. 524, 72 So. 76.

(F) EFFECT OF OPINION EVIDENCE.

§ 431. Opinions of Witnesses in General.

§ 431 (1) In General.

Can Not Control Judgment of Jury—Testing Opinions of Witness.—*Cleveland v. Wheeler*, 8 Ala. App. 645, 62 So. 309. See the title EVIDENCE, § 431 (1), vol. 6 pp. 526, 527.

§ 431 (2) Value.

Market price or value is ordinarily a matter of fact and not opinion, and evidence thereof is binding on the jury, but testimony by the witnesses as to their opinion of the market value is not binding. *Curjel & Co. v. Hallett Mfg. Co.* (Ala.), 73 So. 938.

Market Value Distinguished from Market Price.—*Cleveland v. Wheeler*, 8 Ala. App. 645, 62 So. 309. See the title EVIDENCE, § 431 (2), vol. 6, p. 527.

Value of Land.—Evidence as to the value of land is necessarily opinion evidence, and is not conclusive on courts or juries even when without conflict. *Sellers v. Knight*, 185 Ala. 96, 64 So. 329.

Value of Services.—Court is not bound to accept opinions of witnesses as to value of services rendered by a receiver, his attorney and trustee in a deed of trust. *Citizens' Light, etc., Co. v. Central Trust Co.* (Ala.), 75 So. 330.

Value of Timber.—*Cleveland v. Wheeler*, 8 Ala. App. 645, 62 So. 309. See the title EVIDENCE, § 431 (2), vol. 6, p. 527.

§ 432. Testimony of Experts.

§ 433. — In General.

The jury is not concluded by the opinions of expert witnesses. *Blalack v. Blacksher*, 11 Ala. App. 545, 66 So. 863.

The credibility of an expert locomotive engineer, conflicting as to his experience, that on a clear day an object on a straight track ahead should be seen at least 500 feet by an ordinary person on an approaching engine, and distinguished within 400 feet, was for the jury. *Louisville, etc., R. Co. v. Rayburn* (Ala.), 73 So. 461.

§ 434. — Nature of Subject.

In an attorney's action for compensation for examining an abstract of title, evidence as to the reasonable value of his services was not binding on the jury. *Tyson v. Thompson*, 195 Ala. 230, 70 So. 649, 651, citing 6 Michie Dig., § 431.

§ 435. — Knowledge or Skill of Expert.

Testimony by a surveyor expert in his line as to the result of a survey is not inadmissible because he declined to say it was absolutely correct, where he affirmed it was reliable to the best of his judgment. *Aldrich Min. Co. v. Pearce*, 192 Ala. 195, 68 So. 900.

§ 435½. — Conflict with Other Evidence.

Where a witness states an opinion or conclusion which is irreconcilably opposed to the stated facts upon which it is founded, the opinion or conclusion is of no weight and raises no conflict with the stated facts. *Hicks v. Burgess*, 185 Ala. 584, 64 So. 290.

XIII. EVIDENCE AT FORMER TRIAL OR IN OTHER PROCEEDINGS.

§ 436. Grounds for Admission in General.

In action for damages for wrongful injunction suit, evidence, oral or depositions, given in the injunction suit, is not admissible, where it is not shown that the witnesses can not be produced to testify *ore tenus*. *Yarbrough Turpentine Co. v. Taylor* (Ala.), 78 So. 812.

§ 441. Preliminary Evidence.

Necessity of Predicate.—*Louisville & N. R. Co. v. Dilburn*, 178 Ala. 600, 59 So. 438. See the title EVIDENCE, § 441, vol. 6, p. 530.

§ 442. Mode of Proof.

§ 442 (1) In General.

Admissions made by a party when testifying at a former trial may be shown on a subsequent trial by the testimony of a witness who heard the admissions. *Wilson v. Lewis*, 11 Ala. App. 261, 65 So. 919.

Refreshing Recollection by Reference to Bill of Exceptions.—A witness testifying as to admissions made by a party as a witness at a former trial may refresh his recollection of the testimony by an examination of the bill of exceptions containing the same. *Wilson v. Lewis*, 11 Ala. App. 261, 65 So. 919.

§ 442 (3) Minutes and Notes of Testimony.

Transcript Competent But Not Conclusive.—Alabama, etc., *R. Co. v. Downey*, 177 Ala. 612, 58 So. 918. See the title EVIDENCE, § 442 (3), vol. 6, p. 522.

XIV. WEIGHT AND SUFFICIENCY.

§ 444½. Circumstantial Evidence.

Circumstantial evidence is accepted with great caution. *Watson v. Adams*, 187 Ala. 490, 65 So. 528.

§ 445. Credibility of Witnesses in General.

Although both railroad engineer and fireman testify for plaintiff that they did not discover danger of intestate, a trespasser on track, in time to avoid injuring him, jury may infer from other evidence that they did. *Central, etc., R. Co. v. Ellison* (Ala.), 75 So. 159.

Conflict between Testimony and Physical Facts.—Jury may consider conflict between testimony of any witness and physical facts in determining what weight to give to his testimony. *Karples v. City Ice Delivery Co.* (Ala.), 73 So. 642.

To say that a person of normal eyesight, who was on foot, looked for, but did not see, a nearby locomotive ap-

proaching on a straight track is contrary to the physical facts and can not be regarded. *Louisville, etc., R. Co. v. Moran*, 190 Ala. 106, 66 So. 799, cited in note in *Ann. Cas.* 1917B, 477.

The appearance of a witness on the stand is for the jury in determining the weight to be accorded oral testimony. *Nashville, etc., Railway v. Crosby*, 194 Ala. 338, 70 So. 7.

§ 448. Conclusiveness of Evidence on Party Introducing It.

Where defendant in statutory ejectment held under a default judgment against plaintiff, plaintiff's introduction of a decree for a tax sale reciting due notice to him, in anticipation of a defense under a tax title, did not divest him of the right to show that decree was without the court's jurisdiction. *Gilliland v. Armstrong*, 196 Ala. 513, 71 So. 700.

In an action against a carrier of live stock, based on common law liability, where plaintiff introduced in evidence the bill of lading, held that he was bound by the restriction of carrier's liability contained therein. *Illinois Cent. R. Co. v. Kilgore & Son*, 12 Ala. App. 358, 67 So. 707, certiorari denied *Ex parte Kilgore & Son*, 191 Ala. 671, 67 So. 1002.

Letter of Plaintiff Offered by Defendant.—*Parsons v. Age-Herald Pub. Co.*, 181 Ala. 439, 61 So. 345. See the title EVIDENCE, § 448, vol. 6, p. 535.

§ 449½. Uncontroverted Evidence.

The jury should not arbitrarily disregard uncontradicted testimony. *Central, etc., R. Co. v. Chambers*, 194 Ala. 152, 69 So. 518.

Possibility that result might have been wrought in a certain way or by certain means can not serve to contradict or reflect on credibility of positive testimony of facts otherwise not impeached or rendered of doubtful verity. *Louisville, etc., R. Co. v. Moran (Ala.)*, 76 So. 7.

§ 450. Inferences from Evidence.

Where a fact is sought to be proved by proving another fact, the latter fact must be such that the existence of the fact sought to be proved can be nat-

urally and rationally inferred, and a remote, speculative, and uncertain connection between the fact proved and the one sought to be inferred is insufficient. *Central, etc., R. Co. v. Teasley*, 187 Ala. 610, 65 So. 981.

To justify a verdict in a civil case, the jury need only be reasonably satisfied of the facts and may draw such an inference or deductions from the facts proven as they may believe to be fair, reasonable, and consistent with the other evidence. *Western Union Tel. Co. v. Brazier*, 10 Ala. App. 308, 65 So. 95.

§ 451. Degree of Proof in General.

Reasonably Satisfactory Proof.—*Batson v. Alexander City Bank*, 179 Ala. 490, 60 So. 313. See the title EVIDENCE, § 451 (1), vol. 6, p. 535.

Degree of proof required to establish a fact in civil trials is that necessary to reasonably satisfy the jury. *Rogers v. Whittle (Ala. App.)*, 74 So. 96; *Southern R. Co. v. Kendall & Co.*, 14 Ala. App. 242, 69 So. 328, certiorari denied in *Ex parte Southern R. Co.*, 193 Ala. 681, 69 So. 1020.

Same — Weight of Evidence Insufficient.—It is not enough that an issue is supported by the weight of the evidence; but the evidence must reasonably satisfy the jury. *Oliver v. Oliver*, 187 Ala. 340, 65 So. 373.

§ 452. Sufficiency to Support Verdict or Finding.

Minds of Jurors Confused.—*Birmingham R., etc., Co. v. Saxon*, 179 Ala. 136, 59 So. 584. See the title EVIDENCE, § 452, vol. 6, p. 537.

§ 455. Particular Facts or Issues.

Evidence that plaintiff properly addressed and mailed letters, together with their production by defendant at trial, held to establish their receipt. *Hartford Fire Ins. Co. v. Ollinger, etc., Dry Dock Co. (Ala. App.)*, 77 So. 452.

Value.—The fair market value of property is the conclusion of such value by the jury drawn from the evidence, opinion and positive, shedding light thereon. *National Surety Co. v. Citizens' Light, etc., Co. (Ala.)*, 78 So. 834.

In suit to have conveyance declared

mortgage and for redemption and accounting, held, that valuation placed upon property as its market value should not be greater than largest amount shown to have been offered for it. *Van Heuvel v. Long* (Ala.), 75 So. 339.

Examination of Accused.

See ante, CRIMINAL LAW.

Examination of Expert.

See ante, CRIMINAL LAW; EVIDENCE.

Examination of Juror.

See post, GRAND JURY; JURY.

Examination of Witnesses.

See post, WITNESSES.

Excavations.

See post, HIGHWAYS; MUNICIPAL CORPORATIONS; NEGLIGENCE.

EXCEPTIONS, BILL OF.

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Cross References.

See the title EXCEPTIONS, BILL OF, vol. 6, p. 542, and references there given.
See also, ante, APPEAL AND ERROR; CRIMINAL LAW.

As to necessity for exceptions in lower court to preserve error on appeal, see ante, APPEAL AND ERROR. As to bills of exception in criminal cases, see ante, CRIMINAL LAW. As to taking and noting exceptions at trial, see post, TRIAL.

I. NATURE, FORM, AND CONTENTS IN GENERAL.

§ 1. Nature and Purpose of Remedy in General.

A bill of exceptions may be defined as

"a formal statement in writing of exceptions taken by a party on the trial to a ruling, decision, charge, or opinion of the trial judge, setting out the proceedings on the trial, the acts and rulings of the

trial judge alleged to be erroneous, the objections and exceptions taken thereto, together with the grounds therefor, and authenticated by the signature of the trial judge." *Padgett v. Gulfport Fertilizer Co.*, 11 Ala. App. 366, 66 So. 866, 867.

Review of Errors Not Apparent on Face of Record.—A bill of exceptions is a statutory device to afford review of errors not apparent on the face of the record. *Padgett v. Gulfport Fertilizer Co.*, 11 Ala. App. 366, 66 So. 866.

§ 2. Statutory Provisions.

Time for Presentation—Statute Mandatory.—Code 1907, § 3019, providing that a bill of exceptions may be presented within 90 days from entry of judgment, and not afterwards, is mandatory. *Buck Creek Lumber Co. v. Nelson*, 188 Ala. 243, 66 So. 476.

Showing Date of Presentation—Statute Mandatory.—Code 1907, § 3019, requiring that a bill of exceptions shall show the date of presentation to the trial judge, is mandatory, and, where it fails in that respect, it is no bill. *Box v. Southern R. Co.*, 184 Ala. 598, 64 So. 69.

§ 5. Scope and Contents of Bill in General.

A "bill of exceptions" is a formal statement in writing of exceptions taken by a party on the trial to a ruling of the court, setting out the proceedings, the acts, and rulings alleged to be erroneous, together with the objections and exceptions, and signed by the trial judge in accordance with Code 1907, § 3018. *Padgett v. Gulfport Fertilizer Co.*, 11 Ala. App. 366, 66 So. 866.

An instrument containing no exceptions is not a bill of exceptions, though purporting to be. *Blackwell v. State*, 8 Ala. App. 430, 62 So. 1034.

Where no exceptions appear in what purports to be the bill of exceptions, it is not a bill of exceptions, and no rulings of the lower court are presented for review. *Hughes v. State*, 11 Ala. App. 307, 66 So. 844.

§ 6. Setting Forth Errors or Irregularities.

Judgment Not Shown—Review of Evi-

dence Rulings.—Even though the bill of exceptions does not show what the judgment was so as to prevent it from being reviewed, rulings on the admissibility of evidence may be reviewed. *Peters v. Brunswick-Balke-Collender Co.*, 6 Ala. App. 507, 60 So. 431.

Rendition of Judgment Sufficiently Shown.—A showing by the bill of exceptions that the court "handed down a judgment for the plaintiff" sufficiently shows what the judgment was, so as to authorize its review. *Peters v. Brunswick-Balke-Collender Co.*, 6 Ala. App. 507, 60 So. 431.

§ 7. Setting Forth Objections, Rulings, and Exceptions.

See ante, "Scope and Contents of Bill in General," § 5.

Motion for New Trial.—The granting of a motion for new trial will not be reviewed, where the motion and the judgment below are not incorporated in the bill of exceptions, though they are in the record, and their incorporation in the bill of exceptions was enjoined on some unnamed person by a recital in the bill. *Kreamer v. Jackson Lumber Co.*, 179 Ala. 225, 60 So. 88.

§ 9. Incorporating Evidence.

§ 10. — Setting Forth Evidence in General.

As to presumptions on appeal on failure to set out evidence, see ante, **APPEAL AND ERROR**.

Review of Ruling on Plea in Abatement.—Where the evidence in support of a plea in abatement is not shown by the bill of exceptions, the court's ruling directing a finding for the state on the plea can not be reviewed. *Watts v. State*, 177 Ala. 24, 59 So. 270.

Review of Giving of General Charge.—Where the bill of exceptions does not purport to set out all the evidence, the supreme court can not reverse the trial court for giving a general charge for defendant. *Brannon v. Birmingham*, 177 Ala. 419, 59 So. 63.

Review of Charge on Particular Issue or Phase of Evidence.—To procure review of a refused charge which hypothetically instructs on some particular issue, or phase of the evidence, it is not

always necessary that the bill of exceptions set out all the evidence or all its tendencies, it being sufficient under Circuit Court Rule 32 (Code 1907, p. 1526) to set out enough of the evidence or its tendencies to enable the appellate court to understand the question sought to be raised, and to clearly see that the charge does not ignore the bearing of any pleading or qualified testimony or does not tend to mislead, and is or is not a proper instruction. *Handley v. Shaffer*, 177 Ala. 636, 59 So. 286.

Trial by Court—Agreed Statement of Facts Not Sufficient as Substitute.—See ante, APPEAL AND ERROR.

§ 11. — Stenographer's Report.

A bill of exceptions, consisting of a stenographic report of testimony in the form of questions and answers, is properly stricken as violating circuit court practice rule No. 32 (Civ. Code 1907, p. 1526). *Cole v. State*, 4 Ala. App. 673, 59 So. 235.

A bill of exceptions which is only a catechismal stenographic report of the trial, embodying the testimony and remarks of counsel and of the court, violates circuit court practice rule 32 (Code 1907, p. 1526), and may on motion be stricken. *Owens v. State*, 11 Ala. App. 309, 66 So. 852.

Where the paper signed by the trial court, and set out in the record as the bill of exceptions, was merely a full stenographic report of the trial, not showing that any exception was reserved to the action of the court in rendering judgment for an appellee, the only question sought to be reviewed on such bill, the motion of the appellees to strike from the record such stenographic report must be granted. *Clancy v. Taylor*, 12 Ala. App. 557, 68 So. 522.

Where Affirmative Charge Requested—Statute.—Code 1907, p. 1526, rule 32, requiring bills of exceptions to contain a statement of testimony in extenso, when the general affirmative charge has been asked, held not to authorize a bill expressly purporting to be nothing other than the stenographic report of questions and answers on the trial below, unless the testimony could not be condensed

into a general statement. *Turner v. Thornton*, 192 Ala. 98, 68 So. 813.

§ 13. — Abridgment.

Violation of Practice Rule—Discretion to Strike Bill or Impose Costs.—Where a bill of exceptions does not flagrantly violate rule 32 of circuit and inferior court practice (Code 1907, vol. 2, p. 1526), which deals with the inclusion of testimony in a bill of exceptions, and provides that a violation shall subject the party reserving the exception to a penalty, with power to disallow the paper as a bill of exceptions and as a part of the record, the court may, in its discretion, either strike the bill or tax with costs. *Long v. Seigel*, 177 Ala. 338, 58 So. 380.

Setting Out Questions and Answers.

—Where the meaning of answers of witnesses was a disputed question between the parties, and plaintiff, who is the appellant, contended that there was no conflict in the evidence and that he was entitled to a general affirmative charge, it was not a violation of rule 32 for circuit and inferior courts for the bill of exceptions to set out the testimony in the form of questions and answers. *Higdon v. Warrant Warehouse Co.*, 10 Ala. App. 496, 63 So. 938.

Setting Out Evidence in Narrative Form.

—A bill of exceptions which fails to set out the necessary evidence in succinct, intelligent, narrative form is not a compliance with the requirements of the court. *Sloss-Sheffield Steel, etc., Co. v. Redd*, 6 Ala. App. 404, 60 So. 468.

§ 18. Insertion of Documents.

A lengthy document, offered in connection with motion for new trial, regardless of whether it set up a good cause for a new trial, was properly incorporated in bill of exceptions seeking to revise action on such motion. *Ferlesie v. Cook* (Ala.), 78 So. 915.

Bill Sufficiently Identifying Deed.

Where the clerk was by a bill of exceptions directed to put therein a deed identified by a recital that the plaintiff offered in evidence a deed from B. "and" G. conveying the undivided one-third interest in the land asked for dated December 1, 1910, filed for record December 14, 1910, a deed from B. "to" G. is prop-

erly inserted in the bill, as the "and" will be considered a clerical misprision for "to"; the deed otherwise complying with the recital. *Bley v. Lewis*, 188 Ala. 535, 66 So. 454.

Bill Not Sufficiently Identifying Chattel Mortgage.—In an action by a chattel mortgagee to recover for conversion of certain mortgaged mules taken by defendants on a subsequent mortgage, defendants' bill of exceptions recited: "Plaintiff here introduced a mortgage which reads as follows: (The clerk will here set out said mortgage)"—and referring to defendants' mortgage: "Defendants here introduced the mortgage, which is as follows: (The clerk will here set the same out.)" Held, that under the rule that when a document is sought to be made a part of the bill of exceptions by reference, and not by copy, it must be so described that a succeeding clerk can readily and with certainty know what document or paper is referred to without room for mistake, necessitating a description of the paper by its date, amount, parties, or other identifying features, the references contained in the bill were insufficient, and justified the clerk in omitting the mortgages from the bill. *Jones v. White*, 189 Ala. 622, 66 So. 605.

"Skeleton Bills"—Exhibits.—A bill of exceptions need not contain a copy of the documents desired to be made a part thereof, but "skelton bills," which are bills containing calls for the insertion by the clerk of the necessity documents, are sufficient under Code 1907, § 3018, requiring bills to be signed by the trial judge, though documents can not be incorporated in a bill of exceptions as exhibits where the calls therefor are not sufficiently definite to identify them, even if documents may in unusual cases, be made a part of the bills in that manner. *Padgett v. Gulfport Fertilizer Co.*, 11 Ala. App. 366, 66 So. 866.

§ 18. Construction of Bill.

Construed against Party Excepting.—A bill of exceptions is construed most strongly against the party excepting. *Seaboard, etc., R. Co. v. Mobley*, 194 Ala. 211, 69 So. 614; *Consolidated Mercantile Co. v. Warren* (Ala. App.), 74

So. 738, certiorari denied in 75 So. 1003; *Bryan v. Stewart*, 194 Ala. 353, 70 So. 123; *East Pratt Coal Co. v. Jones* (Ala. App.), 75 So. 722. See ante, APPEAL AND ERROR.

Same—Equivocal Recitals.—Where recitals in a bill of exceptions are equivocal, they must be interpreted against exceptor. *Blount County Bank v. Harris* (Ala.), 77 So. 43; *Wear v. Wear* (Ala.), 76 So. 111.

Construed to Sustain Trial Court.—A bill of exceptions must be given that construction which sustains the trial court. *East Pratt Coal Co. v. Jones* (Ala. App.), 75 So. 722.

Where a bill of exceptions admits of two constructions, one of which will reverse and the other sustain the judgment, the latter will be adopted. *Seaboard, etc., R. Co. v. Mobley*, 194 Ala. 211, 69 So. 614.

Bill Showing Objection to Witness' Qualifications Only.—An objection that question called for witness' opinion "and not properly qualified" refers to witness' qualifications, and not to point that question was not properly limited as to time, under rule that equivocal statements in bills of exceptions will be resolved against exceptor. *Wear v. Wear* (Ala.), 76 So. 111.

Bill Showing Proper Acknowledgment of Deed.—Recital in the bill of exceptions to admission of a deed, that the deed was "properly acknowledged before P., a notary public of C. county," must be construed as an admission that P. was a notary, and that the acknowledgment was duly executed. *Swindall v. Ford*, 184 Ala. 137, 63 So. 651.

Bill Not Showing All Evidence Incorporated Therein.—A bill of exceptions merely showing that the parties offered certain witnesses who testified as shown, that at certain stages the parties, respectively, rested or reopened the cases, that after the testimony of a certain witness the testimony was closed, and that "at the conclusion of the testimony the court gave the following charges," does not show it contains all the evidence on which the trial was had. *Middlebrooks v. Sanders*, 180 Ala. 407, 61 So. 898.

Bill Showing Charges Requested Sep-

arately.—A statement in a bill of exceptions that defendant requested "the following special charges in writing" reasonably imported that they were requested, not separately but as a whole. *Mobile, etc., R. Co. v. Minor*, 6 Ala. App. 633, 60 So. 951, certiorari denied *Ex parte Mobile, etc., R. Co.*, 184 Ala. 666, 61 So. 1005.

§ 19½. Operation and Effect of Bill.

Bill in Transcript Conflicting with Bill Returned under Certiorari.—When a bill of exceptions is sent up as a return to a writ of certiorari, and differs from the one contained in the transcript, the one returned under the writ will be regarded as the correct bill. *Jones v. White*, 189 Ala. 622, 66 So. 605.

II. SETTLEMENT, SIGNING, AND FILING.

§ 21. In General.

Affirmance on Appeal for Want of Signing and Settlement.—Where a bill of exceptions is not signed by the trial judge, or established as provided by statute after he ceased to hold office, and there is no assignment of error upon the rulings on the pleadings, the judgment must be affirmed. *Drummond v. Lamar*, 177 Ala. 530, 58 So. 194.

§ 22. Authority to Allow or Settle.

Death of Trial Judge.—An undated stipulation, signed only by the solicitor for the state, on death of the trial judge, can not be treated as a sufficient bill of exceptions, since Code 1907, § 3022, prescribes that, when the trial judge dies, a bill of exceptions shall be established as in the case of refusal of a judge to sign. *Graves v. State*, 178 Ala. 1, 59 So. 584. See post, "Proceedings to Establish Exceptions," § 34.

Establishment in Supreme Court or Court of Appeals.—See post, "Proceedings to Establish Exceptions," § 34.

Where Trial Judge Ceases to Hold Office—Statute.—Where a bill of exceptions is not presented to and signed by the trial judge, the remedy to establish the bill after he has ceased to hold office is not to present the bill to his successor but by motion to establish it on the next call of the division, as pro-

vided by Code 1907, § 3022. *Drummond v. Lamar*, 177 Ala. 530, 58 So. 194. § 23. Time for Presentation, Allowance, and Filing.

§ 24. — In General.

§ 24 (1) In General.

See post, "Quashing or Striking from Files," § 37.

Bill Not Presented in 90 Days.—Limitation of 90 days for presentation of bill of exceptions being jurisdictional, an instrument signed by trial judge, but not presented within that time, is no bill of exceptions. *Wrenn v. Baker* (Ala. App.), 73 So. 756.

Bill Signed before Appeal Taken.—That a bill of exceptions was signed before the appeal was taken is immaterial. *Covington & Co. v. Sewell* (Ala.), 76 So. 318.

Presumption of Presentation on Date of Signing.—The bill of exceptions, not showing when it was presented to the trial court, will be treated as presented on the day it was signed, and so will be stricken; that day, though within the time for signing, not being within the time for presentation. *Busby v. State*, 10 Ala. App. 183, 65 So. 307.

§ 24 (3) Effect of Motion for New Trial.

Review Confined to Rulings on Motion.—Where bill of exceptions was not presented to the trial judge within 90 days from the judgment, but was presented within 90 days from the ruling on motion for new trial, it could be considered only in reviewing the ruling on the motion for new trial. *Patterson v. Holt* (Ala. App.), 78 So. 637; *Ewart Lumber Co. v. American Cement Plaster Co.*, 9 Ala. App. 152, 62 So. 560.

Where bill of exceptions was not signed within the time required for review of main trial, but in time to be used in reviewing the overruling of motion for new trial, it will be considered so far as it relates to the latter. *Camp Transfer Co. v. Davenport* (Ala. App.), 74 So. 156, certiorari denied in *Ex parte Davenport* (Ala.), 74 So. 1005.

Bill of exceptions presented within 90 days from the day on which judgment was entered on motion for new trial will not be stricken out in so far as it per-

tains to the motion or assignments of error thereon. *Shipp v. Shelton*, 193 Ala. 658, 69 So. 102.

§ 25. — At or after Trial.

Under Code 1907, § 3109, providing that bills of exceptions may be presented within 90 days from the day on which the judgment is entered, if the bill does not show on its face that it was presented within 90 days, it can not be looked to as a basis of showing error. *Harper v. State*, 13 Ala. App. 47, 69 So. 302.

Bill Presented Monday, Ninety-First Day after Judgment.—Under Code 1907, § 11, providing that the time within which any act is provided by law to be done must be computed by excluding the first day and including the last, if the last day is Sunday, it must also be excluded, and the Monday following shall be counted as the last day within which the act may be done, where a bill of exceptions was presented to the trial judge on Monday the ninety-first day after judgment was entered, it was filed in time, under § 3019, providing that bills of exceptions may be filed within 90 days from the day on which judgment is entered. *Stewart v. Keller*, 197 Ala. 575, 73 So. 89.

Impeachment of Bill by Extraneous Proof.—When a bill of exceptions is presented to the trial judge within the statutory period, which fact appears on the face of the record, and is signed within the statutory period, as appears on the face of the record, it is a part of the record, which, as certified, imports absolute verity, and can not be impeached by extraneous proof, such as an affidavit. *Collins v. State*, 14 Ala. App. 54, 70 So. 995.

§ 27. — Time Prescribed or Allowed.

Presentation in Time Jurisdictional.—The presentation of a bill of exceptions to the trial judge within 90 days from the rendition of the judgment is jurisdictional and absolutely essential to a review of any ruling on the trial not arising out of the record proper, unless such ruling is made a definite ground for a new trial and a bill of exceptions appropriate to a review of the rulings on such motion is presented within the

time allowed by statute and signed by the trial judge. *Southern R. Co. v. Carroll*, 14 Ala. App. 374, 70 So. 984. See post, "Quashing or Striking from Files," § 37.

Bill Not Filed for More than Twelve Months.—A bill of exceptions not filed for more than 12 months after the trial of the case can not be looked to on appeal for the purpose of revising actions or rulings of the trial judge on the main trial, unless the same questions were again presented and renewed on the motion for a new trial. *McCary v. Alabama*, etc., R. Co., 182 Ala. 597, 62 So. 18.

§ 29. — Compliance with Requirements.

Bill Regular on Its Face—Impeachment by Affidavits.—It may be shown by affidavit that a bill of exceptions, which appears on its face to have been presented to and signed by the trial judge within the time allowed by law, was not so signed. *Johnson v. Frix*, 177 Ala. 251, 58 So. 427.

Presentation in Time Shown by Signing in Time.—That the bill of exceptions was presented to the presiding judge within the 90 days required by Code 1907, § 3018, is attested by the fact that it was signed by him within that period. *Brannan v. Sherry*, 195 Ala. 272, 71 So. 106.

§ 30. — Presentation and Allowance after Expiration of Time.

See ante, "Effect of Motion for New Trial," § 24 (3); post, "Quashing or Striking from Files," § 37.

Striking Bill Not Presented in Time.—See ante, "Time Prescribed or Allowed," § 27.

§ 31. Stipulations as to Allowance or Settlement.

Death of Trial Judge—Agreement of Counsel.—Rulings on the trial required to be presented by a bill of exceptions can not be considered unless so presented, and the written agreement of counsel, where the trial judge had died since the trial, was not a bill of exceptions. *McLeod v. Garrick*, 196 Ala. 389, 72 So. 72.

A written agreement of counsel for the settlement of a bill of exceptions, after the death of the trial judge, upon proper motion in the appellate court would have

been sufficient evidence to establish the bill as provided by statute. *McLeod v. Garrick*, 196 Ala. 389; 72 So. 72.

§ 32. Allowance or Settlement by Judge or Other Officer.

Striking Oral Charge Not Excepted to.—Where no objections are interposed to the oral charge, and no exceptions are reserved to it as a whole, or to any part thereof, and it is, as a whole, incorporated into the bill of exceptions by the party taking the plea, it is not error for the trial judge to strike it out of the bill before signing. *Thompson v. Alexander City Cotton Mills Co.*, 190 Ala. 184, 67 So. 407.

§ 33. Compelling Allowance or Settlement.

See post, "Proceedings to Establish Exceptions," § 34.

§ 34. Proceedings to Establish Exceptions.

See ante, "Stipulations as to Allowance or Settlement," § 31.

Establishment in Court of Appeals—Failure or Refusal of Trial Judge to Sign.—Code 1907, § 3021, providing that if the judge shall fail or refuse to sign a bill of exceptions, the point of decision and the facts being truly stated, it may be established in the court of appeals, confers power on such court to establish a bill only when a correct bill has been duly and seasonably presented to the trial judge and he has failed or refused to sign it. *Crane v. State*, 10 Ala. App. 82, 65 So. 301.

Same—Death of Trial Judge.—Where timely motion was made to establish bill of exceptions as set out in record, trial judge having died before signing bill, and counsel for appellee files written statement agreeing that bill as filed is correct, motion to establish will be granted. *Home Supply Co. v. Almon* (Ala. App.), 76 So. 473.

Same—Absence of Judge.—Code 1907, § 3019, declares that bills of exceptions may be presented at any time within 90 days from the day on which judgment was entered and not afterwards. Section 3022 provides that if the judge dies, resigns, or is impeached, or his term of office expires, or if from other good

cause he does not sign a bill of exceptions duly presented to him within the proper time, it may be established in the court of appeals. Held, that proof that the trial judge was out of the state during the last 30 days of the time which appellant had for presenting his bill of exceptions, without evidence that the bill of exceptions was in existence within 90 days from the day on which judgment was entered, did not show that the judge's absence from the state was the sole cause of appellant's failure to present the bill and procure its allowance by the trial judge, and was therefore insufficient to show jurisdiction of the appellate court to establish the same. *Crane v. State*, 10 Ala. App. 82, 65 So. 301.

Same—Appellant Must Comply with Requirements.—"There is no statute which confers upon an appellant who has failed to do what is required of him to obtain a bill of exceptions the right to proceed in the appellate court for the establishment of it." *Crane v. State*, 10 Ala. App. 82, 65 So. 301, 302.

Establishment in Supreme Court.—Under Code 1907, § 3022, as amended by Acts 1915, pp. 816-817, party may have bill of exceptions settled and signed by judge of supreme court if facts are shown to exist authorizing him to take such action though it is possible to have it done by trial judge. *Munson S. S. Line v. Harrison* (Ala.), 76 So. 446.

Where a case was tried December 8, 1914, a bill of exceptions presented to the trial judge January 13, 1915, will be established on motion in the supreme court. *Roman v. Lentz*, 194 Ala. 610, 69 So. 827.

Same—Statute Not Exclusive.—Acts 1915, p. 816, amending Code 1907, § 3022, providing for establishing bills of exceptions, by a justice of the supreme court where trial judge dies, resigns, is removed, is sick, or absent, is not an exclusive remedy, but Code 1907, § 3021, still governs where trial judge retains office and could, but refuses to, approve a bill properly presented. *Sovereign Camp W. O. W. v. Ward* (Ala.), 75 So. 331.

Same—Trial Judge out of County.—Bill of exceptions filed with clerk of court

on next to last day for filing because trial judge was out of county and counsel did not know when he would return may, under Code 1907, § 3022, as amended by Acts 1915, pp. 816-817, be settled and signed before judge of supreme court, though trial judge returned day after filing, and was not thereafter incapacitated to transact duties. *Munson S. S. Line v. Harrison* (Ala.), 76 So. 446.

If trial judge is out of county and litigant can not ascertain when he will return, he may, under Code 1907, § 3022, as amended by Acts 1915, pp. 816-817 apply to judge of supreme court to sign and settle bill of exceptions without waiting for his return until last day on which bill can be presented. *Munson S. S. Line v. Harrison* (Ala.), 76 So. 446.

Same—Where Trial Judge Could Have Been Found by Due Diligence.—Under Code 1907, § 3022, as amended by Acts 1915, pp. 816-817, party can not apply to member of supreme court to settle bill of exceptions, where he could have found trial judge by due diligence. *Munson S. S. Line v. Harrison* (Ala.), 76 So. 446.

Same—Expiration of Trial Judge's Term.—Bill of exceptions, not settled by the trial judge because of expiration of his term, can not be settled by another trial judge, but only by a justice of the supreme court, as provided by Code 1907, § 3022, as amended by Acts 1915, p. 816. *Thacker v. Selma* (Ala. App.), 77 So. 939.

Same—Bill Lost after Signing.—Where a bill of exceptions was lost after the judge signed it and his absence prevented a substantial copy thereof being signed within the required time, under Code 1907, § 3022, it may be established in the supreme court. *Wadsworth Red Ash Coal Co. v. Scott*, 197 Ala. 361, 72 So. 542.

§ 35. Certificate, Signature, and Seal of Judge.

§ 35 (2) Construction and Operation.

Bill Showing Presentation and Signing in Time.—Where clerk's certificate shows that judgment was rendered against defendant on March 6th, bill of exceptions was marked "Presented" by trial judge on June 4th, and signed by him on Au-

gust 28th, there is no merit in motion to strike bill. *Tyson v. Jennings Produce Co.* (Ala.), 77 So. 986.

§ 35 (3) Signature and Seal.

Necessity for Signature.—An instrument purporting to be a bill of exceptions not appearing to have been signed by the presiding judge can not be considered as such. *Rowe v. Buttram*, 180 Ala. 456, 61 So. 258.

§ 35½. Filing.

Dates on Bills Showing Signing in Time.—Where dates on bill of exceptions showed that it was signed within 90 days after judgment, it will not be dismissed as not having been filed within that time, though judge did not certify date of presentment, and though statement that bill was tendered within time prescribed by law could not be regarded. *Covey Cotton Oil Co. v. Bank* (Ala. App.), 74 So. 87, certiorari denied in 75 So. 1003.

§ 36. Amendment or Correction.

Correction by Trial Court—Time.—Where, in copying into the bill of exceptions a deed introduced in evidence which was in the file of the papers in the trial court, the township and range were omitted from the description by a clerical error, and the omission was not discovered until the bill of exceptions had become a part of the record, the trial court had power at the next term to correct the clerical omission so as to make the record speak the truth, since, while after a bill of exceptions has been signed and had become a part of the record, and the term at which the case was tried has expired, it is beyond the control of the judge, and he has no power to alter or amend it, he may correct it as to clerical errors or omissions like other parts of the record. *Holloway v. Henderson Lumber Co.*, 194 Ala. 181, 69 So. 821.

Same—Nature of Error Correctable—Evidence Required.—The correction of a bill of exceptions after it has become a part of the record and the term has expired must relate to some clerical mistake, and must rest upon record or quasi record evidence. *Holloway v. Henderson Lumber Co.*, 194 Ala. 181, 69 So. 821.

§ 37. Quashing or Striking from Files.

See ante, "Stenographer's Report," § 11; "At or after Trial," § 25; "Time Prescribed or Allowed," § 27.

Bill Presented on Ninetieth Day.—A motion to strike the bill of exceptions on the ground that it was not presented to the trial judge, within the time allowed by Code 1907, § 3019, allowing 90 days, will be overruled, where it appears that presentation was made on the ninetyeth day after rendition of judgment. *Keeble v. State*, 14 Ala. App. 31, 70 So. 971.

Bill Not Presented within Time Required.—Bill of exceptions, not presented to the trial judge for signature within the 90 days required by law, will, on motion of appellee, be stricken. *Ross v. Central, etc., R. Co.* (Ala. App.), 68 So. 512. See *Owens v. State*, 11 Ala. App. 309, 66 So. 852; *McOllister v. State*, 183 Ala. 8, 62 So. 767.

Same—91 Days after Judgment.—Under Code 1907, § 3019, a bill presented 91 days after the judgment will be stricken. *McGay v. State*, 183 Ala. 41, 63 So. 70, following *McOllister v. State*, 183 Ala. 8, 62 So. 767; *Pierce v. State*, 8 Ala. App. 359, 63 So. 33.

Same—92 Days after Judgment.—Under Code 1907, § 3019, a bill of exceptions presented on the 92d day after entry of judgment will be stricken on motion. *Harper v. State*, 13 Ala. App. 47, 69 So. 302.

Under Code 1907, § 3019, where judgment was entered May 19th, and bill of exceptions was presented on August 19th, 92 days thereafter, a motion in the supreme court to strike the bill of exceptions will be granted. *Rice v. Beavers & Co.*, 196 Ala. 355, 71 So. 659.

Under Code 1907, § 3019, where the judgment was entered on November 12, 1912, a bill of exceptions, presented to the trial judge on February 12, 1913, 92 days thereafter, would be stricken from the record. *Young v. State*, 8 Ala. App. 343, 9 Ala. App. 679, 62 So. 1014.

Same—Submission on Motion to Strike and on Merits.—A purported bill of exceptions, not presented to the presiding judge within 90 days after judgment en-

tered, as required by Code 1907, § 3019, will be stricken, where the parties submit the appeal on motion to strike the bill and on the merits. *Tuggle v. Wilson*, 179 Ala. 671, 60 So. 391; *Lewis v. State*, 194 Ala. 1, 69 So. 913.

Same—Signed Bill.—If the bill of exceptions was not in fact presented within the time allowed, the fact that it is signed does not make it a part of the record, but it may be stricken on proper motion. *Collins v. State*, 14 Ala. App. 54, 70 So. 995.

Same—Parol Proof to Defeat Bill.—Failure to observe the requirement of Code 1907, § 3019, that a bill of exceptions must be presented within 90 days from the entry of judgment may be shown by parol, and, being shown, must result in the bill being stricken. *Buck Creek Lumber Co. v. Nelson*, 188 Ala. 243, 66 So. 476, 477.

Failure to Sign within Time Prescribed.—A bill of exceptions, not signed within the time prescribed by Code 1907, § 3019, must, on appellee's motion, be stricken out. *Deason v. Gray*, 189 Ala. 672, 66 So. 646.

Under Code 1907, § 3019, providing that a bill of exceptions must be signed by the judge within 90 days after presentation, a bill of exceptions, not signed until after the expiration of 90 days from presentation, will, on motion of appellee, be stricken. *Sellers v. Dickert*, 194 Ala. 661, 69 So. 604.

If the bill of exceptions was not signed by the judge within 90 days after judgment entry, as required by Code 1907, § 3019, it must be stricken, notwithstanding that it was kept open by the judge, at the request of appellee's counsel, to enable appellee to insert a copy of the oral charge; that being a matter between the judge and appellee's counsel in which appellant was not concerned. *Tennessee Coal, etc., R. Co. v. Perry*, 10 Ala. App. 371, 64 So. 651.

Same—Applicability of Statute.—Code 1907, § 3020, declaring that the appellate court may strike a bill of exceptions from the record because not signed within the time required by law, has no application when the bill is not presented within the 90 days allowed therefor.

Harper v. State, 13 Ala. App. 47, 69 So. 302.

Failure to File within Time.—Where a bill of exceptions is not filed within the time fixed by Code 1907, § 3019, it will be stricken from the record on motion. Buck Creek Lumber Co. v. Nelson, 188 Ala. 243, 66 So. 476.

Same—Absence of Trial Judge.—Under Gen. Acts 1915, p. 816, providing that appellant's bill of exceptions, may in the absence of the trial judge from the county, be filed with the clerk within

90 days from entry of judgment, a bill, so filed after 91 days had expired since such entry, will be stricken. Scott v. State (Ala. App.), 77 So. 937.

Setting Out Testimony in Extenso.—The supreme court has expressly reserved the right to strike bills of exceptions containing a statement of the testimony in extenso, in violation of Code 1907, p. 1526, rule 32, without motion or insistence of appellee. Turner v. Thornton, 192 Ala. 98, 68 So. 813.

Exceptions.

As to exceptions in contracts, conveyances, etc., see the particular titles such as CONTRACTS; COVENANTS; DEEDS; MORTGAGES; etc. As to exceptions in judicial proceedings, see ante, APPEAL AND ERROR; CRIMINAL LAW; EXCEPTIONS, BILL OF; post, TRIAL. As to exceptions in statutes, see post, STATUTES.

Excessive Damages.

See ante, DAMAGES, and references there given.

Excessive Punishment.

See ante, CONSTITUTIONAL LAW; CRIMINAL LAW.

Excessive Taxation.

See post, TAXATION.

EXCHANGE OF PROPERTY.

- § 2. Exchange of Real Property.
- § 2½. — Requisites and Validity.
- § 2½a. — Construction of Contract.
- § 3. — Modification or Rescission.
- § 3½. — Performance of Contract.
- § 3½a. — Remedies.
 - § 3½a (1) Pleading.
 - § 3½a (2) Evidence.
 - § 3½a (3) Damages.
- § 4. Exchange of Personal Property.
- § 5. — Rescission.
- § 7. — Remedies.
 - § 7 (1) Conditions Precedent.
 - § 7 (2) Evidence.
 - § 7 (3) Trial.

Cross References.

See the title EXCHANGE OF PROPERTY, vol. 6, p. 578, and references there given.

In addition, see ante, ESTOPPEL; EVIDENCE, post, TRIAL.

As to admissibility of testimony as to signature to contract for exchange of property, see ante, EVIDENCE. As to proper instructions in actions arising from contracts for exchange of property, see post, TRIAL.

§ 2. Exchange of Real Property.

§ 2½. — Requisites and Validity.

Immediate Ownership.—It was not material to the validity of a contract for the exchange of a house and lots for a farm that plaintiff should own the house and lot which he agreed to convey at the time of the agreement. *Moore v. Whitmire*, 189 Ala. 615, 66 So. 601.

§ 2½a. — Construction of Contract.

Presumption of Legal Title.—Where an agreement for the exchange of lands is silent as to the nature and character of the estate or interest to be sold or conveyed, the presumption is that an indefeasible legal title to the unsevered estate in the soil is what is intended to pass and to be acquired. *Martin v. Brown (Ala.)*, 74 So. 241.

Province of Court.—Where an agreement for exchange of land does not specify the kind of estate to be conveyed, the determination of the same is for the court. *Martin v. Brown (Ala.)*, 74 So. 241.

§ 3. — Modification or Rescission.

See post, "Rescission," § 5.

§ 3½. — Performance of Contract.

Deed of Third Party.—Under an agreement by plaintiff to convey a lot in exchange for other land, defendant could waive a personal deed from plaintiff and accept title directly from other parties in full discharge of plaintiff's obligation. *Moore v. Whitmire*, 189 Ala. 615, 66 So. 601.

Breach of Warranty.—An agreement for an exchange of lands, providing that each party was to furnish an abstract showing a good title free from incumbrances, with certain exceptions, and that 30 days should be given each party to correct any defect in the title, did not contain a warranty of title, but merely a stipulation that the abstracts should show clear titles, except as to the specified incumbrances, which was evidently a condition precedent to the enforced acceptance of the property; and hence there could be no recovery for breach of warranty. *Moore v. Whitmire*, 189 Ala. 615, 66 So. 601.

§ 3½a. — Remedies.**§ 3½a (1) Pleading.**

Complaint.—In an action for breach of contract to exchange realty, a complaint which did not state nature of breach, what provisions were breached, that plaintiff had complied with provisions, or negative a breach by him before defendant's breach, was insufficient. *Ferlesie v. Cook* (Ala.), 78 So. 915.

Same—Variance.—Under an agreement for an exchange of property by which plaintiff agreed to transfer to defendant a certain lot, he could not perform by tendering a deed from other parties, unless his own deed was waived by defendant; and hence there was a fatal variance between a count alleging an agreement to cause the lot to be conveyed to defendant and evidence showing an agreement to transfer it. *Moore v. Whitmire*, 189 Ala. 615, 66 So. 601.

Plea—Sufficiency.—In an action for breach of an agreement by which plaintiff agreed to transfer a city lot to defendant in consideration of a transfer to him by defendant of a farm, pleas that plaintiff had broken the contract, in that he had never conveyed or offered to convey the lot, that he had failed within the time stipulated in the contract to execute and deliver a conveyance, and that he had failed to transfer the lot, but had tendered a deed from persons other than himself, were not subject to demurrers on general grounds. *Moore v. Whitmire*, 189 Ala. 615, 66 So. 601.

§ 3½a (3) Evidence.

Admissibility of Evidence.—Where, in an action for breach of a contract to exchange a farm for a house and lot, defendant pleaded that plaintiff had never conveyed or offered to convey the house and lot, that he did not execute and deliver a conveyance within the time stipulated in the contract, and that he failed to transfer the lot but tendered a deed from third persons, and plaintiff filed a replication alleging that defendant had accepted a deed as a full compliance on the part of plaintiff, evidence that plaintiff had executed a deed to defendant was within the scope of the pleadings and properly admitted. *Moore v. Whitmire*, 189 Ala. 615, 66 So. 601.

In an action for breach of an agreement to exchange lands, evidence that defendant, after his failure to secure quitclaim deeds to the land which he agreed to convey, offered to reconvey to plaintiff the lot conveyed by him was not material, and should have been excluded. *Moore v. Whitmire*, 189 Ala. 615, 66 So. 601.

§ 3½a (3) Damages.

Cost of Abstract of Title.—Where defendant failed to perform an agreement for the exchange of lands, providing that each party was to furnish an abstract showing a good title, the cost to plaintiff of procuring an abstract of title to his lot was not recoverable as damages. *Moore v. Whitmire*, 189 Ala. 615, 66 So. 601.

§ 4. Exchange of Personal Property.**§ 5. — Rescission.**

Fraud in Horse Trade.—If a fraud is perpetrated by one of the parties to an exchange of horses, for which the other claims a rescission, his own fraud in the transaction is no defense; the doctrine as to parties in *pari delicto* not applying. *Whitworth v. Thomas*, 83 Ala. 308, 3 So. 781, 3 Am. St. Rep. 693.

Refusal to Return Property.—Use of the animal after rescinding a horse trade, the other party refusing to accept return of the animal, did not of itself revoke the rescission. *Smith v. Thomas* (Ala.), 78 So. 820.

§ 7. — Remedies.**§ 7 (1) Conditions Precedent.**

Theory of Liability.—In an action for difference in value between teams exchanged with defendant's tenant, where plaintiff claimed defendant agreed to pay the difference, the only theory on which defendant would be liable would be that he was a direct party to the trade. *Thomas v. Shows* (Ala. App.), 73 So. 994.

Taking Possession.—An owner of a mule, induced by fraud or false warranty to exchange it for a horse, may take possession of the mule whenever he can without committing a breach of the peace or trespass upon the premises of another where he promptly demands a rescission, and does no acts inconsistent with a

holding of the horse as bailee. *McCoy v. Prince*, 11 Ala. App. 388, 66 So. 950.

§ 7 (2) Evidence.

Admissibility.—In an action to recover a horse exchanged for a mule, and damages for its detention, evidence as to value of use of mule by plaintiff after rescission was not admissible, where defendant did not file a plea to set off such use against plaintiff's damages for detention of the horse. *Smith v. Thomas* (Ala.), 78 So. 820.

§ 7 (3) Trial.

Instructions.—*Pritchett v. Fife*, 8 Ala. App. 462, 62 So. 1001. (See the title EXCHANGE OF PROPERTY, § 7 (3), vol. 6, p. 579.)

Questions for Jury.—In an action for difference in value between teams exchanged with defendant's tenant, where a written contract with defendant was not claimed, and court charged that no lia-

bility would exist unless in writing, held, in view of the evidence that the only issue submitted was defendant's liability on a direct indebtedness and hence there was no reversible error in the instruction. *Thomas v. Shows* (Ala. App.), 73 So. 994.

Plaintiff's testimony that he traded for defendant's mule upon defendant's assurance that it was a good old mule makes a jury question whether there was a warranty. *Craven v. Quillin* (Ala.), 73 So. 413.

Sufficiency of Evidence.—In action for difference in value between teams exchanged with defendant's tenant who resided on defendant's farm, where plaintiff claimed that defendant was a party to the trade and agreed to pay the difference, a verdict for plaintiff held not contrary to preponderance of the evidence. *Thomas v. Shows* (Ala. App.), 73 So. 994.

Exclamation.

See ante, CRIMINAL LAW; EVIDENCE.

Exclusions of Witnesses.

See ante, CRIMINAL LAW; post, TRIAL; WITNESSES.

Exclusive Jurisdiction.

See ante, COURTS.

Excusable Homicide.

See ante, HOMICIDE.

EXECUTION.

I. Nature and Essentials in General.

§ 8. Effect of Payment or Satisfaction of Judgment.

II. Property Subject to Execution.

§ 23. Property Mortgaged or Otherwise Encumbered.

§ 24. — Personal Property.

III. Issuance, Form, and Requisites of Writ.

§ 38. Authority of Particular Courts and Officers.

§ 51. Form and Requisites in General.

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IV. Lien, Levy or Extent, and Custody of Property.

§ 85. Mode and Sufficiency of Levy.

§ 88. — Particular Interests in Personal Property.

§ 97. Irregularities and Objections as to Levy, and Waiver.

§ 102. Custody and Care of Property.

§ 104. Delivery of Property on Forthcoming or Delivery Bond.

§ 107. — Liabilities on Bonds.

V. Stay, Quashing, Vacating, and Relief against Execution.

§ 110. Stay of Execution.

§ 111. Quashing or Vacating Writ.

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§ 116 (1) In General.

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§ 122. Rights of Claimants of Property.

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§ 133. — Pleading.

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§ 135. — Evidence.

§ 135 (1) Presumptions and Burden of Proof.

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§ 140. — Judgment and Enforcement Thereof.

VII. Sale.

(A) Manner, Conduct, Validity and Confirming or Vacating.

- § 171. Opening or Vacating.
- § 174. — Irregularities or Misconduct Affecting Sale.
- § 176. — Inadequacy of Price in Connection with Other Objections.
- § 177. — Application and Proceedings Thereon.
- § 179. Actions to Set Aside Sale.
 - § 179 (1) In General.
 - § 179 (2) Pleading and Evidence.
- (B) Title and Rights of Purchaser.
 - § 184. Estate or Interest Acquired.
 - § 185. — In General.
 - § 189. Bona Fide Purchasers.
 - § 190. — In General.
 - § 191. — Notice.
 - § 193. Effect of Defects or Irregularities in Execution, Levy, or Sale.
 - § 193 (1) In General.
 - § 193 (3) Levy or Sale.
 - § 195. Possession.
 - § 196½. — During Period for Redemption.
 - § 198. Rents and Profits.
- (C) Redemption.
 - § 204. Persons Entitled to Redeem and Priority of Right.
 - § 205½. Time of Redemption.
 - § 207. Tender and Payment into Court.
 - § 210. Defects, Objections, and Waiver.
 - § 211. Actions to Redeem and for Accounting.
 - § 212. Operation and Effect.
- (D) Conveyance to Purchaser.
 - § 224. Construction and Operation.
 - § 227. — Relation Back.

IX. Payment, Satisfaction and Discharge.

- § 247. Payment.
- § 250. Levy on Personal Property.

XII. Wrongful Execution.

- § 275. Actions.
- § 279. — Evidence.

Cross References.

See the title EXECUTION, vol. 6, p. 589, and references there given.

As to alleging fraud in issuance of execution under which stock was sold, see ante, CORPORATIONS. As to title under execution sale against heirs of fraudulent grantor, see post, FRAUDULENT CONVEYANCES. As to collateral attack on execution and sale under issue of a venditioni exponas on judgment, see post, JUDGMENT. As to what purchaser at execution sale of mortgaged chattel acquires, see post, MORTGAGES.

I. NATURE AND ESSENTIALS IN GENERAL.

§ 8. Effect of Payment or Satisfaction of Encumbered.

No Entry of Satisfaction on the Record.—*Henderson v. Planters, etc., Bank*, 178 Ala. 420, 59 So. 493. See the title EXECUTION, § 3, vol. 6, p. 593.

Satisfaction of Execution.—*Henderson v. Planters, etc., Bank*, 178 Ala. 420, 59 So. 493. See the title EXECUTION, § 8, vol. 6, p. 593.

II. PROPERTY SUBJECT TO EXECUTION.

§ 23. Property Mortgaged or Otherwise Incumbered.

§ 24. — Personal Property.

Equity in Mortgaged Chattel.—Under the express provisions of Code 1907, § 4091, a chattel mortgagor has an equity in the mortgaged property which is recognized at law, so far at least as to render it subject to levy under process against him. *Logan v. Smith Bros. & Co.*, 9 Ala. App. 459, 63 So. 766, cited in note in 51 L. R. A., N. S., 1069, certiorari denied in *Ex parte Logan*, 185 Ala. 525, 64 So. 570.

Equity of Redemption—Right of Possession.—Under Code 1907, § 4091, subd. 2, 3, limiting the right or interest, less than the absolute title, that a defendant may have in personal property subject to levy and execution sale, to an equity of redemption and to a right to the possession, other than a possession acquired by a hiring, a mortgagor's equity of redemption in personalty may be levied upon and sold, either before or after the law day of the mortgage and at any time before foreclosure in equity or under the mortgage power of sale, which equity is the only interest of the mortgagor which may be sold under execution, unless the mortgage expressly or impliedly provides that the mortgagor shall retain the possession until default or condition broken, in which case such right of possession is subject to levy and sale as an interest separate and distinct from the equity of redemption. *Horton v. Hovater*, 11 Ala. App. 413, 66 So. 939.

III. ISSUANCE, FORM, AND REQUISITES OF WRIT.

§ 38. Authority of Particular Courts and Officers.

Issuance — Duty of Clerk.—*Henderson v. Planters, etc., Bank*, 178 Ala. 420, 59 So. 493. See the title EXECUTION, § 38, vol. 6, p. 602.

Duty of Clerk to Issue.—Code 1907, § 3272, subd. 11, requires the clerks of the circuit court to issue all writs of execution on the judgments of the county court returnable as if such suits had been determined in the circuit court. Section 4079 provides that the clerk must issue executions on all judgments in favor of the successful parties. Section 6696, provides that the judges of probate shall be the judges of the county courts of their respective counties. Section 6698 provides that the judges of the county courts are the clerks of their respective courts, but may at their own expense employ a clerk who may do all acts not judicial in their character. Held, that it is the duty of the circuit court clerk to issue executions from the county court only when he is clerk of that court; but, where the probate judge is clerk of the county court, it is his duty to issue such examinations. *State v. Hasty*, 184 Ala. 121, 63 So. 559.

§ 51. Form and Requisites in General.

Omission of Parties. — An execution failing to show in whose favor it was issued was void. *Barrett v. Brownlee*, 190 Ala. 613, 67 So. 467.

§ 54. Description of and Recitals as to Parties.

Failure to State Name of Plaintiff.—*Jordan Bros. v. Gordon*, 8 Ala. App. 479, 62 So. 1023. See the title EXECUTION, § 54, vol. 6, p. 610.

§ 64. Amendment.

Under Code 1907, § 3256, providing that the circuit court has power after final judgment to correct any error or defect in the judgment or process, and to secure parties in their right against any abuse of execution an execution, irregular or defective, in that it runs for a sum not warranted by the judgment, may be corrected in the court where judgment was rendered; such court having inherent

power to control its process so as to give justice. *Henderson v. Holman*, 193 Ala. 262, 69 So. 424.

IV. LIEN, LEVY OR EXTENT, AND CUSTODY OF PROPERTY.

§ 85. Mode and Sufficiency of Levy.

§ 88. — Particular Interests in Personal Property.

Where a sheriff, in levying execution upon cotton stored in a warehouse, located two bales whose numbers were 3416 and 3423, corresponding with those sought, and crawled up on top of the bales to see the numbers, but made no other identification mark, there was no valid levy; the sheriff not placing any identification mark on the bales levied upon, and it appearing that there were other bales in the warehouse of the same numbers. *Higdon v. Warrant Warehouse Co.*, 10 Ala. App. 496, 63 So. 938.

§ 97. Irregularities and Objections as to Levy, and Waiver.

Where a warehouseman held cotton upon which the sheriff levied execution, the warehouseman's agreement to hold the cotton thereafter as bailee for the sheriff estopped him from subsequently attacking the validity of the levy. *Higdon v. Warrant Warehouse Co.*, 10 Ala. App. 496, 63 So. 938, cited in note in 51 L. R. A., N. S., 637.

§ 102. Custody and Care of Property.

Interest of Sheriff.—By virtue of a levy of execution or attachment a sheriff acquires a special title or property in the goods levied upon, which will support detinue, trover, or trespass against one who wrongfully disturbs his possession. *Higdon v. Warrant Warehouse Co.*, 10 Ala. App. 496, 63 So. 938.

When Sheriff's Interest Ceases.—A sheriff's special title in goods taken on execution is based upon the theory that he is liable over to some one else, and his title ceases when the execution creditor is satisfied and the purchaser at execution sale is put in possession, but until the purchaser is put in possession the sheriff has such an interest in the property that he may maintain an action against a bailee who refuses to redeliver.

Higdon v. Warrant Warehouse Co., 10 Ala. App. 496, 63 So. 938.

§ 104. Delivery of Property on Forthcoming or Delivery Bond.

§ 107. — Liabilities on Bonds.

Under Code 1907, § 6024, declaring that if judgment is rendered against the claimant of goods levied on under execution, and he fails to deliver the property to the officer making the levy, such officer must indorse the bond forfeited, an indorsement on a forthcoming bond, reading that "the time having expired for delivery of the property and the payment of the costs, this bond is forfeited," is sufficient. *Henderson v. Holman*, 193 Ala. 262, 69 So. 424.

V. STAY, QUASHING, VACATING, AND RELIEF AGAINST EXECUTION.

§ 110. Stay of Execution.

Under Code 1907, § 3256, authorizing the circuit court after final judgment to secure parties in their rights against any oppression or abuse of execution or any process or upon any release or payment after judgment, the remedy against the abuse of execution or other process is to be administered on the equitable principles applying to proceedings on the writ of supersedeas or the common law writ of audita querela, and movant is entitled to relief whenever the plaintiff has no just reason to enforce the process. *Wallace v. Cook Brewing Co.*, 196 Ala. 245, 72 So. 93.

§ 111. Quashing or Vacating Writ.

§ 114. — Proceedings and Determination.

One moving to quash an execution as issued more than a year after rendition of judgment without revivor, must show the judgment was not recorded within a year, which would bring such issuance within the exception to Code 1907, § 4148. *State v. Ham*, 13 Ala. App. 648, 69 So. 253.

§ 115. Injunction.

§ 116. — Grounds.

§ 116 (1) In General.

Adequate Remedy at Law.—A bill to enjoin execution will not lie on the ground

that the execution was void or irregular in running for an amount not warranted by the judgment for, if void, the execution would cast no cloud on the property, and if irregular, the party has an adequate remedy in the court wherein judgment was rendered. *Henderson v. Holman*, 193 Ala. 262, 69 So. 424, cited in notes in Ann. Cas. 1918C, 156, 176, 244, 245, 254.

§ 116 (9) Existence and Adequacy of Other Remedy and Irreparable Injury.

Law or Equity.—Where the remedy at law under the averments of a bill to enjoin the enforcement of a default judgment was plain, adequate, and complete, the bill was without equity, and was properly dismissed. *Wallace v. Cook Brewing Co.*, 196 Ala. 245, 72 So. 93, cited in note in Ann. Cas. 1919C, 156.

Default Judgment—"Satisfied."—Complainant, showing that the authorized agent of one obtaining a default judgment against him had marked the record of the judgment as "Satisfied," and thereby canceled it, and that nothing was due on the judgment, was entitled to relief, not by bill in equity to enjoin the enforcement of the judgment, but by a motion in the lower court under the provisions of Code 1907, § 3256, to prevent an abuse of the process of that court; as Loc. Acts 1907, p. 203, establishing the law and equity court of a county, provided by § 21 that nothing should prevent the exercise of any power conferred upon the circuit court touching final judgments. *Wallace v. Cook Brewing Co.*, 196 Ala. 245, 72 So. 93.

§ 117. — Actions to Restrain Executions.

Harton v. Enslen, 182 Ala. 408, 62 So. 696. See the title EXECUTIONS, § 117 (1), vol. 6, p. 641.

VI. CLAIMS BY THIRD PERSONS.

§ 122. Rights of Claimants of Property.

§ 124. — Attack on Judgment or Execution.

Void Process.—*Jordan Bros. v. Gordon*, 8 Ala. App. 479, 62 So. 1023. See the title EXECUTION, § 124, vol. 6, p. 646.

Regularity of Judgment.—In the statutory suit to claim property upon which execution was levied, where the process

is not void on its face, the claimant can not question the regularity of either the judgment or the execution. *Millitello v. Roden Grocery Co.*, 190 Ala. 675, 67 So. 420.

Estoppel—Validity of Judgment.—A contention that by his assertion before obtaining the judgment that the judgment debtor and claimant were not the same person plaintiff had estopped himself from claiming that they were, the statutory suit to try the claim to property upon which the execution had been levied, is not an attack upon the regularity or validity of the judgment, and evidence to sustain such a contention is admissible. *Millitello v. Roden Grocery Co.*, 190 Ala. 675, 67 So. 420.

§ 129. Proceedings for Establishment and Determination of Claims.

§ 133. — Pleading.

In the trial under Code 1907, § 6039, of the claim to property upon which an execution had been levied, the only proper issue is whether the property levied on is subject to the process, and under that issue any evidence bearing thereon, including evidence of estoppel, may be introduced, so that the claimant is not prejudiced by the sustaining of demurrers to his pleas setting up an estoppel. *Millitello v. Roden Grocery Co.*, 190 Ala. 675, 67 So. 420.

§ 134. — Issues and Questions Considered.

Equitable Defenses.—Equitable matters as that the execution plaintiffs are bound by an agreement between the execution debtor and creditors whereby claimants were to take his property and administer it for the payment of his debts, held available to claimants in a claim suit, under Code 1907, § 6039. *Bickley, etc., Co. v. Porter*, 193 Ala. 607, 69 So. 565.

Legal Effect of Claim.—Where a third person claimed property levied on under execution, her claim admitted in legal effect the existence of plaintiff's debt and the levy for collection of same. *Pope v. Glenn (Ala.)*, 75 So. 917.

Question for Jury.—In a statutory claim suit by third person for property levied on, the only issue for the jury was whether property belonged to defendant

and was liable to execution. *Pope v. Glenn* (Ala.), 75 So. 917.

§ 135. — Evidence.

§ 135 (1) Presumptions and Burden of Proof.

If mortgaged property, because of irregularities in execution of mortgage, or in its recordation, under Code 1907, § 3383, remained subject to execution, the burden was on execution creditor to show such facts under section 6040. *Jackson v. Wilson Bros.* (Ala.), 78 So. 883.

§ 135 (2) Admissibility.

Consideration for Bill of Sale to Claimant.—Where a mule levied on was claimed by the debtor's wife, it was error to refuse to permit her to prove, as bearing on the bona fides of her claim of title, that \$300 had been borrowed by herself and her husband from a mercantile company, secured by a mortgage on all the live stock owned by them, including the mule, and that claimant loaned the money to her husband, which was a part of the consideration of a bill of sale which the husband made to claimant of the mule levied on. *Craddock v. Walden*, 184 Ala. 58, 63 So. 534.

Claims of Third Persons — Payments.—As tending to show that plaintiffs were parties to an agreement with creditors whereby a committee should take his property and administer it to pay his debts, the committee, in a claim suit, could show that after the agreement payments were made to plaintiffs in pursuance of it. *Bickley, etc., Co. v. Porter*, 193 Ala. 607, 69 So. 565.

Same — Conversations.—Conversation between a debtor's attorney and the attorney of certain creditors, tending to show whether such creditors were parties to an agreement of the debtor with creditors for administration of his property by a committee, may be testified to by the debtor's attorney in a claim suit between such creditors and the committee. *Bickley, etc., Co. v. Porter*, 193 Ala. 607, 69 So. 565.

What Claimant May Show. — Where goods in dispute in a claim suit were clearly intended for sale in business conducted by claimant, it was proper to allow claimant to show circumstances tend-

ing to show her ownership of the business. *Pope v. Glenn* (Ala.), 75 So. 917.

§ 135 (3) Weight and Sufficiency.

Where a mule levied on as the property of a husband and claimed by his wife was found in the husband's lot, he had at least a community of possession which was sufficient to show that the mule was prima facie subject to levy, unless the wife had legal title thereto. *Craddock v. Walden*, 184 Ala. 58, 63 So. 534.

§ 137. — Instructions.

The requested charge in a claim suit by a committee, depending on whether plaintiffs were parties to and bound by an agreement of the debtor with creditors for administration of his property by the committee for payment of his debts, that the intention of parties governs in a contract, and that if the jury are satisfied from the evidence that plaintiffs reserved the right to reduce their claim to judgment, and did so reduce it, it would, after being recorded, be a lien on the property levied on, and that it was recorded before the deed of trust was recorded, was properly refused as misleading. *Bickley, etc., Co. v. Porter*, 193 Ala. 607, 69 So. 565.

§ 140. — Judgment and Enforcement Thereof.

Clerical Misprision.—That a judgment in a claim case ordered the property "sold or condemned" instead of "sold and condemned" was not ground for reversal; the error being a mere clerical misprision amendable on motion in the circuit court. *Craddock v. Walden*, 184 Ala. 58, 63 So. 534.

VII. SALE.

(A) MANNER, CONDUCT, VALIDITY, AND CONFIRMING OR VACATING.

§ 171. Opening or Vacating.

§ 174. — Irregularities or Misconduct Affecting Sale.

A mere irregularity in execution sale, such as failure to give statutory notice of time and place, will not authorize vacating sale. *Ashurst v. Arnold-Henegar-Doyle Co.* (Ala.), 78 So. 386.

§ 176. — Inadequacy of Price in Connection with Other Objections.

Discretion.—Where a sheriff levied on and sold for \$159 over 100 acres of land, shown to be worth \$12.50 to \$15 an acre, held, court did not abuse discretion in setting aside execution sale. *Danforth v. Burchfield* (Ala.), 78 So. 904.

Glaring and Gross Inadequacy.—Mere inadequacy of price is no ground for setting aside an execution sale; but, when inadequacy is so glaring and gross as to shock understanding and conscience of an honest and just man, it will, of itself, authorize setting aside sale. *Danforth v. Burchfield* (Ala.), 78 So. 904.

§ 177. — Application and Proceedings Thereon.

What Precision Necessary.—In proceeding under Code 1907, § 4134, to set aside execution sales for oppression, irregularity, etc., the technical precision required of pleaders in more formal proceedings is not required. *Danforth v. Burchfield* (Ala.), 78 So. 904.

Immaterial Variance.—In proceeding under Code 1907, § 4134, to set aside an execution sale of land, it was not fatal to relief prayed that immaterial or unnecessary allegations in motion were not proved as alleged. *Danforth v. Burchfield* (Ala.), 78 So. 904.

Proof of Ownership.—Since party who claims land under execution sale is estopped from denying that it is in fact property of defendant in execution, it is unnecessary, in proceeding under Code 1907, § 4134, to set aside sale, for movant to offer evidence on question of ownership. *Danforth v. Burchfield* (Ala.), 78 So. 904.

Ex Parte Affidavits.—In proceeding under Code 1907, § 4134, to set aside execution sales, practice sanctions the use of ex parte affidavits. *Danforth v. Burchfield* (Ala.), 78 So. 904.

§ 179. Actions to Set Aside Sale.

§ 179 (1) In General.

Relief against Sale.—*Empire Realty Co. v. Harton*, 176 Ala. 99, 57 So. 763. See the title EXECUTION, § 179 (1), vol. 6, p. 677.

§ 179 (2) Pleading and Evidence.

Sale—Inadequacy of Price.—*Harton v.*

Enslen, 176 Ala. 77, 57 So. 723. See the title EXECUTION, § 179 (2) vol. 6, p. 677.

Bill—Title of Complainant.—*Harton v. Enslen*, 176 Ala. 77, 57 So. 723. See the title EXECUTION, § 179 (2), vol. 6, p. 677.

(B) TITLE AND RIGHT OF PURCHASER.

§ 184. Estate or Interest Acquired.

§ 185. — In General.

Property in Hands of Bailee.—Where bulky property is levied upon, it may be sold by sample, and the sale passes title to the purchaser even though the property is at that time in the hands of a bailee who holds it for the sheriff. *Higdon v. Warrant Warehouse Co.*, 10 Ala. App. 496, 63 So. 938.

Effect of Sale.—Under Code 1907, § 4125, providing that a judicial sale regularly made shall convey title as effectually as if the sale was made by the person against whom the process issues, a sale of property taken on execution passes to the purchaser all title which the sheriff acquired by his levy. *Higdon v. Warrant Warehouse Co.*, 10 Ala. App. 496, 63 So. 938.

§ 189. Bona Fide Purchaser.

§ 190. — In General.

Under Code 1907, § 3383, providing that conveyances of realty are void as to purchasers for a valuable consideration and judgment creditors, without notice, unless recorded before the accrual of the right of such purchaser or creditor, a wife under a conveyance from her husband, not recorded until two years later after a mechanic's lien had attached, three months after the judgment thereon and several days after the venditioni exponas was in the hands of the sheriff, in the absence of any notice of her possession, had no title as against the judgment creditor purchasing at the execution sale. *Harris v. Hanchey*, 192 Ala. 179, 68 So. 276.

§ 191. — Notice.

Change of Possession — Unrecorded Deed.—*Brown v. International Harvester Co.*, 179 Ala. 563, 60 So. 841. See the title EXECUTION, § 191 (1), vol. 6, p. 684.

Holding under Unrecorded Deed.—*Brown v. International Harvester Co.*, 179 Ala. 563, 60 So. 841. See the title EXECUTION, § 191 (1), vol. 6, p. 684.

Facts Putting on Inquiry—Adjudication in Bankruptcy.—That execution purchasers of property of a vendee knew that the vendee had been adjudicated a bankrupt did not charge them with notice that the bankruptcy petition showed the existence of a vendor's lien. *Silvey & Co. v. Cook*, 191 Ala. 228, 68 So. 37.

§ 193. Effect of Defects or Irregularities in Execution, Levy, or Sale.

§ 193 (1) In General.

A sale under an execution issued on a dormant judgment is avoidable at the seasonable election of the defendant in execution, but, if not set aside, operates to pass the title. *Prince v. Carter*, 186 Ala. 535, 65 So. 326.

§ 193 (3) Levy or Sale.

A mere irregularity in execution sale, such as failure to give statutory notice of time and place, will not render defective a purchaser's title. *Ashurst v. Arnold-Henegar-Doyle Co. (Ala.)*, 78 So. 386.

§ 195. Possession.

§ 196½. — During Period for Redemption.

Rights of Purchaser.—Under the redemption statute (Code 1907, § 5747), relating to possession of land and purchaser's notice to a tenant in possession, purchaser held entitled to possession before redemption. *Ensley Mortg., etc., Co. v. Lewis*, 193 Ala. 226, 68 So. 1012.

Debtor's Tenant—Privity of Title.—Under the redemption statute (Code 1907, § 5747), relating to possession of land, and purchaser's notice to a tenant in possession, held, that tenant of debtor did not hold under privity of title and that, on purchaser's notice, his possession was transferred to and he became a tenant of the purchaser with the ordinary rights growing out of the relationship. *Ensley Mortg., etc., Co. v. Lewis*, 193 Ala. 226, 68 So. 1012.

§ 198. Rents and Profits.

Rights of Purchaser—Possession.—Un-

der the redemption statute. (Code 1907, § 5747), providing that the possession of land must be delivered to the purchaser within ten days after the sale thereof by the debtor, if in his possession, or of any one holding under him by privity of title, and that, if in possession of a tenant, the purchaser's written notice of the purchase, after ten days from time of sale, vests the right to possession in him as if such tenant had attorned to him, the purchaser is entitled to possession and to the rents and profits before redemption. *Ensley Mortg., etc., Co. v. Lewis*, 193 Ala. 226, 68 So. 1012.

Notice to Debtor or Agent.—Under the redemption statute (Code 1907, § 5747), relating to possession of land, and purchaser's notice to a tenant in possession, held, that tenant of debtor did not hold under privity of title and that, on purchaser's notice, his possession was transferred to and he became a tenant of the purchaser with the ordinary rights growing out of the relationship. *Ensley Mortg., etc., Co. v. Lewis*, 193 Ala. 226, 68 So. 1012.

(C) REDEMPTION.

§ 204. Persons Entitled to Redeem and Priority of Right.

Manner and Effect of Redemption.—While redemption by piecemeal can not be enforced, the heirs of a decedent whose land was sold under execution could, with the consent of the purchaser, redeem their interests, and have such interests set off in separate parcels, in lieu of undivided interests, subject to the right of those not participating in such partition to redeem the entire tract, and, where such right was not exercised, such redemption and partition fixed the rights of the parties. *Tribble v. Wood*, 186 Ala. 329, 65 So. 73.

Failure to Serve Notice to Deliver Possession.—Under the redemption statute (Code 1907, § 5747), relating to possession of land, and purchaser's notice to a tenant in possession, defendant, who wrongfully ousted the tenant of the vendee of the executing purchaser, and puts its own tenant in possession and collected rent, held to have no right to redeem on ground that notice was not served on it.

Ensley Mortg., etc., Co. v. Lewis, 193 Ala. 226, 68 So. 1012.

§ 205½. Time of Redemption.

A delay in tendering the amount due to the alienee of the purchaser at execution sale is sufficiently accounted for by a showing that the complainant had attempted to redeem from the execution purchaser without notice of his alienation and that such purchaser had accepted the tender. *Thompson v. Brown* (Ala.), 76 So. 298.

§ 207. Tender and Payment into Court.

Tender to Alienee in Possession.—Under Code 1907, §§ 5746-5749, redemptors of land sold under execution must pay or tender the required amount to the purchaser or his vendee; and if the alienee of the purchaser is in actual visible possession, such possession is sufficient notice of the alienation, and the redemptors must pay or tender the required amount to him. *Thompson v. Brown* (Ala.), 76 So. 298.

§ 210. Defects, Objections, and Waiver.

Where the owner has attempted to redeem from the purchaser at execution sale, who has alienated the land, the owner may waive the effect of his redemption from the purchaser, as well as the alleged illegality of the execution sale, and seek redemption from the alienee. *Thompson v. Brown* (Ala.), 76 So. 298.

§ 211. Actions to Redeem and for Accounting.

A bill to redeem from the alienee of the purchaser at execution sale is defective, if it fails to allege that the amount tendered included all lawful charges of which the complainant had notice. *Thompson v. Brown* (Ala.), 76 So. 298.

§ 212. Operation and Effect.

Where some heirs of a decedent whose land was sold under execution redeemed their respective interests, and the husband of one of the heirs, who purchased the re-

maining unredeemed interests, recognized the right of one of the nonredeeming heirs, and accepted from her repayment of the money advanced to purchase her interest, a trust resulted in favor of her grantee as to her interest. *Tribble v. Wood*, 186 Ala. 329, 65 So. 73.

(D) CONVEYANCE TO PURCHASER.

§ 224. Construction and Operation.

§ 227. — Relation Back.

Conveyance after Attachment of Lien.—*Cranford Mercantile Co. v. Anderton*, 179 Ala. 573, 60 So. 974. See the title EXECUTION, § 227, vol. 6, p. 700.

IX. PAYMENT, SATISFACTION, AND DISCHARGE.

§ 247. Payment.

Payment by Officer.—*Henderson v. Planters, etc., Bank*, 178 Ala. 420, 59 So. 493. See the title EXECUTION, § 247, vol. 6, p. 707.

Payment to Sheriff—Effect.—*Henderson v. Planters, etc., Bank*, 178 Ala. 420, 59 So. 493. See the title EXECUTION, § 247, vol. 6, p. 707.

Authority of Officers as to Payment.—*Henderson v. Planters, etc., Bank*, 178 Ala. 420, 59 So. 493. See the title EXECUTION, § 247, vol. 6, p. 707.

§ 250. Levy on Personal Property.

Henderson v. Planters, etc., Bank, 178 Ala. 420, 59 So. 493. See the title EXECUTION, § 250, vol. 6, p. 709.

XII. WRONGFUL EXECUTION.

§ 275. Actions.

§ 279. — Evidence.

In an action for wrongful levy and sale of plaintiff's property on execution against another, evidence that the execution defendant stated that he did not own the property held sufficient to overcome the presumption of ownership from possession by the execution defendant. *Vines v. Vandergrift & Son*, 192 Ala. 351, 68 So. 280.

EXECUTORS AND ADMINISTRATORS.

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Cross References.

See the title EXECUTORS AND ADMINISTRATORS, vol. 7, p. 1, and references there given.

As to heir at law maintaining bill to remove administration from probate to chancery court, see ante, COURTS. As to creditor by specialty suing personal representative of debtor, see ante, DESCENT AND DISTRIBUTION. As to right of beneficiary under a will to remove administration of estate to chancery court, see ante, EQUITY. As to when a court of equity will take jurisdiction of administration out of probate court, see ante, EQUITY. As to removal to chancery court where administrator acts as such in three states and as guardian of decedent's chil-

dren, see ante, EQUITY. As to bill by distributees to remove administration from probate to chancery court to preserve solvency of estate, see ante, EQUITY. As to jurisdiction of chancery court in settlement of firm transactions at suit of distributee of decedent, see ante, EQUITY. As to bill by administrator of trustee barred by laches, see post, TRUSTS.

I. ADMINISTRATION IN GENERAL. § 12. Appointment of Executor.

§ 1. Scope of Administration.

Involves What.—*Rucker v. Tennessee Coal, etc., R. Co.*, 176 Ala. 456, 58 So. 465. See the title EXECUTORS AND ADMINISTRATORS, § 1, vol. 7, p. 23.

§ 3. Necessity of Administration.

§ 3 (1) In General.

Property of Defunct Corporation — Heirs of Deceased Member.—Where defendant had in its possession property belonging to a defunct corporation, and plaintiff's, as heirs of a deceased member, were entitled to participate in the distribution, their bill for distribution is not defective in failing to allege administration upon the estate of the deceased member, for, if there were no debts and the heirs were of age, none is necessary, and, if there were debts and administration was necessary, the court might provide for it in its decree. *Mobile Temperance Hall Ass'n v. Holmes*, 189 Ala. 271, 65 So. 1020.

§ 3 (4) Estate Free from Indebtedness.

Redemption from Mortgage—Distribution.—In bill seeking redemption from mortgage foreclosure, division and distribution among heirs should be granted where prayed; there being offer to do equity and no debts of estate other than that embraced in mortgage in controversy, in view of Code 1907, § 5741, as to adjustment of all rights and equities of parties on bill for redemption. *Hale v. Kinaird (Ala.)*, 76 So. 954.

II. APPOINTMENT, QUALIFICATION, AND TENURE.

§ 7. Jurisdiction of Courts.

§ 8. — In General.

Probate Court.—*Carr v. Illinois Cent. R. Co.*, 180 Ala. 159, 60 So. 277, 43 L. R. A., N. S., 634. See the title EXECUTORS AND ADMINISTRATORS, § 8, vol. 7, p. 26.

When Letters Granted. — *Blacksher Co. v. Northup*, 176 Ala. 190, 57 So. 743. See the title EXECUTORS AND ADMINISTRATORS, § 12, vol. 7, p. 27.

§ 15. Right to Appointment as Administrator.

Father's Right to Administer Infant's Estate.—Under Code 1907, § 2486, requiring damages recoverable for wrongful death to be distributed according to the statute of distributions, § 3754, providing that, where there are no children or descendants and but one surviving parent, realty descends one-half to such surviving parent and one-half to the brothers and sisters in equal parts, and § 2520, prescribing the order in which administration must be granted to persons willing to accept and fit to serve, and specifying next in order after the husband or widow the next of kin entitled to share in the distribution of the estate, where an infant left surviving a father and minor sisters, the father, if fit to serve, was entitled to administer the estate, consisting of a right of action for wrongful death. *Nichols v. Smith*, 186 Ala. 587, 65 So. 30.

§ 16. Qualifications of Administrator.

Right to Appointment as Administrator — Disqualifications.—Under Code 1907, § 2520, requiring administration to be granted to the persons therein specified, if fit to serve, in the order therein prescribed, and § 2508, providing that no person is a fit person to serve as executor who is under the age of 21, or has been convicted of an infamous crime, or who, from intemperance, improvidence, or want of understanding, is incompetent to discharge the duties of the trust, the court can deny the application of a person otherwise entitled to administration only for one of the causes specified in § 2508; and hence administration of the estate of an infant decedent, consisting of a right of action

for wrongful death, could not be denied to the father, though he had no peculiar fitness for the office, and had abandoned his family and neglected them under circumstances that should have stimulated his care for them, and though it was inferable that his desire for administration was for the purpose of using the situation for his own best advantage. *Nichols v. Smith*, 186 Ala. 587, 65 So. 30.

Lack of Care, Foresight, or Business Capacity. — The "improvidence" which will defeat a right to act as executor under Code 1907, § 2520, providing that no person is fit to serve as executor who, from improvidence, is incompetent to discharge the duties of the trust, means a lack of care, foresight, or business capacity endangering the safety of the estate, and capacity for care and foresight need not be evidenced by the accumulation of any considerable estate. *Nichols v. Smith*, 186 Ala. 587, 65 So. 30.

§ 17. Renunciation of Right to Administer.

Waiver by Widow.—Under Code 1907, §§ 2520, 2522, a widow waives her preferential right to issuance of letters of administration by not applying for letters within 40 days after interstate's death. *Garrett v. Harrison* (Ala.), 77 So. 712.

§ 18. Proceedings for Appointment.

§ 18 (1) Nature of Proceedings.

In Rem or Personam.—*White v. Hill*, 176 Ala. 430, 58 So. 444. See the title EXECUTORS AND ADMINISTRATORS, § 18 (1), vol. 7, p. 30.

§ 18 (2) Parties.

Bill for Appointment and Revocation.—*White v. Hill*, 176 Ala. 480, 58 So. 444. See the title EXECUTORS AND ADMINISTRATORS, § 18 (2), vol. 7, p. 30.

Qualifications—Persons Entitled to Object.—An administratrix, whose appointment was revoked because she was not the lawful wife of intestate, can not question the qualifications of the petitioner for appointment as administratrix, since, if she is not the widow, she has no interest in the estate or in the qualifications of the petitioner for letters of administration. *Fields v. Woods*, 191 Ala. 93, 67 So. 1016.

§ 18 (3) Petition or Bill.

Name of Decedent—Validity of Administrator's Letters.—*Milbra v. Sloss-Sheffield Steel, etc., Co.*, 182 Ala. 622, 62 So. 176. See the title EXECUTORS AND ADMINISTRATORS, § 18 (3), vol. 7, p. 30.

§ 21. Second or Additional Appointment.

Two Administrations on Same Estate.—*Carr v. Illinois Cent. R. Co.*, 180 Ala. 159, 60 So. 277, 43 L. R. A., N. S., 634. See the title EXECUTORS AND ADMINISTRATORS, § 21, vol. 7, p. 33.

Necessity of Removal of Previous Appointee.—*Milbra v. Sloss-Sheffield Steel, etc., Co.*, 182 Ala. 622, 62 So. 176. See the title EXECUTORS AND ADMINISTRATORS, § 21, vol. 7, p. 33.

§ 23. Bond.

Testamentary Executor without Bond—Effect on Court.—Where a will appoints an executor without bond, the provision as to bond is not binding on the court administering the estate. *Cunningham v. Herring*, 195 Ala. 469, 70 So. 148.

§ 26. Operation and Effect of Appointment.

§ 26 (1) In General.

Review—Presumptions. — The question of fitness for letters of administration within Code 1907, § 2520, providing that administration must be granted to some one of the persons therein specified, if fit to serve, is one of fact, and all reasonable presumptions will be indulged in favor of the finding of the probate judge. *Nichols v. Smith*, 186 Ala. 587, 65 So. 30.

§ 26 (2) Collateral Attack in General.

Conclusiveness as to Relationship. — *White v. Hill*, 176 Ala. 480, 58 So. 444. See the title EXECUTORS AND ADMINISTRATORS, § 26 (2), vol. 7, p. 36.

In Action by Administrator.—The appointment of an administrator by a court of probate can not be collaterally attacked in the administrator's action in his representative capacity. *Enzor v. Rushton*, 13 Ala. App. 550, 69 So. 909.

§ 26 (3) Want of Jurisdiction.

Appointment Voidable for Fraud—Effect on Suit.—*Carr v. Illinois Cent. R.*

Co., 180 Ala. 159, 60 So. 277, 43 L. R. A., N. S., 634. See the title EXECUTORS AND ADMINISTRATORS, § 26 (3), vol. 7, p. 37.

Construction and Effect of Second Appointment—Collateral Attack—Milbra v. Sloss-Sheffield Steel, etc., Co., 182 Ala. 622, 62 So. 176. See the title EXECUTORS AND ADMINISTRATORS, § 26 (3), vol. 7, p. 37.

§ 26 (4) Errors and Irregularities.

Prematurity of Issue—Right to Object.—A widow who has waived her preferential right to letters of administration by not seasonably applying therefor can not complain of mere prematurity of issuance thereof to another. *Garrett v. Harrison* (Ala.), 77 So. 712.

§ 29. Revocation of Letters.

Previously Married to Another — No Evidence of Divorce.—Where it is shown that one claiming to be the widow of intestate had been previously married to another, who was still living, and there was no evidence that she had been divorced, her appointment will be revoked. *Fields v. Woods*, 191 Ala. 93, 67 So. 1016.

Petition for—Joinder in Petition for Appointment.—One petitioning for the revocation of letters of administration on the ground that the administratrix was not entitled thereto can join in the same petition a prayer for her own appointment. *Fields v. Woods*, 191 Ala. 93, 67 So. 1016.

§ 32. Removal.

§ 32 (1) Grounds in General.

Appointment of Successor—Propriety of Action.—Propriety of order removing administratrix and appointing her successor held dependent on facts existing and presented to chancellor when it was made, and not on facts existing and presenting on application to set it aside. *Ashurst v. Union Bank, etc., Co.* (Ala.), 76 So. 917.

§ 32 (3½) Grounds for Refusing to Remove.

Petition for Removal—Ratification of Acts.—Allegations, in petition for removal of administrator, of premature and

fraudulent settlement of claim for death of intestate, held not to avail petitioner; petition ratifying settlement by claiming the amount and asking that administrator be compelled to pay it into court. *Garrett v. Harrison* (Ala.), 77 So. 712.

§ 32 (6) Persons Entitled to Apply.

Any one interested or who himself is entitled to administer, or the court ex *mero motu* or at the suggestion of an *amicus curiae*, may make application for removal of a personal representative. *Ashurst v. Union Bank, etc., Co.* (Ala.), 76 So. 917.

§ 34. Administrators De Bonis Non.

§ 34 (1) In General.

Removing Administratrix and Appointing Successor—Propriety of Order.—Propriety of orders removing administratrix and appointing successor held dependent on facts existing and presented to chancellor when they were made, and not on facts existing and presented on application to set them aside. *Ashurst v. Union Bank, etc., Co.* (Ala.), 76 So. 917.

§ 34 (4) Jurisdiction and Proceedings.

Appointment on Petition of Attorneys—Review.—That successor of removed administratrix was appointed on petition of party's attorneys held not to render the appointment void or so improvident as to authorize reversal of order refusing to annul the appointment. *Ashurst v. Union Bank, etc., Co.* (Ala.), 76 So. 917.

§ 34 (5) Operation and Effect of Appointment.

Collateral Attack—Presumption of Jurisdiction.—Under Gen. Acts 1911, p. 574, conferring very general powers on chancery courts in the administration of estates, it will not be presumed on collateral attack that the court appointing an administrator de bonis non did not have the proper jurisdiction, but everything necessary to give validity to the appointment which the record does not contradict will be presumed. *Ashurst v. Union Bank, etc., Co.* (Ala.), 76 So. 917.

Presumption of Vacancy.—The appointment of an administrator de bonis non is of itself *prima facie* evidence that there was a vacancy in the administra-

tion, and this will be conclusively presumed until clearly and explicitly disproved. *Ashurst v. Union Bank, etc., Co. (Ala.)*, 76 So. 917.

III. ASSETS, APPRAISAL, AND INVENTORY.

§ 38. Personal Property in General.

Money Held by Agent for Use of Deceased.—Where the widow of a testator, having a life estate in his homestead, sold the personal property belonging thereto and delivered the proceeds to her confidential agent to hold for the estate of her deceased son, and the agent also retained, at her instructions, rents not used by her for living expenses, on her death the agent was liable to account to executrix of the estate of the deceased son for such money. *Rasch v. Peters (Ala.)*, 78 So. 913.

§ 46. Ownership of Property at Time of Death.

§ 47. — In General.

Jewelry Which Wife Permitted Husband to Wear.—*Chamboredon v. Fayet*, 176 Ala. 211, 57 So. 845. See the title EXECUTORS AND ADMINISTRATORS, § 47, vol. 7, p. 53.

§ 49½. — Evidence of Ownership.

Money in Possession of Decedent — Evidence.—Where, upon son's death, the father took possession of money found in his possession and disposed of it to certain persons, it was error, in action by administratrix to recover it, to refuse to allow the father to show that the money actually belonged to such person. *Sewell v. Sewell (Ala.)*, 74 So. 343.

Decedent's Possession of Personal Property—Presumption.—Personal property found in decedent's possession or under his control at time of death is presumed to belong to him, but this presumption is rebuttable. *Sewell v. Sewell (Ala.)*, 74 So. 343.

IV. COLLECTION AND MANAGEMENT OF ESTATE.

(A) IN GENERAL.

§ 59. Instructions of Court.

Judgments against Administrator in

Another State.—Executor, having bona fide doubt as to intent and meaning of will and as to binding effect of judgments secured against administrator in another state, properly asked direction of chancery court in administration. *Reed v. Bloodworth (Ala.)*, 76 So. 376.

§ 60. Discovery and Collection of Assets.

§ 64. — Compromise or Release of Claims.

Authority in General.—*Carr v. Illinois Cent. R. Co.*, 180 Ala. 159, 60 So. 277, 43 L. R. A., N. S., 634. See the title EXECUTORS AND ADMINISTRATORS, § 64, vol. 7, p. 60.

§ 67. Custody and Management of Estate.

§ 70. — Continuance of Decedent's Business.

Provisions of Will—Power to Continue Testators' Business.—Discretionary powers vested in executor under will to sell and exchange property held not to confer authority to continue general mercantile business as testator had done. *Pearce v. Pearce (Ala.)*, 74 So. 952.

Same—Carrying on Business — Power of Executor.—A trust does not pass to executor so as to enable him to carry on business, unless he has express authority under will, or is so empowered to act by court of chancery. *Pearce v. Pearce (Ala.)*, 74 So. 952.

§ 80. Interest on Funds of Estate.

Mingling and Using Funds for Individual Benefit.—Where executor deposited estate funds in his private account, there was such conversion thereof as to charge him with interest on the funds so converted. *Collins v. Clements (Ala.)*, 75 So. 165.

§ 81. Deposits.

Where Deposit Made in Administrator's Own Name.—*Chancellor v. Chancellor*, 177 Ala. 44, 58 So. 423. See the title EXECUTORS AND ADMINISTRATORS, § 81, vol. 7, p. 70.

Deposit of Trust Funds—Liability for Loss.—*Chancellor v. Chancellor*, 177 Ala. 44, 58 So. 423. See the title EXECUTORS

AND ADMINISTRATORS, § 81, vol. 7, p. 70.

§ 90. Waste, Conversion, or Embezzlement of Assets.

Effect of Life Tenant's Instructions.—Mere fact that life tenant told executor not to invest funds gave him no right to convert them to his own use, though he was not then liable for failure to loan them. *Collins v. Clements (Ala.), 75 So. 165.

§ 93. Administrators De Bonis Non.

§ 93 (6) Rights and Liabilities as to Contracts and Transactions of Predecessor.

Executory Agreement.—Carr v. Illinois Cent. R. Co., 180 Ala. 159, 60 So. 277, 43 L. R. A., N. S., 634. See the title EXECUTORS AND ADMINISTRATORS, § 93 (6), vol. 7, p. 85.

§ 93 (7) Power of Sale Under Will.

Who May Exercise.—An administrator de bonis non with will annexed can not exercise an executor's discretionary power of sale, under Code, § 3437, authorizing the surviving executor to sell under power and extending executor's powers to administrators with wills annexed. Snow v. Bray (Ala.), 73 So. 542.

§ 94. Administrators with Will Annexed.

Testamentary Trust—Deceased Executor—On Whom Trust Devolved.—A will directing executor named to pay sufficient amount each year to wife and children for maintenance, and authorizing him to keep estate intact for 20 years if he sees fit, reposed in executor a personal trust, and on his death without carrying it out, the duty devolved upon administrator with will annexed, and not upon executor's administrator. Ralls v. Johnson (Ala.), 75 So. 926.

(B) REAL PROPERTY AND INTERESTS THEREIN.

§ 102. Title and Authority in General.

Power to Rent or Sell.—Randolph v. Vaile, 180 Ala. 82, 60 So. 159. See the title EXECUTORS AND ADMINISTRATORS, § 102 (1), vol. 7, p. 88.

§ 103. Possession and Use.

§ 103 (1) In General.

Right to Maintain Ejectment.—There can be no recovery in ejectment by one styling himself administrator, which fact was denied by defendants, where he did not then hold that position. Randolph v. Hubbert, 190 Ala. 610, 67 So. 416.

§ 103 (2) Actions to Recover Possession.

Ejectment—Persons Entitled to Action.—Rucker v. Tennessee Coal, etc., R. Co., 176 Ala. 456, 58 So. 465. See the title EXECUTORS AND ADMINISTRATORS, § 103 (2), vol. 7, p. 87.

§ 107. Contracts of Decedent.

Claims against Estate — Purchase Money.—Purchase money due from a deceased purchaser on a valid contract of sale is such a debt of the decedent as his representative may rightfully pay. Jones v. Hert, 192 Ala. 111, 68 So. 259.

§ 108. Sale.

§ 110. — Power Under Will.

§ 110 (1) In General.

Subsequent Birth of Issue—Effect.—Code 1907, § 6160, provides that whenever a testator has a child born after the making of his will, either in his lifetime or after his death, and no provision is made in the will for such contingency, the birth operates as a revocation of the will so far as to allow the child to take the same share of testator's estate as if he had died intestate. Held, that where testator bequeathed all his property to his wife and gave her unqualified power to sell any and all of the property as she might deem best, the subsequent birth of issue unprovided for did not revoke the widow's power to sell as executrix, but merely imposed on her the duty to account to the afterborn children for their interest in the proceeds of the property sold. Woodliff v. Dunlap, 187 Ala. 255, 65 So. 936.

§ 110 (2) Execution of Power and Confirmation of Sale.

A void sale by an administrator under order of court can not be supported as an exercise of a power of sale under a will. Snow v. Bray (Ala.), 73 So. 542.

§ 116. Lease.

Right to Rent.—Nothing appearing to contrary, executors have statutory power to rent real estate of deceased subject to supervision of probate court. *Shotts v. Cooper* (Ala.), 74 So. 353.

(C) PERSONAL PROPERTY.

§ 119. Title and Authority in General.

Relation of Administrator to Distributee.—*Randolph v. Vails*, 180 Ala. 82, 60 So. 159. See the title EXECUTORS AND ADMINISTRATORS, § 119, vol. 7, p. 99.

§ 121½. Contracts of Decedent.

Chose in Action—Agreement of Heirs.—Executory agreement for the sale and transfer of stock to plaintiff's decedent held, to be a chose in action which passed to the administrator, so that an agreement by his heirs to accept a certain dividend or part of the net earnings, and waiving the right to the stock, was not binding on the administrator. *Hamil v. Flowers*, 184 Ala. 301, 63 So. 994.

V. ALLOWANCE TO SURVIVING WIFE, HUSBAND, OR CHILDREN.

§ 135. Quarantine or Other Occupation or Use of Property.

Enforcement of Right—Title Acquired by Adverse Possession.—If one acquired title to land by adverse possession, his widow, as such, can maintain ejectment for it, provided it is so related to the place of his last residence as to make it the subject of the widow's quarantine right. *Bowles v. Lowery*, 181 Ala. 603, 62 So. 107.

§ 137. Specific Articles.

Watch and Chain.—*Chamboredon v. Fayet*, 176 Ala. 211, 57 So. 845. See the title EXECUTORS AND ADMINISTRATORS, § 137, vol. 7, p. 109.

Iron Safe and Electric Battery.—*Chamboredon v. Fayet*, 176 Ala. 211, 57 So. 845. See the title EXECUTORS AND ADMINISTRATORS, § 137, vol. 7, p. 109.

§ 138. Amount or Value.

Right of Widow — Action. — Under

Code 1907, § 4200, exempting to the widow personal property to the value of \$1,000, she may maintain an action to recover the exempt property or money due the decedent, provided it does not exceed \$1,000. *Lasseter v. Deas*, 9 Ala. App. 564, 63 So. 735.

Suit by Widow—Set-Off.—In an action by a widow against one liable to her husband to satisfy her allowance of \$1,000, given by Code 1907, § 4200, any set-off due the defendant may be urged to reduce the recovery. *Lasseter v. Deas*, 9 Ala. App. 564, 63 So. 735.

Revival of Suit—Counterclaim.—Where plaintiff's intestate, who instituted an action of trover, died pending an appeal by defendant, and the action was revived in the name of plaintiff as administratrix, plaintiff became his representative, and occupied the same position as if she had originally begun the action, and amended pleadings filed by her related back to the commencement of the suit; hence, even though plaintiff was intestate's wife, she can not, defendant having set up as counterclaim his right to recover mortgaged property upon which the original plaintiff had waived his exemption, set up her right to the property as widow under Code 1907, § 4200. *Lasseter v. Deas*, 9 Ala. App. 564, 63 So. 735.

§ 139. Persons Entitled.

Exempt Property—Rights of Widow and Minors.—Where a husband dies leaving a widow and minor children and only exempt property, the children, so long as the widow lives, have no right to the possession or disposition thereof unless and until they mature and leave the family, when they become entitled to their proportion of what remains, as provided by Code 1907, §§ 4200, 4202, providing that exempt personal property of a deceased person shall be delivered to the widow, etc. *Kelley v. Kelley*, 9 Ala. App. 306, 63 So. 740.

Same—Right to Sue—Parties.—Code 1907, § 4202, provides that personal property of a decedent exempted by the article shall be delivered to the widow, if there be one, for the maintenance of herself and minor children, or, if there be no widow, then to the guardian of the mi-

nor children for their maintenance. Section 4203 declares that suits respecting such exempt property may be maintained or defended by the widow or, if there be no widow, by the minor child or children. Held, that where a husband died leaving a widow and minor children and property of less value than \$1,000, all of which was exempt, the widow was bound to sue alone on a note, being a portion of such property, and was not entitled to join the heirs or minor children as plaintiffs. *Kelley v. Kelley*, 9 Ala. App. 306, 63 So. 740.

Minor Not Living with Widow.—Under Code 1907, §§ 4199, 4200, exempting personal property to the widow and minor children of a decedent, a minor child not living with the widow is entitled to its share, since such right is given, not as an incident to the family relation, but because of minority. *Ford v. Strong* (Ala.), 78 So. 918.

§ 140. Property Subject to Allowance.

Personalty. — *Chamboredon v. Fayet*, 176 Ala. 211, 57 So. 845. See the title EXECUTORS AND ADMINISTRATORS, § 140, vol. 7, p. 110.

Prior Chattel Mortgage. — *Snead v. Scott*, 182 Ala. 97, 62 So. 36. See the title EXECUTORS AND ADMINISTRATORS, § 140, vol. 7, p. 110.

Growing Crops.—*Snead v. Scott*, 182 Ala. 97, 62 So. 36. See the title EXECUTORS AND ADMINISTRATORS, § 140, vol. 7, p. 110.

§ 142. Bar, Waiver, or Relinquishment.

§ 144. — Antenuptial or Postnuptial Agreement.

Effect on Widow's Exemptions. — *Richter v. Richter*, 180 Ala. 218, 60 So. 880. See the title EXECUTORS AND ADMINISTRATORS, § 144, vol. 7, p. 112.

§ 145. — Testamentary Provisions.

Bequests to Widow. — *Richter v. Richter*, 180 Ala. 218, 60 So. 880. See the title EXECUTORS AND ADMINISTRATORS, § 145, vol. 7, p. 112.

Exemptions of Personalty—Effect of Testamentary Disposition. — *Richter v. Richter*, 180 Ala. 218, 60 So. 880. See the

title EXECUTORS AND ADMINISTRATORS, § 144, vol. 7, p. 112.

§ 146. — Relinquishment after Death of Decedent.

Consideration.—*Chamboredon v. Fayet*, 176 Ala. 211, 57 So. 845. See the title EXECUTORS AND ADMINISTRATORS, § 146, vol. 7, p. 112.

Acceleration of Payment as Consideration.—*Richter v. Richter*, 180 Ala. 218, 60 So. 880. See the title EXECUTORS AND ADMINISTRATORS, § 146, vol. 7, p. 112.

Temporary Absence from State. — *Richter v. Richter*, 180 Ala. 218, 60 So. 880. See the title EXECUTORS AND ADMINISTRATORS, § 146, vol. 7, p. 112.

Burden of Proof.—*Richter v. Richter*, 180 Ala. 218, 60 So. 880. See the title EXECUTORS AND ADMINISTRATORS, § 146, vol. 7, p. 112.

Sufficiency of Evidence. — *Richter v. Richter*, 180 Ala. 218, 60 So. 880. See the title EXECUTORS AND ADMINISTRATORS, § 146, vol. 7, p. 112.

§ 151. Allowance by Court.

Where Decedent Leaves Less than \$1,000 Personalty.—*Snead v. Scott*, 182 Ala. 97, 62 So. 36. See the title EXECUTORS AND ADMINISTRATORS, § 151, vol. 7, p. 114.

§ 154. Rights of Distributees or Heirs.

Allowance to Widow and Children — Severance of Possession.—*Snead v. Scott*, 182 Ala. 97, 62 So. 36. See the title EXECUTORS AND ADMINISTRATORS, § 154, vol. 7, p. 117.

VI. ALLOWANCE AND PAYMENT OF CLAIMS.

(A) LIABILITIES OF ESTATE.

§ 155. Obligations of Decedent in General.

Performance — Death of Principal. — Where broker, having agreed to procure loan for commission, procured one who was ready, able, and willing to make the loan, and so notified his customer, the fact that the customer died before the notice reached him did not release his estate from the payment of the compen-

sation in the absence of provision in the contract to that effect. *Allen v. Stradford* (Ala.), 78 So. 955.

§ 156. Services Rendered to Decedent.

§ 157. — In General.

Expenses of Last Sickness.—In view of Code 1907, §§ 2597, 2598, providing that expenses of last sickness are preferred claims against an estate, but that no preference will be given among debts of same class, if amount found in decedent's possession and paid by father for physicians was reasonable, and other preferred claims would not be prejudiced, the father is entitled to such deduction. *Sewell v. Sewell* (Ala.), 74 So. 343.

§ 160½. Funeral Expenses.

Money in Decedent's Possession Applied to Funeral Expenses.—In action by administrator to recover money found in decedent's possession and taken by his father, it was proper to permit the father to show that part of the money was used in paying funeral expenses. *Sewell v. Sewell* (Ala.), 74 So. 343.

§ 164. Evidence.

§ 164 (1) Presumptions and Burden of Proof.

Brokers—Right to Compensation. — Where broker alleged that a customer, since deceased, agreed to pay commission for securing loan if the broker, after giving notice of acceptance of the loan and receiving from the customer an abstract, should make the loan within a reasonable time thereafter, notice to deceased of acceptance of the loan should be presumed from the fact that deceased furnished the abstract. *Allen v. Stradford* (Ala.), 78 So. 955.

Presentation of Claim.—Plaintiff suing an executrix, by joining issue on the plea of statute of nonclaim, assumes the burden of proof of presentation of claim in the time and manner required by Code 1907, §§ 2590, 2593. *Brannan v. Sherry*, 195 Ala. 272, 71 So. 106.

Failure to Present Claim within 12 Months.—In a suit on a claim due from a decedent, the plaintiff has the burden of proving presentation to avoid the bar arising out of failure to present the claim

within 12 months after accrual or the grant of letters of administration. *Weller & Sons v. Rensford*, 185 Ala. 333, 64 So. 366.

§ 164 (2) Admissibility.

Account for Nursing.—In action against executor on account for nursing, testimony whether witness ever saw property formerly belonging to deceased in plaintiff's possession was properly excluded as immaterial. *Nance v. Countess* (Ala. App.), 78 So. 464.

(B) PRESENTATION AND ALLOWANCE.

§ 165. Necessity for Presentation in General.

Knowledge of Executrix of Existence of Debt—Bar.—Actual formal presentation of a claim against a decedent's estate, and by one having right to make it, is necessary to prevent the bar of the statute of nonclaim; and mere knowledge by executrix of its existence is not enough. *Brannon v. Sherry*, 195 Ala. 272, 71 So. 106.

§ 167. Claims Which Must Be Presented.

Preservation of Specific Lien—Charge on General Estate.—To preserve a specific lien upon intestate's property, it is not necessary to file with the personal representative a claim for the debt which supports the lien, but to preserve the debt as a charge upon the intestate's general estate, such a filing is necessary. *Traweck v. Hagler* (Ala.), 75 So. 152.

Judgment in Sister State—Time for Presentation. — Although claimants had secured judgment against administrator in another state, claims were barred, they were not presented in proceedings by the executor in a probate court in Alabama within 12 months, as required by Code 1907, § 2590. *Reed v. Bloodworth* (Ala.), 76 So. 376.

§ 168. Time for Presentation.

Claim of Third Person for Funeral Expenses of Decedent.—*Roche Undertaking Co. v. De Bardeleben*, 7 Ala. App. 232, 60 So. 1000. See the title EXECUTORS AND ADMINISTRATORS, § 168 (1), vol. 7, p. 122.

Claim Not Due—Right to Prove. — Under the express provisions of Code 1907, § 2601, a claim against an estate for the price of land contracted for by decedent may be proved, though not due when the petition is filed, where it will become absolutely due at some future time. *Jones v. Hert*, 192 Ala. 111, 68 So. 259.

§ 170. Statement and Verification of Claim.

Verification—Necessity. — While under Code 1907, § 2593, providing that presentation of a claim against decedent's estate may be made to the executor, or by filing the claim or a statement thereof in the probate court, and that every such claim so presented to the executor "and" filed in the probate court must be verified, presentation of a claim against a decedent's estate need not be to executor personally and by filing in probate court, claim must in either case be verified. *Brannan v. Sherry*, 195 Ala. 272, 71 So. 106.

Same — Decedent's Own Note Presented.—Under Code 1907, § 2593, relating to presentation of claims, declares that every claim presented must be verified by the oath of claimant or some other person having knowledge of correctness of such claim, and in view of § 2590, held, that on presentation of a claim to personal representative it must be verified, though the original instrument of indebtedness, the decedent's own note, was presented. *Kennedy v. Lyle (Ala.)*, 76 So. 962.

§ 171. Presentation and Filing.

§ 171 (1) In General.

Filing Petition of Intervention. — The filing by plaintiffs of a petition to be allowed to intervene in a suit against the administrator of a decedent upon a claim due from the decedent is not a sufficient presentation of a claim to the administrator where the petition for intervention is denied. *Weller & Sons v. Rensford*, 185 Ala. 333, 64 So. 366.

Knowledge of Existence of Claim by Administrator—Effect.—The filing of a suit on a claim against the estate of a

decedent is a sufficient presentation of the claim to the administrator under Code 1907, § 2593, providing for that form of presentation; but the mere knowledge of the existence of the claim on the part of the executor or administrator will not prevent the operation of the statute of nonclaim. *Weller & Sons v. Rensford*, 185 Ala. 333, 64 So. 366.

Where Claim Should Be Presented.—Under Code 1907, § 2593, providing that the presentation of claims against a decedent may be made by filing the claim, or a statement thereof, in the "office" of the judge of probate in which letters were granted, there is no authority to present the claim in the probate "court," nor can it be presented in the court of chancery. *Weller & Sons v. Rensford*, 185 Ala. 333, 64 So. 366.

Personal Presentation to Administrator.—Under Code 1907, §§ 2590, 2593, providing that claims against the estate of a decedent must be presented within 12 months after accrual, or within 12 months after the granting of letters, and that the presentation may be made by the filing of the claims in the office of the judge of probate, or presentation to the administrator, a claim against the estate of a decedent may be duly presented by personal presentation to the administrator. *Weller & Sons v. Rensford*, 185 Ala. 333, 64 So. 366.

§ 171 (2) Persons Who May Present or File Claims.

Attorney or Executrix.—Presentation of a claim against decedent's estate by the attorneys of executrix, to whom claimant presented it, is not a presentation to her authorized by Code 1907, § 2593; they not being persons authorized to make the presentation. *Brannan v. Sherry*, 195 Ala. 272, 71 So. 106.

§ 171 (3) Sufficiency of Presentation or Filing.

To Attorneys of Executrix.—Presentation of a claim against decedent's estate to the attorneys of executrix is not a presentation to her authorized by Code 1907, § 2593. *Brannan v. Sherry*, 195 Ala. 272, 71 So. 106.

§ 173. Failure to Present.**§ 174. — Effect in General.**

Executory Contract — Damages for Breach.—Plaintiff's decedent assisted defendant's testator in the organization of a corporation upon the understanding that when a sufficient amount of the net income had been distributed to stockholders as dividends to repay what they had subscribed to such capital stock, enough of the stock would be assigned to him as would make him the owner of an undivided 1/32 interest in the capital stock, and died before the time when he might have demanded the stock. Held, that as no stock was in existence when the contract was made, and as there could be no executed contract of sale then, the only remedy of plaintiff's administrator was an action for damages for breach of the executory contract to transfer the stock, which would be barred if not presented to defendant's executors within a year after the issue of letters, as required by Code 1907, § 2590. *Hamil v. Flowers*, 184 Ala. 301, 63 So. 994.

VIII. SALES AND CONVEYANCES UNDER ORDER OF COURT.

(B) APPLICATION AND ORDER.**§ 247. Petition or Other Application.****§ 247 (1) Requirements in General.**

Form of Proceeding.—*Rucker v. Tennessee Coal, etc., R. Co.*, 176 Ala. 456, 58 So. 465. See the title EXECUTORS AND ADMINISTRATORS, § 247 (1), vol. 7, p. 163.

§ 247 (6) Averment of Indebtedness and Amount or Insufficiency of Personalty.

Sufficiency of Petition. — Petition of administrator de bonis non, stating that personalty is insufficient to pay debts, that there is no personalty, that debts were \$500 and are unpaid, that the heirs are two sons of deceased, both over 21, and stating their residence, is sufficient, under Code 1907, § 2622, stating requisites of such petition. *Alvarez v. Warner* (Ala.), 77 So. 344.

§ 247 (7) Averments of Realty.

Insufficient Description. — *Rucker v.*

Tennessee Coal, etc., R. Co., 176 Ala. 456, 58 So. 465. See the title EXECUTORS AND ADMINISTRATORS, § 247 (7), vol. 7, p. 169.

Jurisdictional—Description of Lands. — Petition authorized by Code 1907, § 2622, by personal representative in probate court for sale of lands to pay debts, is jurisdictional, and must conform to statute, which requires lands to be described accurately. *Alvarez v. Warner* (Ala.), 77 So. 344.

§ 249. Objections and Exceptions.

Necessity—Nonexistence or Extinguishment of Debt.—The existence of necessity for subjecting lands to sale to pay debts is of essence of application by a personal representative to sell for such purpose, and hence the heirs may show nonexistence or the extinguishment of such debts in defense of the application to sell. *Alvarez v. Warner* (Ala.), 77 So. 344.

§ 254. Order or Decree.**§ 257. — Operation and Effect.**

Collateral Attack—Sale by Administrator de Bonis Non—Validity.—Where general county administrator assumed to administer estate and was removed, sale on petition of administrator de bonis non would be sustained on collateral attack by ejectment suit, on theory that there was no vacancy authorizing appointment of administrator de bonis non. *Alvarez v. Warner* (Ala.), 77 So. 344.

(C) SALES.**§ 267. Persons Who May Purchase.**

Executor or Administrator Having Interest in Property.—*Randolph v. Vaile*, 180 Ala. 82, 60 So. 159. See the title EXECUTORS AND ADMINISTRATORS, § 267, vol. 7, p. 185.

§ 275. Confirmation.

Sale to Administrator—Validity. — An administrator's purchase of realty from the estate is void, where his report of sale was indorsed approved by the clerk of the probate judge, but there was no decree affirming such sale, nor any deed executed by a commissioner to the administrator. *Snow v. Bray* (Ala.), 73 So. 542.

§ 282. Collateral Attack.

Irregularities. — *Rucker v. Tennessee Coal, etc.*, R. Co., 176 Ala. 456, 58 So. 465. See the title EXECUTORS AND ADMINISTRATORS, § 282, vol. 7, p. 199.

Petition Sufficient.—*Rucker v. Tennessee Coal, etc.*, R. Co., 176 Ala. 456, 58 So. 465. See the title EXECUTORS AND ADMINISTRATORS, § 282, vol. 7, p. 199.

Proceedings Void for Want of Jurisdiction.—*Rucker v. Tennessee Coal, etc.*, R. Co., 176 Ala. 456, 58 So. 465. See the title EXECUTORS AND ADMINISTRATORS, § 282, vol. 7, p. 199.

Inadequacy of Price.—*Conniff v. McFallin*, 178 Ala. 160, 59 So. 472. See the title EXECUTORS AND ADMINISTRATORS, § 282, vol. 7, p. 199.

Depositions under Code 1907, § 2631—Admissibility.—In ejectment where defendant claimed through an administrator's sale, it was error to refuse to allow him to prove that depositions were taken showing that the sale would be to the interest of minors under Code 1907, § 2631, providing that no order for the sale of land belonging to any estate must be made when minors are interested, unless the probate court has taken evidence by deposition showing the necessity of such sale. *Crowder v. Arnett*, 193 Ala. 470, 68 So. 1005.

Ejectment—Common Source of Title—Evidence.—In ejectment, where defendant claimed through an administrator's sale and plaintiff claimed by inheritance from the common source of title, it was error to refuse to allow proof of the order of sale, the confirmation thereof, and the deeds to the purchasers. *Crowder v. Arnett*, 193 Ala. 470, 68 So. 1005.

Irregularities.—A petition by an administratrix to sell lands being sufficient to confer jurisdiction on the probate court, the sale is not open to collateral attack in ejectment on account of mere irregularities. *Crowder v. Arnett*, 193 Ala. 470, 68 So. 1005.

Heir Not Party to Probate Proceedings.—The sale of a deceased's land for distribution by a probate court is not subject to collateral attack by an heir who

was not a party to the probate proceedings. *Lee v. Lee*, 196 Ala. 522, 72 So. 24.

(D) CONVEYANCE.**§ 295. Deed to Purchaser.**

Sale to Administrator — Deed of Commissioner.—An administrator's purchase of realty from the estate is void, where his report of sale was indorsed approved by the clerk of the probate judge, but there was no decree affirming such sale, nor any deed executed by a commissioner to the administrator. *Snow v. Bray* (Ala.), 73 So. 542.

IX. INSOLVENT ESTATES.**§ 301. Administration in General.**

Suit in Equity—Requisites of Creditor's Bill. — Where executors have reported to the probate court that their testator's estate was insolvent, a creditor's bill seeking to remove the estate into a court of equity for administration must disclose some special ground of equity. *Pollock & Co. v. Haigler*, 195 Ala. 522, 70 So. 258.

§ 303. Proceedings on Reporting or Declaring Insolvency.**§ 303 (1) In General.**

Notice of Proceedings. — *Rucker v. Tennessee Coal, etc.*, R. Co., 176 Ala. 456, 58 So. 465. See the title EXECUTORS AND ADMINISTRATORS, § 303 (1), vol. 7, p. 210.

Persons Bound by Decree.—*Rucker v. Tennessee Coal, etc.*, R. Co., 176 Ala. 456, 58 So. 465. See the title EXECUTORS AND ADMINISTRATORS, § 303 (1), vol. 7, p. 210.

§ 303 (2) Hearing and Decree.

Hearing — Procedure in Chancery.—*Rucker v. Tennessee Coal, etc.*, R. Co., 176 Ala. 456, 58 So. 465. See the title EXECUTORS AND ADMINISTRATORS, § 303 (2a), vol. 7, p. 211.

§ 304. Effect of Insolvency upon Previous Acts and Proceedings.

Contestability of Judgment—Certified Judgment.—A judgment secured and certified under Code 1907, § 2796, providing, if an estate is insolvent, for certification of prior judgments against execu-

tors and administrators, not only relieves administrators from personal liability, but makes the judgment a fixed charge against the estate, so that it is thereafter incontestable in the probate court, and demurrers to the contest are properly sustained. *Ouchita Nat. Bank v. Fulton*, 195 Ala. 34, 70 So. 722.

Same — Personal Liability.—A judgment secured and certified under Code 1907, § 2796, providing, if an estate is insolvent, for certification of prior judgments against executors and administrators, not only relieves administrators from personal liability, but makes the judgment a fixed charge against the estate, so that it is thereafter incontestable in the probate court. *Fulton v. Egger* (Ala.), 76 So. 35.

Same—Removal to Chancery Court.—Code 1907, § 2796, making a judgment against an estate final when properly certified, follows an estate in its removal to a court of equity in spite of Acts 1911, p. 574, providing that in chancery administration of estates the court may proceed according to its own rules. *Fulton v. Egger* (Ala.), 76 So. 35.

Same—One Not a Party.—Code 1907, § 2796, stating procedure to make incontestable a judgment against an estate, precludes recourse to the equitable doctrine that equity will, in a proper case, enjoin a judgment holder from enforcing it to the prejudice of one who was not a party or privy in the cause resulting in his judgment. *Fulton v. Egger* (Ala.), 76 So. 35.

Same—Equitable Relief for Fraud.—Where a creditor of an estate made his judgment incontestable under Code 1907, § 2796, a bill subsequently filed for removal of the estate to chancery, and for relief against such judgment, alleging forgery of and want of consideration for the note on which it was based, held insufficient on which to base relief from fraud. *Fulton v. Egger* (Ala.), 76 So. 35.

Same—Validity of Statute.—Validity of Code 1907, § 2796, as to contestability of certain judgments against estates, is not open to question. *Fulton v. Egger* (Ala.), 76 So. 35.

§ 307. Sales and Conveyances under Order of Court.

Jurisdiction. — *Rucker v. Tennessee Coal, etc., R. Co.*, 176 Ala. 456, 58 So. 465. See the title EXECUTORS AND ADMINISTRATORS, § 307 (1), vol. 7, p. 215.

X. ACTIONS.

§ 312. Actions by Creditors and Others Interested in Estate.

Fraudulent Conveyance — Attack by Heirs and Representatives.—The heirs and personal representatives of one who fraudulently conveys his land so as to hinder and delay his creditors can not assail the conveyance. *Davis v. Stovall & Bro.*, 185 Ala. 173, 64 So. 586.

§ 326. Time to Sue, and Limitations.

§ 326 (1) Actions by Executors or Administrators.

Stay—Right of Administrator to Sue.—Code 1907, § 2803, providing that no suit shall be commenced against an administrator until six months, and that no judgment shall be rendered against him until 12 months after the grant of the letters of administration held not to protect defendant from being forced to trial until expiration of twelve months after grant of letters to administrator of deceased plaintiff in whose name the cause has been revived. *Consolidated Mercantile Co. v. Warren* (Ala. App.), 74 So. 738, certiorari denied in 75 So. 1003.

§ 326 (2) Time within Which Actions against Executors or Administrators are Prohibited.

Bill to Remove Administration into Equity.—*Manfredo v. Manfredo*, 182 Ala. 247, 62 So. 522. See the title EXECUTORS AND ADMINISTRATORS, § 326 (2), vol. 7, p. 237.

Testamentary Trust — Statutes—Application. — The statutory inhibition of suits and judgments against personal representatives for 6 and 12 months, respectively, imposed by Code 1907, § 2803, does not apply to a suit against an executor to enforce a testamentary trust. *Smith v. Cain*, 187 Ala. 174, 65 So. 367.

§ 327½. Joinder or Intervention in Actions by Others.

Necessary Parties—Setting Aside Donations by Decedent.—In a creditor's suit to subject the proceeds of money fraudulently donated to defendants by his debtor, the personal representative of the deceased debtor, though proper, was not a necessary party. *Shelton v. Timmons*, 189 Ala. 289, 66 So. 9.

Bill to Set Aside Fraudulent Conveyance of Decedent—Necessary Parties.—The administrator of one who conveyed his property with intent to hinder and delay his creditors is not a necessary party to a bill to set the conveyance aside, because the decree can in no way affect the administrator or the personal assets in his hands, and the excess, after the payment of debts, does not go to the administrator; hence such a bill is not demurrable because not showing administration and not joining the administrator. *Davis v. Stovall*, 185 Ala. 173, 64 So. 586.

§ 330. Pleading.

§ 331. — Declarations or Petition.

Allegations as to Conditions Precedent—Sufficiency of Rejoinder.—In administrator's action in assumpsit, where replication to plea of set-off was that claims had never been filed, as required by Code 1907, § 2589, and more than 12 months had lapsed between grant of letters and the beginning of the suit, a rejoinder "that at the time the money was paid, which is sought to be recovered, defendant's claims were not barred by the statute of nonclaim," held insufficient, as failing to show that defendant was lawfully entitled to demand the payment. *Trawick v. Hagler* (Ala.), 75 So. 152.

§ 332. — Plea or Answer and Affidavit of Defense.

Plea of Ne Unques Executor or Administrator—What Plea Asserts.—*Milbra v. Sloss-Sheffield Steel, etc., Co.*, 182 Ala. 262, 62 So. 176. See the title EXECUTORS AND ADMINISTRATORS, § 332 (3b), vol. 7, p. 254.

§ 339. Evidence.

Plea of Ne Unques Administrator—

Burden of Proof.—Where plaintiff sued on the common courts as administrator, the plea of ne unques administrator being interposed, plaintiff had the burden to show his right to sue as personal representative. *Enzor v. Rushton*, 13 Ala. App. 550, 69 So. 909.

§ 340. Trial.

§ 340 (9) Questions for Jury.

Accounts against Estate.—In action against executor on alleged account stated to deceased, whether it was agreed there would be but one account, and not one each in favor of both plaintiff and his wife, held for the jury. *Nance v. Countess* (Ala. App.), 78 So. 464.

§ 340 (3) Instructions.

Account Stated to Deceased—Right to Recover.—In action against executor on account alleged to have been stated to deceased for her nursing, instruction that, if the jury believed from all the evidence that the account was agreed to as alleged, plaintiff could recover the agreed amount was proper. *Nance v. Countess* (Ala. App.), 78 So. 464.

§ 341. Judgment.

Persons Concluded—Judgment of Sister State.—A judgment against the administrator of an estate in Illinois is not binding on executor under appointment by the probate court in Alabama. *Reed v. Bloodworth* (Ala.), 76 So. 376.

XI. ACCOUNTING AND SETTLEMENT.

(B) PROCEEDINGS FOR ACCOUNTING.

§ 357. Jurisdiction of Courts.

Courts of Equity—Special Equities Not Authorizing Removal.—A creditor of a testator, who had made his executrix the chief beneficiary, and who provided that she should not be required to give bond or render an account of the administration of the estate, may sue in equity for his debt, though the probate court has issued letters testamentary and has assumed jurisdiction of the administration, and the right to sue is not affected by the statute postponing suits to fix liability against a dece-

dent's estate. *Whaley v. Rothschild & Co.*, 176 Ala. 69, 57 So. 707.

Discovery.—*Whaley v. Rothschild & Co.*, 176 Ala. 69, 57 So. 707. See the title EXECUTORS AND ADMINISTRATORS, § 357 (4bba), vol. 7, p. 276.

§ 360. Special Proceedings to Compel Accounting.

§ 360 (3) Parties.

Payment to Distributee — "Proceeding in Rem."—Under Code 1907, § 2476, et seq., requiring the court or the probate judge to audit the account of an administrator and to require him to make proof of the correctness of each item on the credit side of the account, a proceeding for final settlement by an administrator, with a contest by the distributees, is partly in the nature of a "proceeding in rem;" and hence it is immaterial that a motion to charge him with funds wrongfully paid to the distributees is made by one of such distributees. *Miles v. Meade*, 191 Ala. 80, 67 So. 1012.

§ 360 (4) Notice or Citation.

Who May Cite.—Under Code 1907, § 2666, the probate judge may cite an executor or administrator to a settlement on his own motion or on the application of distributees and legatees. *Burch v. Gaston*, 182 Ala. 467, 62 So. 508. See the title EXECUTORS AND ADMINISTRATORS, § 360 (4a), vol. 7, p. 283.

§ 361. Actions for Accounting, and Administration Suits.

Claims against Estate—Proceedings to Enforce.—*McGraw v. Tillery*, 176 Ala. 451, 58 So. 421. See the title EXECUTORS AND ADMINISTRATORS, § 361 (1), vol. 7, p. 284.

(C) CHARGES AND CREDITS.

§ 361½. Charges in General.

Funds received by an executor of his mother's estate, who was also administrator of his father's estate, are not chargeable against him upon his settlement as administrator, before settlement or disposition of the funds as executor. *Miles v. Meade*, 191 Ala. 80, 67 So. 1012.

Creditor as Administrator — Payment

of Debts.—Where a creditor of an estate is appointed administrator, and receives funds of the estate sufficient to satisfy his debt, the law presumes that he will apply them to the payment of his debt, and, where a debtor of the estate is appointed administrator, the law charges him with the amount of the debt as assets in his hands as administrator; but the rule does not apply where one person acts in two representative capacities, and is debtor as to one and creditor as to the other. *Miles v. Meade*, 191 Ala. 80, 67 So. 1012.

§ 368. Counsel Fees and Costs.

Fraudulent Appointment. — *Hall v. Santangelo*, 178 Ala. 447, 60 So. 168. See the title EXECUTORS AND ADMINISTRATORS, § 368, vol. 7, p. 289.

(D) COMPENSATION.

§ 374. Amount and Computation of Compensation.

§ 374 (1) In General.

Compensation beyond Statutory Allowance.—An executor who is allowed the statutory commission can have no compensation for services in management and settlement of the estate, nor per diem allowances. *Collins v. Clements* (Ala.), 75 So. 165.

§ 374 (1½) Commissions.

Statutory Commission Not Exceeded—Discretion of Court.—So long as executor's commission does not exceed the maximum authorized by Code 1907, § 2690, its amount is largely discretionary with the trial court. *Collins v. Clements* (Ala.), 75 So. 165.

§ 377. Forfeiture or Deprivation of Compensation.

False Representation of Administrator.—*Hall v. Santangelo*, 178 Ala. 447, 60 So. 168. See the title EXECUTORS AND ADMINISTRATORS, § 377, vol. 7, p. 294.

(E) STATING, SETTLING, OPENING, AND REVIEW.

§ 382. Evidence.

Verified Petition for Letters—Answer to Petition for Removal—Admissibility.

—Hall *v.* Santangelo, 178 Ala. 447, 60 So. 168. See the title EXECUTORS AND ADMINISTRATORS, § 382 (2), vol. 7, p. 298.

Docket of Probate Court—Admissibility.—Hall *v.* Santangelo, 178 Ala. 447, 60 So. 168. See the title EXECUTORS AND ADMINISTRATORS, § 382 (2), vol. 7, p. 298.

§ 385. Opening or Vacating.

§ 385 (2) Jurisdiction.

Probate Court—Final Settlement—Setting Aside Decree.—Medley *v.* Shipps, 177 Ala. 94, 58 So. 304. See the title EXECUTORS AND ADMINISTRATORS, § 385 (2), vol. 7, p. 302.

§ 385 (4) Grounds.

Fraud, Accident, Surprise, Mistake—Due Diligence.—Under Code 1907, § 3914, authorizing the correction of any mistake of fact or law in the settlement of a decedent's estate to the injury of any party, without fault or neglect on his part, within two years after final settlement, a bill to vacate the decree of the probate court, stating the final account of complainant as administratrix and rendering a decree against her, not alleging fraud, accident, surprise, or mistake in obtaining the decree, or negating complainant's fault or neglect, was insufficient. Adams *v.* Walsh, 190 Ala. 516, 67 So. 432.

Sufficiency of Complaint — Notice—Presence at Hearing.—In view of Code 1907, § 2686, providing that if an administrator does not file his account by the day named in the citation the court shall proceed to state the account, § 2687, providing that after stating such account the court must issue citation to the administrator to file his account and vouchers for final settlement, and § 2688, permitting any person to contest any item of the account, a complaint by an administratrix to set aside a decree on an account stated by the court, which does not allege that plaintiff did not receive the statutory notice and was not present at the hearing, was demurrable, it being presumed on appeal, in absence of such allegations, that such notice was duly given and that plaintiff was pres-

ent at the hearing. Adams *v.* Walsh, 190 Ala. 516, 67 So. 432.

§ 386. Review.

Presumptions—Notice of Proceedings—Presence at Hearing.—In suit by administratrix to set aside settlement stated by the court, it will be presumed on appeal, in the absence of a showing to the contrary by the record, that plaintiff had notice of the proceedings and was present at the hearing before the probate court. Adams *v.* Walsh, 190 Ala. 516, 67 So. 432.

§ 388. Operation and Effect.

§ 389. — In General.

§ 389 (5) Powers of Court after Final Accounting.

Complete Discharge of Administrator.—Medley *v.* Shipps, 177 Ala. 94, 58 So. 304. See the title EXECUTORS AND ADMINISTRATORS, § 389 (5), vol. 7, p. 309.

§ 389 (7) Rights and Liabilities of Legatees and Distributees.

Final Settlement — Nature of Proceedings.—An administrator is trustee for benefit of creditors and distributees, and proceeding by him for final settlement is essentially a proceeding in personam as to conclusion of the property rights of cestui que trust or distributees. Evans *v.* Evans (Ala.), 76 So. 95.

§ 391. Private Accounting and Settlement.

Agreement by Heirs—Construction — Liens.—Caldwell *v.* Caldwell, 183 Ala. 590, 62 So. 951. See the title EXECUTORS AND ADMINISTRATORS, § 391, vol. 7, p. 312.

§ 392. Actions to Open or Set Aside Settlement.

§ 392 (1½) Grounds of Action.

Persons Not Parties and Without Notice.—Under Code 1907, § 3914, providing that, when any error of law or fact has occurred in the settlement of any state of the decedent to the injury of any party without any fault or neglect on his part, such party may correct such error by bill in chancery within two

years after the final settlement thereof, and a failure to appeal from the decree of the probate court shall not be held to be such fault or neglect as will bar the complainant of the remedy provided, the heirs of deceased were entitled to file a bill in chancery to correct errors of law or fact that occurred to their injury in the final decree and declare a trust on the fund where they alleged that they were not parties to the administration of the estate and had no knowledge of any of the proceedings. *Evans v. Evans* (Ala.), 76 So. 95.

§ 392 (1½a) Persons Entitled to Sue.

Failure to Keep and File Accounts.—An administrator was not "without any fault or neglect," within Code 1907, § 3914, providing chancery jurisdiction in case of errors occurring in settlement of estates, where he failed to comply with §§ 2676, 2677, relating to making of accounts, compliance with which would have protected him in his final settlement regarding which equity jurisdiction was sought. *Carpenter v. Carpenter* (Ala.), 75 So. 472.

§ 392 (3) Pleading.

Amendment of Bill to Open Settlement.—*Morgan v. Gaiter*, 182 Ala. 322, 62 So. 731. See the title EXECUTORS AND ADMINISTRATORS, § 392 (3), vol. 7, p. 313.

Excessiveness of Accounts.—*Morgan v. Gaiter*, 182 Ala. 322, 62 So. 731. See the title EXECUTORS AND ADMINISTRATORS, § 392 (3), vol. 7, p. 313.

Right of Sole Heir Who Was Impersonated on settlement to Maintain Bill.—*Morgan v. Gaiter*, 182 Ala. 322, 62 So. 731. See the title EXECUTORS AND ADMINISTRATORS, § 392 (3), vol. 7, p. 313.

Sufficiency of Bill—Laches.—A bill by complainants, an alleged legitimate widow and children of deceased, to reach the proceeds of the sale of land made by the chancery court for distribution between the joint owners, which asserted that respondents, the alleged widow and children of deceased, were not his legitimate widow and children, disclosed that the estate of deceased was duly administered in the probate court

and finally settled. It did not appear whether complainants knew of the administration proceedings, and if they had an opportunity whether they appeared and resisted the decree. Held, that as the bill was filed nearly eight years thereafter, and there was no allegation as to when the facts were discovered relieving complainants of laches, a demurrer was properly sustained to the bill on the ground that complainants were either barred by the decree or by their laches in attacking it. *Clements v. Clements* (Ala.), 76 So. 855.

Suit to Reach Proceeds—Objections.

Where lands were sold by the chancery court for distribution between joint owners as established by order of the probate court, a bill by others claiming to be the legitimate wife and children of deceased, which sought to reach proceeds under control of the chancery court and in effect ratified sale, is not open to objection because it did not attempt to set aside the sale and recover lands. *Clements v. Clements* (Ala.), 76 So. 855.

§ 392 (4) Parties.

Suit to Correct Credits—Person Receiving Payments.—*Morgan v. Gaiter*, 182 Ala. 322, 62 So. 731. See the title EXECUTORS AND ADMINISTRATORS, § 392 (4), vol. 7, p. 314.

Misjoinder.—Land of a decedent having been sold for distribution by the chancery court between the widow and minor children, as decreed by order of the probate court, a bill by persons claiming to be the legitimate widow of deceased and his legitimate children, seeking to subject the proceeds to their claims, is not bad for misjoinder of parties because the alleged legitimate widow was joined as complainant, for she was at least a proper, if not a necessary, party having marital rights in the estate of her husband. *Clements v. Clements* (Ala.), 76 So. 855.

§ 392 (5) Evidence.

Failure to Receive Notice—Burden of Proof.—In an action in chancery to open settlement complainant had the burden of establishing her contention that she

had neither notice nor knowledge of final settlement of an estate. *Adams v. Walsh* (Ala.), 75 So. 888.

Notice—Sufficiency of Evidence.—In an action in chancery to open settlement evidence held sufficient to show that complainant received notice of final settlement of the estate in which she was interested. *Adams v. Walsh* (Ala.), 75 So. 888.

XIII. LIABILITIES ON ADMINISTRATION BONDS.

§ 403. Settlement and Discharge of Principal.

Effect of Final Distribution.—Under bond providing that surety is obligated to perform all duties which are or may be required of administrator, final decree of probate court and distribution thereunder was complete acquittance of surety in view of Code 1907, § 1507. *Evans v. Evans* (Ala.), 76 So. 95.

EXEMPTIONS.

I. Nature and Extent.

- (A) Nature, Creation, Duration and Effect in General.
 - § 4. Construction of Exemption Laws in General.
- (B) Persons Entitled.
 - § 17. Surviving Husband, Wife, Children or Next of Kin.
- (C) Property and Rights Exempt.
 - § 27. Life Insurance.
- (D) Liabilities Enforceable against Exempt Property.
 - § 31. Exceptions from Exemptions in General.
 - § 33. Liabilities Incurred in Fiduciary Capacity.
 - § 35. Judgments.
 - § 36½. Proceedings for Enforcement of Claims.

III. Waiver or Forfeiture.

- § 45. Mortgage or Pledge as Waiver.
- § 46. Operation and Effect of Waiver.
- § 47. — In General.

IV. Protection and Enforcement of Rights.

- § 59. Time for Making Claim.
- § 60. Form and Requisites of Claim.
- § 63. — Inventory or Schedule.
- § 67. Contest and Determination of Claim.
- § 77. Pleading.
- § 78. Evidence.

Cross References.

See the title EXEMPTIONS, vol. 7, p. 339, and references there given.

In addition, see ante, EQUITY; EXECUTORS AND ADMINISTRATORS; post, HOMESTEAD.

As to exemption from forced sale of real property as homestead, see post, HOMESTEAD. As to right to trial by jury of exemption claims in equitable action, see post, JURY.

I. NATURE AND EXTENT.**(A) NATURE, CREATION, DURATION AND EFFECT IN GENERAL.****§ 4. Construction of Exemption Laws in General.**

In Favor of Wife and Children.—Exemption statutes, and particularly those in favor of the wife and children against creditors of the husband or father, must be construed in *pari materia* with the statutes as to frauds and perjuries and fraudulent conveyances. *Kimball v. Cunningham Hdw. Co.*, 192 Ala. 223, 68 So. 309.

(B) PERSONS ENTITLED.**§ 17. Surviving Husband, Wife, Children or Next of Kin.**

See ante, EXECUTORS AND ADMINISTRATORS.

Absolute Right of Wife.—Exemptions of personalty and of homestead in favor of a surviving wife are creations of law and can not be altered or defeated by testamentary disposition. *Richter v. Richter*, 180 Ala. 218, 60 So. 880.

(C) PROPERTY AND RIGHTS EXEMPT.**§ 27. Life Insurance.**

Policy Payable to Children of Insured.—*Young v. Thomason*, 179 Ala. 454, 60 So. 272. See the title EXEMPTIONS, § 27, vol. 7, p. 347.

Proceeds of Insurance.—Under Code 1907, § 4502, providing for exemption of proceeds of insurance policies on life of a husband where the annual premiums do not exceed \$750, or, if the premiums exceed \$750, for exemption of such amount of insurance as an annual premium of \$750 would purchase as an ordinary life policy in a standard life insurance company, where the premiums on a deceased husband's policies exceeded \$750 per annum and \$750 annual premium would purchase not exceeding \$30,000 in ordinary policies on his life, the excess over \$30,000 was subject to payment of his debts. *Kimball v. Cunningham Hdw. Co.*, 197 Ala. 631, 73 So. 323.

Rights of Creditors.—The proceeds of

a policy of life insurance are not removed from the protection of Code 1907, § 4502, exempting proceeds of the insurance policies from liability for debts of the insured where the premiums do not exceed \$750, and brought within § 4287, providing that deeds of gifts, or conveyances, transfers, and assignments, verbal or written, of goods, chattels, and things in action, made in trust for the use of the person making the same, are void against creditors, by a stipulation in the policy that in a certain number of years insured was to be paid personally part of the proceeds thereof, where such contingency has not happened. *Kimball v. Cunningham Hdw. Co.*, 192 Ala. 223, 68 So. 309.

(D) LIABILITIES ENFORCEABLE AGAINST EXEMPT PROPERTY.**§ 31. Exceptions from Exemptions in General.**

Costs.—Costs partake of nature of suit, and neither plaintiff nor defendant in action *ex delicto* or founded upon tort, though form be *ex contractu*, can claim exemptions against execution for costs. *Morscheimer v. Wood (Ala.)*, 78 So. 200.

§ 33. Liabilities Incurred in Fiduciary Capacity.

"Debt" — "Debt Contracted."—Where decree charged one as trustee and commanded payment into court within ten days, otherwise execution would issue, the obligation to pay was not a "debt" or a "debt contracted" within statutes granting exemptions of property from levy and sale under legal process, and contest of homestead exemption interposed by the trustee was properly sustained. *Kimball v. Cunningham Hdw. Co. (Ala.)*, 78 So. 787.

§ 35. Judgments.

Cost in Ex Delicto Cases.—Where recovery is had in *ex delicto* the costs become a part of such recovery, and no exemptions can be claimed against their collection under Const. 1901, § 204, allowing certain exemptions against "debts contracted." *Jones v. Tarleton (Ala. App.)*, 75 So. 643.

Costs in Ex Contractu Cases.—Where recovery is had in action *ex contractu*,

the costs become a part of recovery, and exemptions may be allowed against such a judgment under Const. 1901, § 204, allowing certain exemptions against "debts contracted." *Jones v. Tarleton* (Ala. App.), 75 So. 643.

Judgment for Costs Only.—No exemptions can be claimed against a judgment for costs only, since such judgment is not based on a "debt contracted" within Const. 1901, § 204, allowing certain exemptions against debts contracted. *Jones v. Tarleton* (Ala. App.), 75 So. 643.

§ 38½. Proceedings for Enforcement of Claims.

A bill in equity was proper remedy for creditors seeking to subject to the payment of debts the proceeds of deceased's life insurance policies above the exemption stated in Code 1907, § 4502. *Kimball v. Cunningham Hdw. Co.*, 197 Ala. 631, 73 So. 323.

III. WAIVER OR FORFEITURE.

§ 45. Mortgage or Pledge as Waiver.

Waiver in Chattel Mortgage.—The exemption of \$1000 personalty, given by Code 1907, § 4164, may be waived by an agreement in a chattel mortgage. *Lasseter v. Deas*, 9 Ala. App. 564, 63 So. 735.

§ 46. Operation and Effect of Waiver.

§ 47. — In General.

Machinery.—*Hamner v. Freeman*, 181 Ala. 109, 61 So. 106. See the title EXEMPTIONS, § 47, vol. 7, p. 353.

IV. PROTECTION AND ENFORCEMENT OF RIGHT.

§ 59. Time for Making Claim.

After Sale.—Judgment debtor who failed to file claim of exemptions with judge of probate under Code 1907, § 4168, before levy or to assert same after levy before sheriff under § 4174, could not enforce his claim after sale by petition in equity. *Smith v. Smith* (Ala.), 75 So. 955.

§ 60. Form and Requisites of Claim.

§ 63. — Inventory or Schedule.

Inventory — Requisites. — Defendant, having claimed a sum garnished as ex-

empt, in response to plaintiff's demand for an inventory, amended his claim of exemptions by adding a sworn statement that the sum garnished as claimed to be exempt was all his personal property and all the money belonging to him, whether in his possession or held by others for him, and all debts or choses in action belonging to him or in which he was beneficially interested, and that it was all the personal property which he owned and all his money at the time of the institution of the suit and levy of the writ and during the entire period from the filing of the suit to the claiming of his exemptions. Held, that such statement constituted a sufficient "inventory" required by Code 1907, § 4186. *Johnson v. Huntsville Grocery Co.*, 10 Ala. App. 479, 65 So. 441.

§ 67. Contest and Determination of Claim.

Remedy—Procedure.—Where defendant in garnishment inventories property claimed to be exempt, and verifies that it is all that he owns or in which he has any beneficial interest, plaintiff's remedy is by issue joined under Code 1907, § 4184, and not by motion for judgment by default under § 4178. *Johnson v. Huntsville Grocery Co.*, 10 Ala. App. 479, 65 So. 441.

§ 77. Pleading.

Complaint — Sufficiency.—Certain life insurance policies stipulated that the insurer would pay the insured, personally, certain amounts upon the expiration of a given number of years after the issuance of the policies; the insured reserving to himself a benefit thereunder. The creditors of insured, after his death, filed a bill to reach the proceeds of the policies, alleging that deceased was indebted to them at and before his death, that he was insolvent, and that he had paid premiums up to the time of his death. Held, that the bill was, demurrable as failing to show affirmatively that the money was liable for the debts, or to defeat the claim of the beneficiary to the proceeds; there being no allegation that the premiums paid by deceased were in excess of \$750, allowed by Code 1907, § 4502, providing that proceeds of

insurance policies shall be exempt from execution for certain amounts. *Kimball v. Cunningham Hdw. Co.*, 192 Ala. 223, 68 So. 309.

§ 78. Evidence.

Striking Out Claim.—Where defendant claimed that the sum of \$130.99 which had been garnished was exempt, and filed an inventory under oath that such sum consisted of all his property, the fact that on plaintiff's motion for judgment condemning the sum garnished it was proven that at the time the writ

was served defendant owned about \$400 worth of other personal property did not show he was not prejudiced by the court's ruling striking his claim of exemptions and entering judgment by default; the undisputed evidence not being such as to exclude the inference that at the time of the service of the writ he had less than \$1,000 worth of personal property, including that mentioned in the claim of exemptions. *Johnson v. Huntsville Grocery Co.*, 10 Ala. App. 479, 65 So. 441.

Exhibits.

See ante, CRIMINAL LAW; EVIDENCE.

Experiments.

See ante, CRIMINAL LAW; EVIDENCE.

Expert Testimony.

See ante, CRIMINAL LAW; EVIDENCE.

Expiration of Lease.

See post, LANDLORD AND TENANT.

Expiration of Office.

See post, OFFICERS.

EXPLOSIVES.

- § 1. Injuries from Accidental Explosions.
- § 3. — Illegal or Negligent Manufacture, Storage or Keeping.
- § 4. Injuries from Blasting.

Cross References.

See the title EXPLOSIVES, vol. 7, p. 366, and references there given.

In addition, see ante, ADJOINING LANDOWNERS; DAMAGES; EVIDENCE, post, JUDGMENT; MASTER AND SERVANT; NEGLIGENCE; NUISANCES; TORTS.

As to injuries to adjacent property by blasting, see ante, ADJOINING LANDOWNERS. As to nature and extent of damages in actions on account of blasting, see ante, DAMAGES. As to admissibility of expert or opinion evidence as to blasting methods, see ante, EVIDENCE. As to joint or several liability in actions for damages caused by blasting, see post, JUDGMENT; TORTS. As to duty of master to servant in the using of explosives, see post, MASTER AND SERVANT. As to acts constituting negligence in storing and using explosives, see post, NEGLIGENCE. As to continuous blasting constituting a public nuisance, see post, NUISANCE.

- § 1. Injuries from Accidental Explosions.
- § 3. — Illegal or Negligent Manufacture, Storage or Keeping.

Care in Keeping and Storing.—If defendant, operating iron and smelting furnaces and also quarrying rock, kept a large quantity of dynamite near and in dangerous proximity to a thickly settled community, in a building or magazine situated close to a railroad track operated by it, and close to large slag piles, where hot slag was deposited by it in its operations, and where hot slag was carried from its furnaces close by the explosives by engines hauling hot pots containing slag, defendant was prima facie guilty of maintaining a nuisance. *Sloss-Sheffield Steel, etc., Co. v. Prosch*, 190 Ala. 290, 67 So. 516.

If defendant in quarrying was under the necessity of using dynamite, the law cast the duty on him to keep, handle, and use it in a reasonably safe and careful manner. *Sloss-Sheffield Steel, etc., Co. v. Prosch*, 190 Ala. 290, 67 So. 516.

Where dynamite was stored only temporarily in a warehouse, recovery could not be had for damage done to an adjoining building, unless there was some special negligence in the manner of keeping it. *Hamilton v. Cranford Mercantile Co. (Ala.)*, 78 So. 401.

Pleading.—A count alleging that defendant's stored dynamite "in or near

said town," and that it was "in near proximity to many persons and buildings," sufficiently alleged the danger. *Sloss-Sheffield Steel, etc., Co. v. Prosch*, 190 Ala. 290, 67 So. 516.

Burden of Proof.—Where plaintiff claimed that an explosion of dynamite in another burning building was the cause of the burning of his building, the burden was on him to prove that the explosion was the proximate cause. *Hamilton v. Cranford Mercantile Co. (Ala.)*, 78 So. 401.

Admissibility of Evidence.—In action for damages by fire, alleged to have been caused by neighboring explosion, evidence as to condition of basement when cleaned out months after the fire, after the weather had its effect, was admissible; its weight being for the jury. *Hamilton v. Cranford Mercantile Co. (Ala.)*, 78 So. 401.

In action for damages by fire alleged to have been caused by an explosion in another building, it was immaterial that defendant had stored dynamite in his building two years before. *Hamilton v. Cranford Mercantile Co. (Ala.)*, 78 So. 401.

Misleading Instruction.—Where plaintiff claimed damage by fire was caused by an explosion in defendant's building, an instruction that, if an explosion in plaintiff's building caused or "proxi-

mately contributed" to the burning of his property, to find for defendant was not affirmatively bad, but was misleading and inaccurate. *Hamilton v. Cranford Mercantile Co. (Ala.)*, 78 So. 401.

§ 4. Injuries from Blasting.

Proximate Negligence.—Where plaintiff is injured by blasting while lawfully on the defendant's premises, the liability of the defendant depends upon some proximate negligence on his part. *Ex parte Birmingham Realty Co.*, 183 Ala. 444, 63 So. 67, cited in note in *L. R. A.* 1917A, 1017.

Pleading—Sufficiency.—A count of a complaint for injuries caused by blasting which charged that the defendant's servants, acting within the scope of their employment, knowing that the blasting would frighten and endanger the plaintiff and his family and damage his property by casting rock thereon, wantonly caused rock and stone to be cast on his premises, is not objectionable as alleging, under charge of wanton injury conduct which did not amount to wantonness. *Birmingham Realty Co. v. Thomason*, 8 Ala. App. 535, 63 So. 65.

In an action for injuries by blasting, a count which charged that the defendant's servants, acting in the line and scope of their authority, and knowing that the blasting would frighten and endanger the plaintiff and his family and damage his property by casting stone thereon, wantonly caused rock and stone to be cast upon plaintiff's premises, sufficiently charges a trespass. *Ex parte Birmingham Realty Co.*, 183 Ala. 444, 63 So. 67, cited in note in *L. R. A.* 1917A, 1017.

Elements of Damages.—A corporation whose servants are blasting under circumstances amounting to a nuisance is liable for fright, sense of personal danger, and other mental suffering on the part of one whose premises are invaded by stones thrown by the blasts, and not merely for nominal damages as in the

case of an isolated trespass. *Birmingham Realty Co. v. Thomason*, 8 Ala. App. 535, 63 So. 65.

Evidence of Damages.—Where the complaint alleged an interference by blasting with the right of plaintiff to enjoy his residence, in comfort and safety to himself and family, evidence of the ages of his children was admissible to show the nature and extent of the violation of his right. *Birmingham Realty Co. v. Thomason*, 8 Ala. App. 535, 63 So. 65.

Effect on Other Property.—In an action for damages to property by using an excess of explosives in rock blasting, evidence of the vibratory effect upon other buildings in the neighborhood was admissible to show the character and extent of the explosives. *Harbison-Walker Refractories Co. v. Scott*, 185 Ala. 641, 64 So. 547, cited in note in *Ann. Cas. L. R. A.* 1917A, 1017.

As showing the character of blastings and concussions by which plaintiff's house was injured, proof that rocks were thereby thrown on premises of others is admissible. *Louisville, etc., R. Co. v. Lynne (Ala.)*, 75 So. 14.

Question for Jury.—Even though a plaintiff in an action for trespass by blasting fails to prove aggravation, which would entitle him to exemplary damages, a requested general charge for the defendant should be refused, since the plaintiff would still be entitled to compensatory or nominal damages. *Ex parte Birmingham Realty Co.*, 183 Ala. 444, 63 So. 67, cited in note in *L. R. A.* 1917A, 1017.

In an action for injury to plaintiff's property by excessively heavy rock blasting, evidence held to make the question of wanton negligence a jury question. *Harbison-Walker Refractories Co. v. Scott*, 185 Ala. 641, 64 So. 547, cited in note in *Ann. Cas.* 1916C, 1180.

Ex Post Facto Laws.

See ante, CONSTITUTIONAL LAW.

Express Companies.

See ante, CARRIERS.

Express Conditions.

See ante, CONTRACTS; DEEDS; post, WILLS.

Express Consideration.

See ante, CONTRACTS; DEEDS.

Express Contracts.

See ante, CONTRACTS.

Express Covenants.

See ante, COVENANTS.

Express Malice.

See ante, CRIMINAL LAW; post, FALSE IMPRISONMENT; HOMICIDE; LIBEL AND SLANDER; MALICIOUS PROSECUTION.

Express Trusts.

See post, TRUSTS.

Express Warranty.

See ante, COVENANTS; post, SALES; VENDOR AND PURCHASER.

Expulsion of Passenger.

See ante, CARRIERS.

Expulsion of Tenant.

See post, LANDLORD AND TENANT.

Extension of Lease.

See post, LANDLORD AND TENANT.

Extension of Time.

See the particular titles where the question properly arises; thus, as to time of appearance, see ante, APPEARANCE. As to time of payment of mortgage, see post, MORTGAGES. As to time to plead, see post, PLEADING.

Extortion.

See the title EXTORTION, vol. 7, p. 372, and references there given.

EXTRADITION.

I. Interstate.

§ 4½. Application for Arrest and Proceedings Thereon.

§ 5. Warrant for Arrest and Delivery.

Cross References.

See the title EXTRADITION, vol. 7, p. 374, and references there given.

As to proceedings in habeas corpus application of fugitive from justice apprehended on extradition warrant, see ante, HABEAS CORPUS.

I. INTERSTATE.

§ 4½. Application for Arrest and Proceedings Thereon.

Jurisdictional Facts.—The law requires the governor, before issuing a warrant for the apprehension of a fugitive from justice in another state, to find that such fugitive is duly charged in the other state with a crime, and that he has fled from justice in such state and taken refuge in Alabama. *Pool v. State* (Ala. App.), 78 So. 407.

§ 5. Warrant for Arrest and Delivery.

See ante, "Application for Arrest and

Proceedings Thereon," § 4½.

Jurisdiction. — It was within province of governor to require production of satisfactory evidence of existence of jurisdictional facts law required him to find before issuing warrant for arrest on requisition of fugitive from justice in another state. *Pool v. State* (Ala. App.), 78 So. 407.

Recitals in warrant issued on requisition of governor of another state for arrest of fugitive from justice are prima facie evidence of jurisdictional facts. *Pool v. State* (Ala. App.), 78 So. 407.

Extraordinary Care.

See ante, CARRIERS; EXPLOSIVES; post, MASTER AND SERVANT; NEGLIGENCE.

Extrinsic Evidence.

See ante, CRIMINAL LAW; EVIDENCE.

Facilities.

See ante, CARRIERS; post, RAILROADS.

FACTORS.

- § 1. Who Are Factors.
- § 8. Powers, Duties and Liabilities as to Sale.
- § 11. — Price.
- § 23. Lien.
 - § 23 (2) Existence and Extent in General.
 - § 23 (4) Priorities.

Cross References.

See the title FACTORS, vol. 7, p. 378, and references there given.
In addition, see ante BROKERS; post, PRINCIPAL AND AGENT.

I. WHO ARE FACTORS.

Definition.—Where a foreign corporation shipped potatoes on consignment to a commission broker for him to sell, latter was a "factor" within the definition of a factor as one who, as a business, sells goods and merchandise consigned and delivered to him by or for his principals and for a compensation commonly called factorage or commission. *Tyson v. Jennings Produce Co.* (Ala. App.), 77 So. 986.

§ 8. Powers, Duties and Liabilities as to Sale.

§ 11. — Price.

Mistake in Message.—Where plaintiff wired a factor asking whether he could sell potatoes at 81 cents, and he replied, "Can sell at 81, competitors offering at 75," intending to say "Can't sell at 81," and potatoes were shipped and sold at less than 81 cents, plaintiff could recover difference in balance due, after deduction of proper commission, be-

tween price at 81 cents and actual selling price. *Tyson v. Jennings Produce Co.* (Ala. App.), 77 So. 986.

§ 23. Lien.

§ 23 (2) Existence and Extent in General.

Prior Transactions.—Cotton factors to whom cotton was consigned as against consignor held to have lien not only for advances on the cotton, but for any general balance due on accounts growing out of similar dealings. *Baker, etc., Co. v. American Agri. Chemical Co.* (Ala.), 77 So. 866.

§ 23 (4) Priorities.

Lien of Cotton Factor. — Cotton factors' lien on cotton consigned to them held subordinate to an outstanding legal title or a paramount equity of which the factor had notice before the lien attached by virtue of possession. *Baker, etc., Co. v. American Agri. Chemical Co.* (Ala.), 77 So. 866.

Failure.

See ante, BANKRUPTCY.

As to failure of consideration, see ante, BILLS AND NOTES; CONTRACTS; DEEDS; post, SALES; VENDOR AND PURCHASER. As to failure of title, see ante, COVENANTS; post, VENDOR AND PURCHASER.

Faith and Credit.

See post, JUDGMENT.

FALSE IMPRISONMENT.

I. Civil Liability.

(A) Acts Constituting False Imprisonment and Liability Therefor.

- § 1. Nature and Elements of False Imprisonment.
- § 2. — In General.
- § 5. — Illegality of Arrest.
 - § 5 (1) In General.
 - § 5 (2) Liability of Judicial Officers.
 - § 5 (3) Liability of Officer or Other Person Making Arrest and Persons Assisting Officer.
- § 6. Illegality of Detention after Arrest.
- § 7. Defenses.
- § 8. — In General.
- § 9. — Judicial Process.
- § 11. Persons Liable.

(B) Actions.

- § 12. Pleading.
 - § 12 (1) Declaration, Complaint or Petition.
 - § 12 (2) Plea or Answer.
 - § 12 (3) Issues, Proof, and Variance.
- § 13. Evidence.
- § 14. — Presumptions and Burden of Proof.
- § 15. — Admissibility in General.
- § 18. — Nature and Circumstances of Act.
- § 18½. — Extent of Injury.
- § 19. — Aggravation of Damages.
- § 20. — Mitigation of Damages.
- § 20½. Weight and Sufficiency.
- § 21. Damages.
- § 22. — Elements of Compensation.
- § 23. — Exemplary.
- § 24. Trial.
- § 25. — Questions for Jury.
- § 26. — Instructions.

Cross References.

See the title FALSE IMPRISONMENT, vol. 7, p. 387, and references there given.

In addition, see ante, APPEAL AND ERROR; post, HABEAS CORPUS; MALICIOUS PROSECUTION; MASTER AND SERVANT; TRIAL.

As to the elements of action for malicious prosecution in general, see post, MALICIOUS PROSECUTION. As to liability for acts of servant in causing arrest or detention, see post, MASTER AND SERVANT. As to instructions as to probable cause in false imprisonment cases, see post, TRIAL.

I. CIVIL LIABILITY.**(A) ACTS CONSTITUTING FALSE IMPRISONMENT AND LIABILITY THEREFOR.****§ 1. Nature and Elements of False Imprisonment.****§ 2. — In General.**

The gist of an action for false imprisonment is the unlawfulness of the imprisonment. *King v. Gray*, 189 Ala. 686, 66 So. 643.

Unlawful Detention. — Detention of person by another with force, or against will of person detained, is, in law, imprisonment; and, if detention is not rightful, it is unlawful. *Central, etc., R. Co. v. Carlock*, 196 Ala. 659, 72 So. 261.

§ 5. — Illegality of Arrest.**§ 5 (1) In General.**

Proximate Cause.—Where defendant, through mistake, had built a house on plaintiff's land, and after plaintiff's entry at a time when neither defendant nor his tenant were in actual possession told the officer if plaintiff persisted in going on the premises, as plaintiff had declared his intention of doing, he wanted him arrested, the arrest immediately after was the proximate result of defendant's request. *Rhodes v. McWilson*, 192 Ala. 675, 69 So. 69.

§ 5 (2) Liability of Judicial Officers.

Jurisdiction of Justice.—An ex officio justice of peace, who, in view of Code 1907, §§ 7605, 7606, had jurisdiction as a committing magistrate in case charging plaintiff with violation of Acts 1907, p. 413, § 11 (Acts 1911, p. 613), and who entertained view that Acts 1909, pp. 41, 42, was applicable, merely exceeded his jurisdiction, where he in good faith adjudged plaintiff guilty, and sentenced him, and neither defendant or his sureties were liable to plaintiff, who had been incarcerated in jail for eight days as a consequence, on the theory that his act was wholly without jurisdiction. *Blancett v. Wimberley* (Ala. App.), 78 So. 318.

§ 5 (3) Liability of Officer or Other Person Making Arrest and Persons Assisting Officer.

Liability of Sheriff.—A sheriff, while

executing writs regular and valid on their face, and issued from a court or person having jurisdiction in the premises, is not required to look beyond the writs or to inquire as to the validity of the proceedings prior to their issue, and a sheriff's arrest of plaintiff on two duly issued warrants, charging him with violating the tick law quarantine and with violating the quarantine laws for live stock, sufficient to show violations of law if rules and regulations of the state live stock sanitary board established under Code 1907, §§ 757-770, were then operative in the county, was not an actionable wrong. *Ferguson v. Starkey*, 192 Ala. 471, 68 So. 346.

§ 6. Illegality of Detention after Arrest.

Release to Secure Bail.—If a prisoner's detention by sheriff was under valid process, there was no affirmative obligation on the sheriff to release him from custody or to conduct him in search of sureties on an appearance bond. *Ahlrichs v. Rollo* (Ala.), 76 So. 37.

§ 7. Defenses.**§ 8. — In General.**

Justification of arrest and imprisonment under legal process is a complete defense to an action for false imprisonment. *Nolen v. Jones* (Ala.), 76 So. 935.

§ 9. — Judicial Process.

Regularity of Process.—A ministerial or executive officer is not liable to an action for false imprisonment when he acts under a process regular on its face. *Tennessee Coal, etc., R. Co. v. Butler*, 187 Ala. 51, 65 So. 804.

Validity of Affidavit.—Where affidavit taken before a justice of the peace to begin a prosecution in county court showed that affiant was before justice of the peace, and swore to and subscribed the affidavit and that proceeding was instituted on stated date, and there is nothing on face of affidavit to warrant or show that it has been altered in respect to date, such affidavit was not void on its face. *Ahlrichs v. Rollo* (Ala.), 76 So. 37.

§ 11. Persons Liable.

See also ante, "Liability of Judicial

Officers," § 5 (2); "Liability of Officer or Other Person Making Arrest and Persons Assisting Officer," § 5 (3).

Arrest by Deputy—Liability of Sheriff.—Where his general deputy, a police officer, with the same authority to arrest with or without warrants, while acting within the scope of his authority or under the color of his office, made an illegal arrest, for which he would be liable, the sheriff was also civilly liable to the same degree and the same extent. *Hereford v. Brentz*, 192 Ala. 465, 68 So. 350, cited in note in L. R. A. 1915E, 173.

(B) ACTIONS.

§ 12. Pleading.

§ 12 (1) Declaration, Complaint or Petition.

Allegation of Malice.—*Murphy v. McAdory*, 183 Ala. 209, 62 So. 706. See the title FALSE IMPRISONMENT, § 12 (1), vol. 7, p. 391.

Momentary Detention. — The prescribed allegation in the code form of complaint for false imprisonment, as to the duration of the imprisonment, is merely directory, since it relates merely to the extent of the injury, and a momentary detention, if wrongful, gives a complete cause of action. *Strain v. Irwin*, 195 Ala. 414, 70 So. 734.

Form—Sufficiency.—A complaint substantially following Code 1907, § 5382, form No. 19, for false imprisonment, though containing averments necessary for an action for malicious prosecution, but unnecessary to a cause of action for false imprisonment is good as against a demurrer not specifying the defect. *Deason v. Gray*, 189 Ala. 672, 66 So. 646.

Requisites.—Counts for false imprisonment need not allege the place, nor the manner in which, or the agent by whom, the arrest was made, nor that defendant who caused it was present when it was made. *Strain v. Irwin*, 195 Ala. 414, 70 So. 734.

Irregularity.—A count for false imprisonment, alleging that plaintiff claimed of defendant specified damages for causing plaintiff to be illegally arrested on a charge of removing property upon which a mortgage existed; that such arrest was illegal and against plaintiff's will and

was accompanied by force and arms; and that plaintiff was arrested on such charge on a special date, and "was detained in custody under said charge and illegal arrest for, to-wit — hours" — though it did not follow the code form — stated a good cause of action. *Strain v. Irwin*, 195 Ala. 414, 70 So. 734.

Charge of Illegality.—Counts for false imprisonment alleging that plaintiff's arrest was illegal, even though conclusion, held not to render counts for false imprisonment demurrable, no charge of illegality being required to show a prima facie cause of action. *Strain v. Irwin*, 195 Ala. 414, 70 So. 734.

Illegal Arrest is False Imprisonment.—Where a count for false imprisonment was in code form, and alleged that defendant maliciously and without probable cause caused plaintiff to be illegally arrested on a special charge, it was not essential to the statement of a cause of action that it should further allege an imprisonment, as an illegal arrest is both technically and in fact a false imprisonment. *Strain v. Irwin*, 195 Ala. 414, 70 So. 734.

§ 12 (2) Plea or Answer.

Justification.—In an action for unlawful arrest and false imprisonment, tried on the plea of the general issue only, there could be no justification of the arrest, and the only proper inquiries were as to defendant's responsibility for the arrest and the amount of damages. *Rhodes v. McWilson*, 192 Ala. 675, 69 So. 69.

Matters Available under General Issue.—In an action for false imprisonment, a plea, so far as it denied responsibility for the action of a justice of the peace and sheriff who arrested plaintiff, was a mere traverse of the complaint. *Strain v. Irwin*, 195 Ala. 414, 70 So. 734.

In an action for false imprisonment, the facts that plaintiff made no objection to his arrest, but voluntarily accompanied the officer and gave bail for his appearance, and that defendant was not present and took no part in the arrest, were available, if at all, under the general issue. *Strain v. Irwin*, 195 Ala. 414, 70 So. 734.

§ 12 (3) Issues, Proof, and Variance.

Variance in Charge.—In an action for unlawful arrest and detention of plaintiff on a charge of trespass after warning, a docket of the recorder's court showing that plaintiff was tried on a charge of trespass, even if it concerned the charge on which plaintiff was arrested, was an immaterial variance; and the failure to prove a detention of two days, as alleged, was likewise immaterial, since that was merely one element of damage. *Rhodes v. McWilson*, 192 Ala. 675, 69 So. 69.

Burden of Proof.—Where, in an action for false imprisonment, plaintiff pleaded an illegal arrest, he thereby anticipated the defense of justification, and unnecessarily assumed the negative burden of proof, and hence a plea setting up justification under legal process or legally authorized action was unnecessary. *Strain v. Irwin*, 195 Ala. 414, 70 So. 734.

Proof under Allegation.—Where, in an action for false imprisonment, plaintiff alleged that the imprisonment was malicious, instead of unlawful, and without probable cause, he was bound to prove both malice and want of probable cause. *King v. Gray*, 189 Ala. 686, 66 So. 643.

City Ordinance—Admissibility.—In an action in the circuit court for unlawful arrest and false imprisonment, a city ordinance authorizing arrests without warrant, in certain cases not authorized by state laws held inadmissible to show a lawful arrest, in the absence of a plea of justification. *Rhodes v. McWilson*, 192 Ala. 675, 69 So. 69.

Arrest by Bail—Effect of Bond.—In an action for false imprisonment consisting of an unlawful arrest by bail, the bond is admissible in justification only where the right of the bail to make the arrest is properly pleaded, and, if not so pleaded, is admissible only in mitigation. *Nicholson v. Killpatrick*, 188 Ala. 258, 66 So. 8.

§ 13. Evidence.

§ 14. — Presumptions and Burden of Proof.

Acts of Agents—Ratification.—In order to hold a corporation liable for false imprisonment, the party imprisoned must

show that those who actually detained him were acting as its agents, or that their acts were ratified. *Alabama Fuel, etc., Co. v. Rice*, 187 Ala. 458, 65 So. 402.

§ 15. — Admissibility in General.

See ante, "Issues, Proof, and Variance," § 12 (3).

Evidence of Other Acts.—In an action against a corporation for false imprisonment, evidence that its agent who detained plaintiff, and who had previously warned a negro off the corporate premises, beat the negro with a strip of lumber, is not admissible. *Alabama Fuel, etc., Co. v. Rice*, 187 Ala. 458, 65 So. 402.

Refusal to Release.—In an action for false imprisonment, it having been proven that S. was defendant's secretary, evidence that plaintiff requested S. to release him from a room occupied by defendant in connection with its business, and that S. refused to do so, held admissible. *Birmingham Ledger Co. v. Buchanan*, 10 Ala. App. 527, 65 So. 667.

Detention in Room.—In an action for false imprisonment of plaintiff and other newsboys by defendant newspaper corporation pending the issuance of an important "extra," evidence that there was no way for the boys to get out of the room in which they were confined was admissible. *Birmingham Ledger Co. v. Buchanan*, 10 Ala. App. 527, 65 So. 667.

Proceedings Following Arrest.—In an action for unlawful arrest and false imprisonment, the recorder's record of the proceedings and judgment following the arrest was admissible. *Rhodes v. McWilson*, 192 Ala. 675, 69 So. 69.

Inability to Send Letter.—In an action for malicious prosecution and false imprisonment, evidence that, while plaintiff was imprisoned, he wrote letters to his family, but was unable to get them posted, that he tried to get postage from the jailer, but that such officer said he had no money with which to furnish postage, was irrelevant, and its admission was prejudicial error, especially where it was not claimed that any one refused, upon request, to place his letters in the mail, it being probable that the absence of postage was the reason he could not get them posted. *Sloss-*

Sheffield Steel, etc., Co. v. Devaney, 189 Ala. 564, 66 So. 523.

Manner of Defendant.—In action for false imprisonment the manner of the defendant at the trial in the recorder's court, whether angry or otherwise, was irrelevant. *Rhodes v. McWilson*, 192 Ala. 675, 69 So. 69.

§ 18. — Nature and Circumstances of Act.

Rough Treatment.—In an action for false imprisonment of a newsboy by defendant newspaper corporation while waiting the publication of an "extra," it was proper, in connection with the testimony of other witnesses as to the indication on plaintiff's person, and concerning the condition of his clothing indicating rough usage to which he had been recently subjected, to prove that, as soon as he was permitted to leave the place in which he had been confined, he went immediately to the place near by, at which such other witnesses saw him. *Birmingham Ledger Co. v. Buchanan*, 10 Ala. App. 527, 65 So. 667.

Where it was plain that plaintiff and many other newsboys, older and larger than himself, were confined by defendant newspaper corporation pending the issuance of an important "extra," evidence of marks on plaintiff's person, indicating a recent crying and undue excitement, and of the torn and soiled condition of his clothing immediately after he was released from confinement, was admissible in connection with evidence indicating that his condition might have resulted from experiences to which plaintiff was subjected by his enforced confinement. *Birmingham Ledger Co. v. Buchanan*, 10 Ala. App. 527, 65 So. 667.

Violence and Intimidation.—In an action for false imprisonment of plaintiff and a number of other newsboys by defendant newspaper corporation pending the issuance of an important "extra," evidence that defendant's secretary during such imprisonment struck and choked one of the other boys was admissible to show that the detention of the boys was accompanied by physical violence calculated to intimidate and overawe those not subjected to such treatment. *Birmingham Ledger Co. v.*

Buchanan, 10 Ala. App. 527, 65 So. 667.

Previous Trial in Justice Court.—In action for false imprisonment when plaintiff was arrested for trespassing, the fact that he was tried before a justice for trespassing was properly excluded. *Du Pont de Nemours Powder Co. v. Hyde* (Ala.), 77 So. 733.

§ 18½. — Extent of Injury.

Attorney's Fees.—In action for false imprisonment, where plaintiff claimed special damages for attorney's fees expended by him, he is entitled to offer evidence in support of that claim. *Boshell v. Cunningham* (Ala.), 76 So. 937.

§ 19. — Aggravation of Damages.

Circumstances of Arrest.—The circumstances under which the arrest and detention of plaintiff were accomplished were admissible in aggravation of the damages. *Rhodes v. McWilson*, 192 Ala. 675, 69 So. 69.

§ 20. — Mitigation of Damages.

Circumstances of Arrest.—The circumstances under which the arrest and detention of plaintiff were accomplished were admissible in mitigation of the damages. *Rhodes v. McWilson*, 192 Ala. 675, 69 So. 69.

Declining to Give Bail.—In an action for malicious prosecution and false imprisonment, if plaintiff was offered an opportunity to give bail and could have readily done so, but declined and remained in jail, evidence as to these facts should have been admitted to show that his separation from his family, and any humiliation resulting from his continued detention, was attributable to his own choice and not to defendant's acts. *Sloss-Sheffield Steel, etc., Co. v. Devaney*, 189 Ala. 564, 66 So. 523.

§ 20½. Weight and Sufficiency.

Acts of Agent—Liability of Principal.

—In an action for false imprisonment of a newsboy by refusing to permit him to leave a room on the premises occupied by defendant newspaper company until an important "extra" was published, evidence held to support finding that the person responsible for plaintiff's imprisonment was in defendant's employ and was acting within the course of his em-

ployment by defendant. *Birmingham Ledger Co. v. Buchanan*, 10 Ala. App. 527, 65 So. 667.

Exemplary Damages.—In an action for unlawful arrest and false imprisonment, where there was some evidence that defendant's manner was angry when he caused plaintiff's arrest, and that he threatened to put plaintiff in the coal mines, and that he knew the plaintiff was the owner of the land, it was error to submit the question of exemplary damages. *Rhodes v. McWilson*, 192 Ala. 675, 69 So. 69.

§ 21. Damages.

§ 22. — Elements of Compensation.

Mental Suffering. — *Sloss-Sheffield Steel, etc., Co. v. Devaney*, 7 Ala. App. 457, 60 So. 990. See the title FALSE IMPRISONMENT, § 22, vol. 7, p. 396.

Malicious Prosecution after Arrest.—Plaintiff, in an action for unlawful arrest and false imprisonment on a charge of trespass after warning, was not entitled to damages for defendant's malicious prosecution of the charge. *Rhodes v. McWilson*, 192 Ala. 675, 69 So. 69.

§ 23. — Exemplary.

Actual Malice.—Punitive damages may be recovered for false imprisonment committed with actual malice, or its legal equivalent, which may be found from proof of a wanton disregard of plaintiff's rights. *Birmingham Ledger Co. v. Buchanan*, 10 Ala. App. 527, 65 So. 667.

Acts of Deputy.—Upon wrongful and malicious arrest by his regular deputy, the sheriff might be liable in punitive or exemplary damages. *Hereford v. Brentz*, 192 Ala. 501, 68 So. 350, cited in *L. R. A.* 1915E, 173.

Acts Without Legal Excuse.—When defendant newspaper corporation, being about to publish an important "extra," announcing the nomination of a candidate for president by the Republican National Convention then in session, incarcerated plaintiff and a crowd of other newsboys in its circulation room until the "extra" was issued, that they might

be ready to distribute the paper, and to prevent them from selling a rival paper, plaintiff's restraint was without any pretense of legal excuse, and was sufficient to justify an award of punitive damages in an action for malicious prosecution. *Birmingham Ledger Co. v. Buchanan*, 10 Ala. App. 527, 65 So. 667.

§ 24. Trial.

§ 25. — Questions for Jury.

Previous Wrongful Detention.—In an action for false imprisonment, the general charge for defendant was properly refused on a count claiming damages for plaintiff's confinement in a public jail, which was shown to have been on a proper warrant, for plaintiff might, under its general averments, recover for wrongful detention previous to his jail confinement. *Alabama Fuel, etc., Co. v. Rice*, 187 Ala. 458, 65 So. 402.

Malice—Probable Cause. — In an action for unlawful arrest and false imprisonment with malice and without probable cause, held, under the evidence that the questions of malice and want of probable 'cause were for the jury. *Rhodes v. McWilson*, 192 Ala. 675, 69 So. 69.

§ 26. — Instructions.

Good Faith in Mitigation.—Charge on mitigation of damages, etc., because of good faith in action for false imprisonment held proper. *Boshell v. Cunningham* (Ala.), 76 So. 937.

Misleading Instructions.—A requested charge that to justify an award of punitive damages the jury must be reasonably satisfied that the conduct of "defendant" was consciously wrong, or in reckless indifference to plaintiff's rights, was calculated to mislead the jury to believe that it was necessary to prove defendant's corporate participation in the wrong, though the commission of it by an agent or employee was proved as alleged in the complaint. *Birmingham Ledger v. Buchanan*, 10 Ala. App. 527, 65 So. 667.

FALSE PRETENSES.

- § 3. Elements of Offenses.
- § 5½. — False Token.
- § 6. — Nature of Pretense.
- § 11. — Parting with Right of Property or Possession.
- § 12. — Procuring Written Instrument or Signature.
- § 16. Indictment or Information.
- § 17. — Requisites and Sufficiency in General.
- § 20. — Description of False Token or Pretense or Other Instrument or Means of Fraud.
- § 23½. — Obtaining Money, Property, or Written Instrument.
- § 24. — Issues, Proof, and Variance.
- § 25. Admissibility of Evidence.
- § 26. — In General.
- § 29. — Falsity of Pretense or Claim and Knowledge Thereof.
- § 32. Weight and Sufficiency of Evidence.
 - § 32 (3) Falsity of Pretense or Claim or Knowledge Thereof.
 - § 32 (4) Parting with and Obtaining Money, Property, or Written Instrument.
- § 33. Trial.
- § 34. — Questions for Jury.

Cross References.

See the title FALSE PRETENSES, vol. 7, p. 398, and references there given.

In addition, see ante, CRIMINAL LAW, post, INDICTMENT AND INFORMATION.

As to trial and procedure in prosecutions for false pretenses, see ante, CRIMINAL LAW. As to requirements of indictments in prosecutions for false pretenses, see post, INDICTMENT AND INFORMATION.

§ 3. Elements of Offense.

§ 5½. — False Token.

Check Without Funds.—The giving of check for goods to be paid for upon delivery, without explanation, was a representation, symbol, or token that defendant had money on deposit in such bank, and if false and given with intent to deceive seller and induce him to part with goods, which was accomplished, the defendant was guilty of obtaining property under false pretenses. *Eaton v. State* (Ala. App.), 78 So. 321.

§ 6. — Nature of Pretense.

Sufficiency of Pretense.—An indictment for false pretenses is sufficient if pretense alleged is not patently absurd or irrational, or if defrauded party had not at time it was made and acted upon

means of detecting its falsehood. *Clark v. State*, 14 Ala. App. 633, 72 So. 291.

"Pecuniary Condition" — Comprehension.—Obtaining goods on credit by false pretenses, regarding pecuniary condition or financial responsibility, is a crime within Code 1907, § 6920, providing for conviction of "any person who, by any false pretense or token, and with the intent to injure or defraud, obtains from another any money or other personal property," as well as by § 6925, specifically making such action a crime; the term "pecuniary condition," used in § 6925, comprehending, not only money in hand, but property and all other assets of value constituting an existing fact that go to make up financial responsibility as a basis of credit. *Dennis v. State* (Ala. App.), 75 So. 707.

§ 11. — Parting with Right of Property or Possession.

Nature of Benefit Obtained.—In a prosecution for obtaining money by false pretense, that defendant did not obtain money from defrauded party but merely a suretyship is no defense; it being sufficient that the money was parted with by reason of the false pretenses to some other person in payment of the prisoners obligation and at his request. *Clark v. State*, 14 Ala. App. 633, 72 So. 291.

Time of Obtaining Money.—To constitute the crime of false pretense it is not necessary that money should be parted with at time of false pretense; it being sufficient that an obligation was entered into by reason of the false pretense and in consequence the party defrauded had to pay it. *Clark v. State*, 14 Ala. App. 633, 72 So. 291.

The mere fact that all the money was not obtained at one time is of no consequence in prosecution for obtaining money by false pretenses if it was all obtained by reason of the false pretenses. *Foster v. State* (Ala. App.), 78 So. 722.

Sufficiency of Evidence.—If accused by false pretenses procured proceeds of a loan to be placed to his credit on the books of the bank subject to check, and he afterwards checked out the amount, the offense of obtaining money by false pretenses was complete. *Foster v. State* (Ala. App.), 78 So. 721.

§ 12. — Procuring Written Instrument or Signature.

Signature to Note.—*Bonner v. State*, 8 Ala. App. 236, 62 So. 337, cited in note in Ann. Cas. 1917A, 627. See the title FALSE PRETENSES, § 12, vol. 7, p. 402.

Pretense Calculated to Deceive.—The false pretense by which a signature to a mortgage is obtained must be of a material fact, calculated to deceive, and on which the party to whom it is made has the right to rely. *Addington v. State* (Ala. App.), 74 So. 846.

§ 16. Indictment or Information.

§ 17. — Requisites and Sufficiency in General.

"Representation" — "Pretense."—Un-

der Code 1907, § 7136, an indictment for false pretenses in the statutory form, except that in the conclusion the word "representation" was used for the word "pretense," preserving substantially same sense and meaning, was a substantial conformity, and sufficient. *Clark v. State*, 14 Ala. App. 633, 72 So. 291.

§ 20. — Description of False Token or Pretense or Other Instrument or Means of Fraud.

Existence of a Fact.—An indictment under Code 1907, § 6920, for obtaining money by false pretenses, which alleged that defendant, with intent to defraud, falsely pretended at that time the existence of a fact, whereby he obtained money and other personal property from a party named, was sufficient. *Feagin v. State*, 7 Ala. App. 101, 61 So. 464.

§ 23½. Obtaining Money, Property, or Written Instrument.

Mortgage. — An indictment setting forth a false pretense, and alleging that by means of such false pretense defendant obtained the signature to a mortgage, sufficiently alleges that the false statement was made as a fact, was material, and that it was rightfully relied on by the other party. *Addington v. State* (Ala. App.), 74 So. 846.

§ 24. — Issues, Proof, and Variance.

Exact Amount Not Essential.—In a prosecution for obtaining money under false pretenses, proof that the accused obtained the exact amount of money mentioned in the indictment is not essential to a conviction. *Cheshire v. State*, 10 Ala. App. 139, 64 So. 544.

Several Pretenses.—Where an indictment for obtaining money under false pretenses alleges several separate pretenses, proof of any one of them is sufficient to support a conviction. *Addington v. State* (Ala. App.), 74 So. 846.

In a prosecution for obtaining money under false pretenses, the state need not prove that defendant in the manner alleged obtained the exact amount of money mentioned in the indictment; the allegations as to the amount of money obtained not being descriptive of the essential ingredient of the offense. *Foote v. State* (Ala. App.), 75 So. 728.

Proof of Part of Allegations.—In a prosecution for obtaining money under false pretenses, it is not necessary that all the pretenses alleged be proven, but is sufficient that those proven were intended and calculated to deceive and defraud, and that, on the strength of any one of them, the money was obtained. *Footte v. State* (Ala. App.), 75 So. 728.

Falsity of Pretense.—Proof of the falsity of the alleged pretense is essential to the establishment of the corpus delicti in a prosecution for obtaining money by false pretenses. *Sherard v. State* (Ala. App.), 75 So. 721.

§ 25. Admissibility of Evidence.

§ 26. — In General.

Procuring Signature to Note.—In a prosecution under Code 1907, § 6921, for obtaining the signature of a third person to a note by false pretenses, the facts that the party whose name was so obtained had to pay the note and that defendant had never paid it were inadmissible, since the offense was committed, if at all, at the time the signature to the note was obtained. *Bonner v. State*, 8 Ala. App. 236, 62 So. 337, cited in notes in Ann. Cas. 1916D, 855, and 1917D, 627.

§ 29. — Falsity of Pretense or Claim and Knowledge Thereof.

False Instrument.—In a prosecution under Code 1907, § 6921, for obtaining the signature of a certain named person to a note by false pretenses as to ownership of land, a mortgage executed by the defendant was admissible as showing that he had parted with his title to the land. *Bonner v. State*, 8 Ala. App. 236, 62 So. 337, cited in notes in Ann. Cas. 1916D, 855, 1917D, 627.

Financial Statement.—In prosecution for obtaining goods by false pretenses, regarding pecuniary condition, the financial statement made by defendant as to his holdings was admissible. *Dennis v. State* (Ala. App.), 75 So. 707.

Issuance of Check.—In a prosecution for obtaining goods by false pretenses, the issuance of check upon which payment was refused on the date of its issue soon after making of pretenses had

a tendency to show their falsity. *Dennis v. State* (Ala. App.), 75 So. 707.

Fraudulent Intent—Negation. — In a prosecution for obtaining goods by false pretenses as to pecuniary condition, defendant's evidence showing character of his business and daily deposits of money was admissible since it tended to rebut the states theory that statements were made with fraudulent intent. *Dennis v. State* (Ala. App.), 75 So. 707.

§ 32. Weight and Sufficiency of Evidence

§ 32 (3) Falsity of Pretense or Claim or Knowledge Thereof.

Pretense of Being a Lawyer. — In a prosecution for obtaining a signature to a mortgage by false pretenses, evidence held to warrant the jury in finding that defendant sufficiently stated that he was a lawyer, not that that was the conclusion the prosecuting witness drew from other statements, so as to justify a conviction. *Addington v. State* (Ala. App.), 74 So. 846.

§ 32 (4) Parting With and Obtaining Money, Property, or Written Instrument.

Mortgage.—Evidence held not to sustain conviction for obtaining a mortgage by falsely pretending that accused was authorized to, and would, render services as an attorney in return therefor. *Addington v. State* (Ala. App.), 77 So. 993.

§ 33. Trial.

§ 34. — Questions for Jury.

Intention.—*Bonner v. State*, 8 Ala. App. 236, 62 So. 337, cited in notes in Ann. Cas. 1916D, 855, 1917D, 627. See the title FALSE PRETENSES, § 34, vol. 7, p. 409.

Inducement of Act.—In a prosecution for false pretenses, whether pretenses made were cogent and controlling in inducing the act held for jury. *Clark v. State*, 14 Ala. App. 638, 72 So. 291.

Sufficiency of Evidence. — Evidence held to present jury question as to accused's guilt of obtaining money by false pretenses. *Foster v. State* (Ala. App.), 78 So. 721.

False Representation.

See ante, BILLS AND NOTES; CONTRACTS; FALSE PRETENSES; post, FRAUD; INSURANCE; SALES; VENDOR AND PURCHASER.

False Swearing.

See ante, CRIMINAL LAW; post, PERJURY.

Family.

See ante, DESCENT AND DISTRIBUTION; post, HUSBAND AND WIFE; PARENT AND CHILD.

Fares.

See ante, CARRIERS.

Farming on Shares.

See post, LANDLORD AND TENANT.

Father.

See post, PARENT AND CHILD.

Fault.

See ante, CARRIERS; post, MASTER AND SERVANT; NEGLIGENCE; RAILROADS; STREET RAILROADS.

Federal Courts.

See ante, COURTS; post, REMOVAL OF CAUSES.

Federal Procedure.

See ante, COURTS; CRIMINAL LAW; post, REMOVAL OF CAUSES.

Federal Questions.

See ante, COURTS; post, REMOVAL OF CAUSES.

Fellow Servant.

See post, MASTER AND SERVANT.

Feme-Covert.

See post, HUSBAND AND WIFE.

Fences.

See the title FENCES, vol. 7, p. 414, and references there given.
As to high partition fence as constituting nuisance, see post, NUISANCES.

Fermented Liquors.

See ante, INTOXICATING LIQUORS.

FERRIES.

I. Establishment and Maintenance.

§ 1. Franchises and Privileges.

§ 2. — Nature of Franchise.

Cross References.

See the title FERRIES, vol. 7, p. 419, and references there given.

I. ESTABLISHMENT AND MAINTENANCE.

§ 1. Franchises and Privileges.

§ 2. — Nature of Franchise.

Not an Appurtenance to Land.—*Graham v. Caperton*, 176 Ala. 116, 57 So. 741, cited in note in L. R. A. 1916D, 833. See the title FERRIES, § 2, vol. 7, p. 419.

Fidelity Insurance.

See post, INSURANCE.

Fiduciary Relations.

See ante, ATTORNEY AND CLIENT; BROKERS; EXECUTORS AND ADMINISTRATORS; post, GUARDIAN AND WARD; PRINCIPAL AND AGENT; TRUSTS.

Field Notes.

See ante, BOUNDARIES.

Fighting.

See ante, ASSAULT AND BATTERY; post, HOMICIDE.

Final Judgments and Decrees.

See ante, APPEAL AND ERROR; CRIMINAL LAW; EQUITY; post, JUDGMENT.

Financial Condition.

See ante, DAMAGES.

FINES.

§ 10. Disposition of Proceeds.

Cross References.

See the title FINES, vol. 7, p. 426, and references there given.

§ 10. Disposition of Proceeds.

Payment of Witness Fees.—Code 1907, § 6888, provides that all fines shall go to the county. Persons convicted of misdemeanors and sentenced to work out fines on the public roads paid such fines. By a local improvement act, approved March 11, 1911 (Acts 1911, p. 91), all county convicts of Morgan county were required to be worked on public roads of the county, and the commissioners' court was required to see that it was done. The treasurer of the county contended that fines paid by the misdemeanor convicts should be devoted to the public roads. Held, that such money became part of the fine and forfeiture fund, and could be devoted to paying fees of state

witnesses. *Ryan v. Collins*, 196 Ala. 478, 71 So. 690.

Same — Certificate of Clerk. — Under Code 1907, § 6664, declaring that the foreman of the grand jury shall issue certificates to all witnesses examined, to become claims against the fine and forfeiture fund in the same manner as certificates issued to state witnesses by the clerk of the court, a certificate for a witness fee, signed by the foreman of the grand jury and indorsed by the clerk of the court, showing that the state failed to convict, shows that the owner is entitled to payment by the treasurer; the clerk's indorsement being a compliance with § 6666, requiring him to issue witness certificates. *Ryan v. Collins*, 196 Ala. 478, 71 So. 690.

Firearms.

See post, HOMICIDE; WEAPONS.

Fire Insurance.

See post, INSURANCE.

FIRES.

Cross References.

See the title FIRES, vol. 7, p. 430, and references there given.

In addition, see ante, ARSON; post, INSURANCE; RAILROADS.

Civil Liability for Willful Burning—Question for Jury.—Where, in an action for the burning by defendant of plaintiff's cotton house and his seed cotton therein, there was circumstantial evidence that defendant maliciously burned the property, and plaintiff testified di-

rectly that the cotton house was his property, but did not directly state that he owned the seed cotton, but the facts stated by him justified that inference, an affirmative charge for defendant was properly refused. *Bowdoin v. Bradley*, 11 Ala. App. 530, 66 So. 823.

Firms.

See post, PARTNERSHIP.

FISH.

§ 1½a. Power to Protect and Regulate.

§ 1½b. Fish Wardens and Other Officers.

§ 3. Offenses.

Cross References.

See the title FISH, vol. 7, p. 430, and references there given.

In addition, see post, NUISANCES; WATERS AND WATERCOURSES.

§ 1½a. Power to Protect and Regulate.

Statutory Provisions.—The general property in all fish, so far as not excepted by Code, § 6902, is in the state, which may regulate their capture and disposition; but the owner of land on which there is a stream has a special property in the fish therein and may take them for his own use as provided by statute. *Yolande Coal, etc., Co. v. Pierce*, 12 Ala. App. 431, 68 So. 563, certiorari denied in 193 Ala. 687, 69 So. 1021.

§ 1½b. Fish Wardens and Other Officers.

Payment of Salary.—Under Acts 1911, pp. 458, 467, 480, §§ 10, 42, creating the Alabama Oyster Commission, which was

repealed by Acts 1915, p. 145, abolishing said commission, and under Acts 1915, p. 739, providing an appropriation for the payment of unpaid salaries to its officers and employees, held, that the indorsement of a note payable to the commission to its president in part payment of his salary was not an ultra vires act nor a defense to the maker of the note. *Mobile Fish, etc., Co. v. Craft*, 197 Ala. 147, 72 So. 399.

§ 3. Offenses.

Offenses as to Oysters, Clams and Other Shellfish.—*Mangeldorf v. State*, 8 Ala. App. 302, 62 So. 373. See the title FISH, § 3, vol. 7, p. 435.

FIXTURES.

- § 2. Intent in Making Annexation.
- § 3. Mode and Sufficiency of Annexation.
- § 4. — Actual.
- § 7. Between Landlord and Tenant and Their Privies.
- § 7½. — In General.
- § 8. — Trade Fixtures.
- § 10. Between Mortgagor and Mortgagee of Land and Their Privies.
 - § 10 (1) In General.
 - § 10 (1½) Domestic and Ornamental Fixtures.
- § 12. Between Vendor and Purchaser of Land and Their Privies.
- § 16. Agreements.
- § 18. Removal.
- § 18½. — Waiver or Loss of Right.
- § 19. Actions Relating to Fixtures.
 - § 19 (1) Nature and Form of Remedy.
 - § 19 (2) Pleading and Evidence.
 - § 19 (4) Instructions.

Cross References.

See the title **FIXTURES**, vol. 7, p. 432, and references there given.

§ 2. Intent in Making Annexation.

Permanent Annexation.—Where there is actual annexation of personalty to realty, application thereof to the use to which the realty is appropriated, and the parties intend a permanent accession to the freehold, the chattel becomes real estate. *Barbour Plumbing, etc., Co. v. Ewing* (Ala. App.), 77 So. 430.

§ 3. Mode and Sufficiency of Annexation.

§ 4. — Actual.

Mill Machinery.—*Hanvey v. Gaines*, 181 Ala. 288, 61 So. 883. See the title **FIXTURES**, § 4, vol. 7, p. 435.

§ 7. Between Landlord and Tenant and Their Privies.

§ 7½. — In General.

Removal—Rights of Sublessee.—A sublessee of an amusement park may, in the absence of any provision in the lease to the contrary, remove during the term appliances placed in the park for amusement, removable without serious injury to the freehold. *Walker v. Tillis*, 188 Ala. 313, 66 So. 54.

§ 8. — Trade Fixtures.

When Removable.—Mere machines or trade fixtures in the nature of chattels

and capable of being detached without material injury to the freehold may be removed by the lessee or his sublessee during the term, the machines or trade fixtures having been erected by the lessee or his sublessee as fixtures. *Walker v. Tillis*, 188 Ala. 313, 66 So. 54.

§ 10. Between Mortgagor and Mortgagee of Land and Their Privies.

§ 10 (1) In General.

Agreement to Remove Erection — Rights of Mortgagee.—*Roberts v. Caple*, 8 Ala. App. 444, 62 So. 343. See the title **FIXTURES**, § 10 (1), vol. 7, p. 435.

§ 10 (1½) Domestic and Ornamental Fixtures.

Heating Plant — Conditional Sale. —

By oral conditional sale contract as to heating plant the status of the property as personal property, with right of removal in seller, was preserved as against prior mortgagee of the realty where it was installed. *Barbour Plumbing, etc., Co. v. Ewing* (Ala. App.), 77 So. 430.

§ 12. Between Vendor and Purchaser of Land and Their Privies.

Erection of House on Land Belonging to Another.—*Roberts v. Caple*, 8 Ala.

App. 444, 62 So. 343. See the title FIXTURES, § 12, vol. 7, p. 436.

§ 16. Agreements.

Effect.—*Bohanan v. Dodd*, 7 Ala. App. 220, 60 So. 955. See the title FIXTURES, § 16 (1), vol. 7, p. 437.

Construction of Lease — "Improvement"—Trade Fixtures.—A provision in a lease of an amusement park that at the expiration of the term the lessor may repossess himself, and that all improvements erected on the land during the lease shall revert to him, and that the land with improvements shall revert within 30 days after nonpayment of rent at maturity, the failure to perform other conditions on giving notice does not authorize the lessor to prevent the removal by the lessee or a sublessee of trade fixtures; the word "improvements" being confined to alterations, repairs, or improvements on the premises not including articles in their nature chattels. *Walker v. Tillis*, 188 Ala. 313, 66 So. 54.

Right to Removal—Oral Agreement.—A reservation of a fixture or the right to remove it at the expiration of a lease may be made by oral agreement. *Middleton v. Alabama Power Co.*, 196 Ala. 1, 71 So. 461.

Agreement to Make Realty.—Parties may by contract make trade fixtures a part of the land on which they stand. *Middleton v. Alabama Power Co.*, 196 Ala. 1, 71 So. 461.

House—Right of Disposal.—A house erected by widow with her own means on land of deceased husband, with full understanding and agreement of heirs that it shall remain hers to be disposed of as she saw fit, is a chattel, disposable as such. *Clements v. Morton (Ala.)*, 76 So. 306.

§ 18. Removal.

§ 18½. — Waiver or Loss of Right.

Filing Statutory Lien.—Conditional seller of heating plant installed in a hospital subject to a mortgage, by filing statutory lien on the hospital property, recognized the title to the plant in the mortgagor, and was precluded from setting up title against mortgagee; such election between inconsistent rights being irrevocable. *Barbour Plumbing,*

etc., Co. v. Ewing (Ala. App.), 77 So. 430.

§ 19. Actions Relating to Fixtures.

§ 19 (1) Nature and Form of Remedy.

Waste—Injunction.—An action in the nature of waste lies for the wrongful removal by a tenant of fixtures resulting in injury to reversion, and the landlord may before the removal apply for an injunction. *Walker v. Tillis*, 188 Ala. 313, 66 So. 54.

§ 19 (2) Pleading and Evidence.

Trade Fixtures.—If improvements are what is termed "trade fixtures," they do not become prima facie part of the land on which they stand. *Middleton v. Alabama Power Co.*, 196 Ala. 1, 71 So. 461.

Houses—Right of Removal Reserved.—Where houses are erected upon land of another, prima facie they become part of the realty, except where the builder reserves the right of removal. *Middleton v. Alabama Power Co.*, 196 Ala. 1, 71 So. 461.

Houses Erected on Land of Another.—Where houses are erected upon the land of another, they are prima facie part of realty, and will be so treated in absence of agreement to contrary. *MacArthur Bros. Co. v. Middleton (Ala.)*, 75 So. 895.

§ 19 (4) Instructions.

Houses—Rights of Removal.—In action against tenant for conversion of houses erected by him, tenant's requested charge, to effect that he had right to remove houses, was properly refused; there being agreement that houses should remain upon land. *MacArthur Bros. Co. v. Middleton (Ala.)*, 75 So. 895.

Same—Instruction with Reference to Removal.—In an action by a landlord against his tenant for conversion by the latter of certain houses constructed by him, instruction that as between the owner and one in temporary possession of land under an agreement for use of the same the laws are extremely indulgent to the latter with respect to the fixtures annexed for a purpose connected with such temporary possession exceeded the degree of indulgence allowable in favor of a tenant. *MacArthur Bros. Co. v. Middleton (Ala.)*, 75 So. 895.

Following Trust Property.

See post, TRUSTS.

FOOD.

§ 1½. Statutory Provisions.

§ 6. Liabilities for Injuries.

Cross References.

See the title FOOD, vol. 7, p. 441, and references there given.

In addition, see ante, EVIDENCE; post, INN KEEPERS; MUNICIPAL CORPORATIONS.

As to admissibility of opinion evidence in action for damages for ptomaine poisoning caused by tainted food, see ante, EVIDENCE. As to liability for serving unfit or tainted food, see post, INNKEEPERS. As to validity of ordinance providing for privilege tax for keeping dairies within city limits, see post, LICENSES; MUNICIPAL CORPORATIONS.

§ 1½. Statutory Provisions.

"Unbolted Corn Meal"—Judicial Notice.—"Unbolted corn meal" is excepted from operation of Acts 1911, p. 104, providing for the registration, tagging, sampling, and analyzing of "commercial feeding stuffs," expressly excepting unmixed meals made directly from entire grains of corn and certain other grains, since the courts judicially know that corn meal is an unmixed meal made from entire grains of corn, and that "unbolted corn meal" is simply meal not bolted, or from which the bran has not been sifted or separated. *Miller, etc., Comm. Co. v. International Sugar Feed Co.*, 197 Ala. 100, 72 So. 368.

§ 6. Liabilities for Injuries.

Sale of Spoiled Food—Care Required, Evidence, Instructions.—*Travis v. Louisville, etc., R. Co.*, 183 Ala. 415, 62 So. 851, cited in notes in L. R. A. 1915B, 482; Ann. Cas. 1915C, 144. See the title FOOD, § 6, vol. 7, p. 442.

Quality of Food — Liability. — The keeper of a hotel, dining car, café, or other public eating place, engaged in the business of serving food to customers, is bound to use due care to see that the

food so served is fit for human consumption and may be eaten without causing sickness or endangering life by reason of its condition, so that, for his negligence in failing to observe such duty to his patrons, such keeper is liable. *Greenwood Café v. Lovinggood*, 197 Ala. 34, 72 So. 354.

Complaint—Sufficiency.—In an action against the owners of a café for serving tainted food, a complaint, charging that defendants were running a café and serving meals to the public for a reward, that plaintiff was their customer, that their agents, in the line of their duty, negligently served to plaintiff tainted food, for which plaintiff paid defendants' agents 25 cents and that the food made him sick sufficiently averred the liability of defendant for negligence. *Greenwood Café v. Lovinggood*, 197 Ala. 34, 72 So. 354.

Evidence.—In an action against café keepers for serving tainted food, testimony of a witness, that after he and plaintiff ordered and ate roast chicken he was sick all night, was admissible. *Greenwood Café v. Lovinggood*, 197 Ala. 34, 72 So. 354.

Forbearance.

See post, PRINCIPAL AND SURETY.

FORCIBLE ENTRY AND DETAINER.

I. Civil Liability.

- § 3. Nature and Elements of Forcible Entry.
- § 5. Nature and Form of Remedy.
- § 7. Title to Support Action.
- § 8. Prior Possession of Plaintiff.
- § 10. Notice to Quit and Demand of Possession.
- § 11. Defenses.
- § 22. Evidence.
 - § 22 (1) Presumptions and Burden of Proof.
 - § 22 (2) Admissibility in General.
 - § 22 (3) Admissibility of Evidence of Title.
- § 24. Trial.
- § 26. — Questions for Jury.
- § 30. Judgment.
- § 32. Review.
- § 33. — Appeal and Trial De Novo.

Cross References.

See the title FORCIBLE ENTRY AND DETAINER, vol. 7, p. 444, and references there given.

As to unlawful detainer where possession was acquired under lease from plaintiff, see post, LANDLORD AND TENANT. As to purchaser from landlord maintaining action for unlawful detainer, see post, LANDLORD AND TENANT.

I. CIVIL LIABILITY.

§ 3. Nature and Elements of Forcible Entry.

Cutting through Inside Fence.—The act of cutting through an inside fence as an act separate and apart from a prior entry on and possession of the premises as a whole is not a forcible entry on the premises, and will not support an action for forcible entry and detainer. *Phillips v. Phillips*, 186 Ala. 545, 65 So. 49.

Definition.—"Forcible entry and detainer," though originally a public offense in England, is a tort in the United States to be redressed by a civil action, summary in its forms and machinery, by which the plaintiff seeks to gain possession of real property which has been tortiously taken or is tortiously withheld, being purely possessory in character and not maintainable unless plaintiff has had prior possession; title being not properly in issue. *Harris v. Harris*, 190 Ala. 619, 67 So. 465.

§ 5. Nature and Form of Remedy.

Trial of Title and Right of Possession.—Under Code 1907, § 4271, providing that in an action of forcible entry and detainer, the estate or merits of the title can not be inquired into, all questions as to the ultimate title or right of possession, as distinguished from the actual possession are excluded. *Dent v. Stovall* (Ala.), 75 So. 941.

§ 7. Title to Support Action.

Burden of Proof.—A plaintiff in forcible entry and detainer must either show a superior title in himself or a forcible entry or unlawful detainer by defendant. *Phillips v. Phillips*, 186 Ala. 545, 65 So. 49.

§ 8. Prior Possession of Plaintiff.

Sufficiency of Possession—Possession by Grantor after Delivery of Deed.—*Daniel v. Williams*, 177 Ala. 140, 58 So. 419. See the title FORCIBLE ENTRY AND DETAINER, § 8 (3), vol. 7, p. 451.

§ 10. Notice to Quit and Demand of Possession.

Entry by Force or Threats.—Code 1907, § 4262, in defining forcible entry and detainer and specifying what force may be considered sufficient, declares that it shall be sufficient if entry is made by threats of violence to the party in possession or by such words or actions as have a tendency to excite fear or apprehension of danger. Held, that where there were no contractual relations between the parties and defendant entered by force or threats, no demand for possession was necessary to entitle plaintiff to sue. *Harris v. Harris*, 190 Ala. 619, 67 So. 465.

§ 11. Defenses.

Pleading—Amendment.—Where plaintiffs claimed under a lease from the owner, and defendant as to them was a mere trespasser or intruder in forcible entry and detainer, held not entitled to complain of the court's refusal to permit him to show that one of the plaintiffs made another and different contract with the landowner. *Harris v. Harris*, 190 Ala. 619, 67 So. 465.

§ 22. Evidence.

§ 22 (1) Presumptions and Burden of Proof.

Unlawful Detainer—Superior Title.—*Daniel v. Williams*, 177 Ala. 140, 58 So. 419. See the title FORCIBLE ENTRY AND DETAINER, § 22 (1), vol. 7, p. 462.

§ 22 (2) Admissibility in General.

Deed—Grantor's Working of Land.—In forcible entry and detainer, where a deed was admitted for the limited purpose of showing the extent of possession, testimony that the grantor had been working the land held irrelevant as drawing the attention of the jury to the question of title rather than possession. *Dent v. Stovall* (Ala.), 75 So. 941.

Lease.—In an action for forcible entry and detainer against a mere trespasser, plaintiffs' lease under which they were entitled to possession held irrelevant under Code 1907, § 4271, providing that in such action the merits of

the title can not be inquired into. *Harris v. Harris*, 190 Ala. 619, 67 So. 465.

Possession under Lease from Plaintiff.—In forcible entry and detainer, where defendants put in evidence the possession of one under whom they claimed, it was proper for plaintiffs to show that such person took possession under a lease from them. *Dent v. Stovall* (Ala.), 75 So. 941.

§ 22 (3) Admissibility of Evidence of Title.

Deed Purporting to Convey to Defendant's Ancestors.—In forcible entry and detainer a deed purporting to convey the land in question to defendant's ancestors is admissible for the limited purpose of showing the extent of the possession claimed. *Dent v. Stovall* (Ala.), 75 So. 941.

§ 24. Trial.

§ 26. — Questions for Jury.

Affirmative Charge.—Evidence held to warrant general affirmative charge for defendants in forcible entry and detainer suit. *Dent v. Stovall* (Ala.), 75 So. 941.

Threats of Violence.—In an action for forcible entry and detainer whether defendant entered certain real property in controversy by threats of violence or by words or actions having a tendency to act, excite fear or apprehension of danger to plaintiff in possession held for the jury. *Harris v. Harris*, 190 Ala. 619, 67 So. 465.

§ 30. Judgment.

Sufficiency—Description of Land.—A judgment in unlawful detainer that defendant restore to plaintiff land mentioned in complaint was void where the complaint to which reference was made bore only this matter of description: " * * * Two hundred and fifty (250) acres of land, more or less, on the McCalley place near Merrimack Mills in Madison county, state of Alabama. Being the same lands of which he has [was] heretofore in possession. * * * " *Finney v. Baker* (Ala.), 78 So. 875.

Same—Uncertainty of Description.—A judgment in forcible entry for recovery of a certain 40 described, or for that part thereof entered by defendant and

described by metes and bounds, was insufficient for uncertainty, as not specifying whether the 40, or only part thereof, was to be recovered. *Davis v. Densmore*, 194 Ala. 551, 69 So. 581.

Identification of Land.—Where the sufficiency of the description of land in a complaint, verdict, or judgment is brought into question, in an unlawful detainer suit, through direct and not collateral attack, the inquiry must be whether the property subject of the averment or recital is so designated as to identify it for the essential purpose that the defendant may be advised of what land he is called to defend, and the court of what land its powers are invoked, that an execution of such judgment as may be rendered may be effected, and that the judgment entered may be sufficiently definite as to its subject matter to accomplish the law's aim through the application of the doctrine of *res adjudicata*. *Lessley v. Prater* (Ala.), 75 So. 355.

Same.—In a forcible entry and detainer suit, a judgment awarding the plaintiff possession of "four acres of land, and house lying north of the Corbin road known as the R. A. Lessley estate, where the R. A. Lessley homestead

is located, situated in the county of Coosa and state of Alabama in § 2, township 23 of range 17, and that writ of possession and execution issue," was a sufficient description of the land if "the R. A. Lessley, homestead or estate" is a well-defined, distinct, and commonly known entity in that community, since in describing property in court proceedings reference may be made to existing things, such as recorded instruments, maps, etc., as well as complete areal entities that are known in the community where the land lies, if the description does not leave to the sheriff's ascertainment in executing the writ the effect of evidence or the decision of any question of fact. *Lessley v. Prater* (Ala.), 75 So. 355.

§ 32. Review.

§ 33. — Appeal and Trial De Novo.

Right to Allege Error—Prejudice.—Where, in forcible entry and detainer, plaintiffs claimed under a lease from the owner, and defendant as to them was a mere trespasser or intruder, he could not complain of the court's refusal to permit him to show that one of the plaintiffs had made another or different contract with the landowner. *Harris v. Harris*, 190 Ala. 619, 67 So. 465.

Foreclosure.

See ante, CHATTEL MORTGAGES; post, JUDGMENT; MECHANICS' LIENS; MORTGAGES; PLEDGES; VENDOR AND PURCHASER.

Foreign Administrator.

See ante, EXECUTORS AND ADMINISTRATORS.

Foreign Commerce.

See ante, COMMERCE.

Foreign Corporations.

See ante, CORPORATIONS.

Foreign Courts.

See ante, COURTS.

Foreign Judgment.

See post, JUDGMENT.

Foreign Laws.

See ante, EVIDENCE; post, STATUTES.

FORGERY.

- § 1. Nature of Offense in General.
- § 3. Elements of Offenses.
- § 4. — Intent.
- § 5. — Nature of Instrument.
- § 10. — Injury from Forgery.
- § 11. — Uttering or Publishing Forged Instrument.
- § 12. Degrees.
- § 16. Indictment or Information.
- § 19. — Description of or Setting Forth Instrument.
- § 20. — Facts Extrinsic to Instrument in General.
- § 21. — Making or Alteration of Instrument.
- § 22. — Uttering or Publishing Forged Instruments.
- § 23. — Issues, Proof and Variance.
- § 25. Admissibility of Evidence.
- § 26. — In General.
- § 28. — Making or Alteration of Instrument, Signature, or Entry.
- § 32. Weight and Sufficiency of Evidence.
- § 33. Trial.
- § 35. — Questions for Jury.

Cross References.

See the title FORGERY, vol. 7, p. 476, and references there given.

In addition, see ante, CRIMINAL LAW; post, INDICTMENT AND INFORMATION.

As to procedure and trial in prosecutions for forgery, see ante, CRIMINAL LAW. As to requisites of indictment in prosecutions for forgery, see post, INDICTMENT AND INFORMATION.

§ 1. Nature of Offense in General.

See post, "Elements of Offenses," § 3.

§ 3. Elements of Offenses.

§ 4. — Intent.

Forgery, at common law, is the false making, or material alteration, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy or a foundation of a legal liability. *Everage v. State*, 14 Ala. App. 106, 71 So. 983, certiorari denied in *Ex parte Everage*, 196 Ala. 701, 72 So. 1019.

§ 5. — Nature of Instrument.

Insurance Policy on Life of Another.

—The false making of an application for insurance on the life of a third person constitutes the crime of forgery. *Dudley v. State*, 10 Ala. App. 130, 64 So. 534, certiorari denied in *Ex parte Dudley*, 188 Ala. 77, 66 So. 91.

Injunction Bond.—An injunction bond in a suit to enjoin the enforcement of executions against him in the sheriff's hands imported on its face the creation of a pecuniary obligation and was the

subject of forgery. *Everage v. State*, 14 Ala. App. 106, 71 So. 983, certiorari denied in *Ex parte Everage*, 196 Ala. 701, 72 So. 1019.

§ 10. Injury from Forgery.

Injury Immaterial.—That injury did or did not result from the forgery is immaterial, the capacity of the false and fraudulent writing to work injury being the material question. *Everage v. State*, 14 Ala. App. 106, 71 So. 983, certiorari denied in *Ex parte Everage*, 196 Ala. 701, 72 So. 1019.

§ 11. — Uttering or Publishing Forged Instrument.

What Must Be Proved.—Before a defendant can be convicted of uttering a forged instrument, the state must prove beyond a reasonable doubt that there was a forged instrument, and that the defendant, knowing the instrument to be forged, with the intent to defraud, uttered it. *Owens v. State* (Ala. App.), 78 So. 423.

§ 12. Degrees.

Application for Life Policy—Third Degree.—The forgery of an application for a policy on the life of a third person, not falling within the classes of forgery denounced by statute as forgery in the first and second degrees, constitutes forgery in the third degree under the direct provision of Code 1907, § 6916. *Dudley v. State*, 10 Ala. App. 130, 64 So. 534, certiorari denied in *Ex parte Dudley*, 188 Ala. 77, 66 So. 91.

§ 16. Indictment or Information.

§ 19. — Description of or Setting Forth Instruments.

In General.—*Bartlett v. State*, 8 Ala. App. 248, 62 So. 320. See the title FORGERY, § 19, vol. 7, p. 481.

§ 20. — Facts Extrinsic to Instrument in General.

Insurance Application—Third Person.—An indictment for the forgery of an application for insurance on the life of a third person need not set out the manner in which the application might be injurious to the insurer and the insured, that matter sufficiently appearing on its

face. *Dudley v. State*, 10 Ala. App. 130, 64 So. 534, certiorari denied in *Ex parte Dudley*, 188 Ala. 77, 66 So. 91.

§ 21. — Making or Alteration of Instrument.

"Forge."—It is not necessary to set out in what particular act the forgery consisted, because the word "forge" includes the false making of an instrument in whole or in part, and a statement of the particular acts constituting the particular offense. *Everage v. State*, 14 Ala. App. 106, 71 So. 983, certiorari denied in *Ex parte Everage*, 196 Ala. 701, 72 So. 1019.

§ 22. — Uttering or Publishing Forged Instruments.

Knowledge of Forgery.—*King v. State*, 8 Ala. App. 239, 62 So. 374. See the title FORGERY, § 22, vol. 7, p. 483.

§ 23. — Issues, Proof and Variance.

Variance in Description of Instruments.—*Bartlett v. State*, 8 Ala. App. 248, 62 So. 320. See the title FORGERY, § 23, vol. 7, p. 483.

§ 25. Admissibility of Evidence.

§ 26. — In General.

King v. State, 8 Ala. App. 239, 62 So. 374. See the title FORGERY, § 26, vol. 7, p. 484.

§ 28. — Making or Alteration of Instrument, Signature, or Entry.

Forged Note.—Witness, a bank official, having testified that he gave note except for signature, to accused, stating that the bank would accept it if signed by another, testimony that on his return to the bank he found the note purporting to have been signed by such other in the cash drawer at the bank was admissible. *Turner v. State* (Ala. App.), 72 So. 574.

§ 32. Weight and Sufficiency of Evidence.

Intent to Defraud.—*Bartlett v. State*, 8 Ala. App. 248, 62 So. 320. See the title FORGERY, § 32, vol. 7, p. 486.

Authority to Sign Check.—Testimony of person whose name was signed to check that the check was such as he used, but that he did not issue such a

check to defendant, and never issue the check involved, does not establish a forgery; since it does not show that he did not authorize the signing of the check. *Owens v. State* (Ala. App.), 78 So. 423.

§ 33. Trial.

§ 35. — Questions for Jury.

Weight and Sufficiency of Evidence.—

King v. State, 8 Ala. App. 239, 62 So. 374; *Bartlett v. State*, 8 Ala. App. 248, 62 So. 320. See the title **FORGERY**, § 35, vol. 7, p. 487.

Formal Defects—Formal Errors.

See ante, **APPEAL AND ERROR**; post, **PLEADING**.

Formal Parties.

See post, **PARTIES**.

Former Adjudication.

See post, **JUDGMENT**.

Former Jeopardy.

See ante, **CRIMINAL LAW**.

Fornication.

See the title **FORNICATION**, vol. 7, p. 488, and references there given.

Forthcoming Bonds.

See ante, **ATTACHMENT**; **EXECUTION**; post, **REPLEVIN**.

FRANCHISES.

§ 1½. Grants in General.

*Cross References.**

See the title **FRANCHISES**, vol. 7, p. 489, and references there given.

In addition, see post, **MUNICIPAL CORPORATIONS**; **WATERS AND WATERCOURSES**.

§ 1½. Grants in General.

Construing Franchise. — Ambiguous provisions in the grant of a public fran-

chise will be construed in favor of the public. *Birmingham Waterworks Co. v. Hernandez*, 196 Ala. 438, 71 So. 443.

Fraternal Associations.

See post, **INSURANCE**.

FRAUD.

I. Deception Constituting Fraud, and Liability Therefor.

- § 8. Fraudulent Representations.
- § 9. — Nature in General.
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 - § 11 (1) In General.
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II. Actions.

- (A) Rights of Action and Defenses.
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 - § 28. — Allegations of Fraud in General.
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 - § 36. — In General.
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 - § 39. — Damages.
 - § 40. Weight and Sufficiency.
- (D) Damages.
 - § 41. Measure in General.
 - § 41 (1) In General.
 - § 41 (2) Difference between Actual and Represented Value.

(E) Trial, Judgment, and Review.

§ 42. Questions for Jury.

III. Criminal Responsibility.

§ 44. Offenses.

§ 45. Prosecution and Punishment.

Cross References.

See the title FRAUD, vol. 7, p. 490, and references there given.

I. DECEPTION CONSTITUTING FRAUD, AND LIABILITY THEREFOR.

§ 8. Fraudulent Representations.

§ 9. — Nature in General.

For mere "trader's talk" a seller is not liable either in contract or tort. *Tillis v. Smith Sons Lumber Co.*, 188 Ala. 122, 65 So. 1015.

Effect of Good Faith.—Under Code 1907, § 4298, providing that misrepresentation of a material fact, made willfully to deceive, or recklessly, without knowledge, and acted upon by the opposite party, or if made by mistake, and innocently, and so acted upon, constitutes legal fraud, the good faith of a party in making such a misrepresentation is immaterial. *Hafer v. Cole*, 176 Ala. 242, 57 So. 757.

Effect of Improbability or Incredibility of Statement.—*King v. Livingston Mfg. Co.*, 180 Ala. 118, 60 So. 143. See the title FRAUD, § 9, vol. 7, p. 493.

§ 11. — Matters of Fact or of Opinion.

§ 11 (1) In General.

Mere expressions of opinion will not support an action for deceit, unless defendant, knowing them to be false, made them with intent to deceive. *Hockensmith v. Winton*, 11 Ala. App. 670, 66 So. 954.

An expression of an opinion is actionable where shown to be knowingly false, made with the intention to deceive, and accepted and relied on. *Wall v. Graham*, 192 Ala. 396, 68 So. 298.

Expressions of opinion will support an action for deceit when knowingly false and made with intent to deceive, and so acted upon that they do deceive. *Moon v. Benton*, 13 Ala. App. 473, 68 So. 589.

§ 11 (2) Value.

Where the parties deal at arm's length,

expressions of opinion by a seller as to the property, such as the current market values, etc., will not be ground for an action of deceit, because the vendee has no right to rely thereon. *Tillis v. Smith Sons Lumber Co.*, 188 Ala. 122, 65 So. 1015.

While statements as to the value of real estate, made to induce another to buy or accept a lien on it, are generally mere expressions of opinion, they are not always so, especially when coupled with misrepresentations as to material facts, or a concealment of facts, or when artifice is used preventing inquiry or examination, or when intended and understood as the statement of a fact not of an opinion. *Moon v. Benton*, 13 Ala. App. 473, 68 So. 589.

§ 12. — Falsity and Knowledge Thereof.

See ante, "Nature in General," § 9.

A buyer may, under Code 1907, § 2469, sue for the seller's fraud by showing that the representations of the seller were fraudulently or recklessly made. *McCoy v. Prince*, 11 Ala. App. 388, 66 So. 950.

Where a seller did not believe his representations, it is no defense that he gained the information upon which they were based from an apparently reliable source. *Hockensmith v. Winton*, 11 Ala. App. 670, 66 So. 954.

Honest belief in the truth of a statement of fact made as an inducement to the execution of a contract does not relieve a person making such statement of his legal liability therefor. *Greil Bros. Co. v. McLain*, 197 Ala. 136, 72 So. 410.

§ 13. Fraudulent Concealment.

§ 14. — Nature in General.

Deceit can be grounded on evasions and acts, as well as upon direct misrep-

representations. *Providence Oil, etc., Co. v. Allen*, 186 Ala. 282, 65 So. 329.

One who sold a ship and the freight on her then voyage two weeks after he had drawn a disbursement note for less than the total amount of the freight, which he made a lien against the ship as well as the freight, was guilty of actionable fraud in not informing the buyer of the existence of the draft, of which the latter had no means of acquiring knowledge. *Corry v. Sylvia y Cia*, 192 Ala. 550, 68 So. 891.

An express warranty in a bill of sale conveying a ship and her freight that the ship is unincumbered does not defeat liability for an implied misrepresentation by concealment of the fact that the freight was incumbered. *Corry v. Sylvia y Cia*, 192 Ala. 550, 68 So. 891.

§ 15. — Duty to Disclose Facts.

To maintain an action for fraudulent concealment, there must be shown a duty to disclose the truth, and that the disclosure was not made when opportunity was presented, whereby the party to whom the duty was due was induced to act to his injury. *National Park Bank v. Louisville, etc., R. Co. (Ala.)*, 74 So. 69.

§ 16. Materiality of Matter Represented or Concealed.

Where a note was given by one defendant to another and by him sold to plaintiff by means of fraudulent misrepresentations as to the value of the security, the fact that the debt for which the note was given was simulated, not genuine, was material as tending to connect both defendants with the fraudulent transaction, even though they were estopped from asserting against the plaintiff that there was no consideration for the note. *Moon v. Benton*, 13 Ala. App. 473, 68 So. 589.

§ 17. Reliance on Representations and Inducement to Act.

§ 18. — In General.

Under Code 1907, § 2469, declaring that a willful misrepresentation, when acted upon, affords a cause of action, a purchaser deceived by a misrepresentation, upon which he did not act, can not main-

tain an action for deceit. *Hockensmith v. Winton*, 11 Ala. App. 670, 66 So. 954.

§ 19. — Duty to Investigate.

In General.—*King v. Livingston Mfg. Co.*, 180 Ala. 118, 60 So. 143; *Wilks v. Wilks*, 176 Ala. 151, 57 So. 776. See the title FRAUD, § 19, vol. 7, pp. 496, 497.

Where statements are made as of fact, especially of matters which may be assumed to be within the knowledge of the party making them, the party to whom they are made can rely upon them without instituting an independent investigation. *Tillis v. Smith Sons Lumber Co.*, 188 Ala. 122, 65 So. 1015.

§ 20. — Relations and Means of Knowledge of Parties.

If a purchaser states his ignorance, and invites the opinion of the vendor, and gives him to understand that he relies upon his opinion, the vendor is not bound to answer; but, if he does, his answer must speak the truth, since under such circumstances, the affirmation of a definite opinion as to value becomes an affirmation of fact, that is, of the fact of a bona fide opinion. *Tillis v. Smith Sons Lumber Co.*, 188 Ala. 122, 65 So. 1015.

§ 21. Injury from Fraud.

Absence of Injury.—*Hall v. Santangelo*, 178 Ala. 447, 60 So. 168. See the title FRAUD, § 21, vol. 7, p. 497.

Where one of two partners secured purchasers for his partner's interest in the firm by falsifying the books so as to conceal some of the firm debts, but the purchasers assumed only the debts of the firm as they appeared on the books at the time of the sale, the purchasers were not actionably injured by the fraud. *McCarrell v. Hayes*, 186 Ala. 323, 65 So. 62.

Effect of Covenants of Warranty in Deed.—Fraudulent representation by the vendor with respect to his title or ownership, as well as to matters collateral to the title of the property, such as location, quantity, quality, and condition of the land, the privileges connected with it, or the rents and profits derived therefrom, constitutes such fraud as will support the action for damages for fraud, although a deed with covenants of warranty is delivered, in view of Code 1907, § 2468, providing that fraud by one accompanied

with damages to the party defrauded in all cases gives the right of action. *Berry v. Woody* (Ala. App.), 77 So. 942.

§ 23. Fraudulent Representations or Concealment as to Particular Facts.

Misrepresentations as to the value of land upon which a mortgage had been given to secure a note, accompanied by material misrepresentations as to the location of the property affecting the value, authorized a recovery in an action for deceit. *Moon v. Benton*, 13 Ala. App. 473, 68 So. 589.

§ 23½. Fraud in Particular Transactions or for Particular Purposes.

To support an action for deceit concerning defendant's ownership of land, whereby plaintiff was induced to procure a conveyance of a lot to defendant under an agreement for an exchange of lands, it was not necessary that the transaction out of which the deceit arose should be evidenced by a writing. *Moore v. Whitmire*, 189 Ala. 615, 66 So. 601.

II. ACTIONS.

(A) RIGHTS OF ACTION AND DEFENSES.

§ 22½a. Nature and Form of Remedy.

One induced to enter into a contract through fraud may rescind, or affirm and sue for deceit. *Hockensmith v. Winton*, 11 Ala. App. 670, 66 So. 954.

Code 1907, § 4298, declares that misrepresentations of a material fact made with intent to deceive, or made by mistake and innocently, when acted upon by the opposite party, constitute legal fraud, while § 4299 declares that the suppression of a material fact which a party is bound to communicate constitutes fraud. Section 2469 declares that willful misrepresentations of a material fact, upon which another acts to his injury, will support an action for deceit, but that knowledge of falsehood is an essential element of the action. Held, that there is no conflict between the statutes; for one induced to enter into a contract by reason of false representations has the right either to rescind the contract because of the fraud, in which case he need not prove that the defend-

ant had knowledge of the falsity of the representation, or to affirm it and sue for damage for the deceit, in which case he must prove that defendant knowingly misrepresented. *Hockensmith v. Winton*, 11 Ala. App. 670, 66 So. 954.

Contract for Purchase of Land.—One who has been induced to contract for the purchase of lands by fraud, to his injury, may sue for deceit, and recover compensatory damages. *Berry v. Woody* (Ala. App.), 77 So. 942.

Seeking to Affirm and Disaffirm Provisions of Contract.—An action of deceit, though ordinarily maintainable where one has been injured through another's fraud, is not available to permit a contracting party to affirm some provisions of the contract and disaffirm others. *Blackmon v. Quennelle*, 189 Ala. 630, 66 So. 608.

Innocent or honest misrepresentations will authorize a rescission of the contract of sale, but not an action for deceit. *Kilby Locomotive, etc., Works v. Lacy & Son*, 12 Ala. App. 464, 67 So. 764.

Law or Equity.—If an intervener who had assigned his chattel mortgage as collateral, and is seeking independent relief in a suit by his chattel mortgagor to restrain foreclosure by subsequent assignees, was deceived as to ownership of his mortgage, his remedy was at law and not in equity. *Blake v. Anniston City Nat. Bank*, 197 Ala. 611, 73 So. 114.

§ 24. Conditions Precedent.

A party who exchanged an automobile for a team of horses, taking a check for the balance in its favor, was not estopped from suing for breach of warranty or deceit by retaining or using the check or the horses, as the suit was not upon a rescission. *Stewart v. Riley*, 189 Ala. 519, 66 So. 488.

§ 25. Waiver of Right of Action.

Where defendant and his tenant, S., were indebted to C. on a note, and defendant by false representations made to plaintiff as to the financial condition of S. induced plaintiff to agree to pay the note, and C., who was innocent of all fraud, accepted the obligation of

plaintiff, and defendant obtained his release on the note, defendant could not relieve himself from liability on the theory of plaintiff's waiver of fraudulent representations. *Wall v. Graham*, 192 Ala. 396, 68 So. 298.

§ 26. Defenses.

Defendant could not destroy plaintiff's cause of action predicated on fraud committed by the defendant by misrepresenting his title in the sale of the property by tendering, after the right of action had accrued, a complete title to the property. *Berry v. Woody* (Ala. App.), 77 So. 942.

(B) PARTIES AND PLEADING.

§ 27. Pleading.

§ 28. — Allegations of Fraud in General.

In pleadings in chancery, for which no abbreviated code form is provided, all the elements of actionable deceit must be severally alleged. *Corry v. Sylvia y Cia*, 192 Ala. 550, 68 So. 891.

Count 4, alleging that defendant owned a large number of vacant lots, and undertook and agreed to sell to plaintiff two of said lots, and put plaintiff in possession, and then and there falsely and fraudulently represented that said two lots were lots 13 and 14 according to the Ivey Realty plat, and on said day and date delivered to plaintiff deed to lots 13 and 14, and falsely and fraudulently represented that said deeds conveyed said lots so pointed out, when as a matter of fact the lots pointed out to plaintiff were lots 15 and 16 according to said survey, which fact then and there was wholly unknown to plaintiff, and then and there well known to defendant, etc., although inartificially drawn, did in effect and legal substance state a cause of action for fraud and deceit in the sale of land, and was not demurrable. *Hutchinson v. Bozeman* (Ala. App.), 76 So. 406.

A count alleging that plaintiff claims of defendant the sum of \$500 for deceit in the sale of two lots, which defendant at the time of the sale knew to be situated in a low, flat place, and of practically no value, was insufficient to state

a cause of action for deceit in the sale of land. *Hutchinson v. Bozeman* (Ala. App.), 76 So. 406.

§ 29. — Intent.

In chancery pleading, a fraudulent intent, essential to constitute a cause of action, must be averred and not left to inference. *Board v. Merrill*, 193 Ala. 521, 68 So. 971.

§ 30. — Statements, Acts, or Conduct Constituting Fraud.

Complaint for deceit in sale of land was demurrable, where it failed to charge that defendant falsely or fraudulently represented that he had title to the lots, and was silent as to recitals in deed. *Hutchinson v. Bozeman* (Ala. App.), 76 So. 406.

In a count for conspiracy to defraud by the delivery of cotton on spurious bills of lading, allegations that by willfully deceiving or causing to be deceived, or making false representations or fraudulently suppressing or causing to be suppressed truth from the holders of the false bills of lading when their complaints were referred to defendant's agent, a course of business was established by which the co-conspirator was unable to sell a large number of their drafts with false bills of lading attached, does not sufficiently allege the duty to disclose the truth, nor the concealment thereof, since it does not show, except by conclusion, what the complaints were, nor show any facts which made the alleged suppression of the truth calculated to deceive the plaintiff. *National Park Bank v. Louisville, etc., R. Co.* (Ala.), 74 So. 69.

A complaint in an action for deceit which alleges that defendant's representations as to the property a third person would own after payment of his debt to defendant were false and made to defraud plaintiff, and relieved defendant of paying a debt, etc., avers the making by defendant of a false statement of a fact as to the financial condition of the third person. *Wall v. Graham*, 192 Ala. 396, 68 So. 298.

§ 31. — Falsity of Representations and Knowledge Thereof.

Legal Implication of Knowledge.—A count for deceit in the form prescribed

by the Code (subdivision 21, § 5382, Code 1907) except that it did not allege defendant's knowledge of the falsity, is nevertheless sufficient where there is a legal implication of such knowledge from the facts pleaded, and under such a count, the burden is on plaintiff to prove every element of actionable deceit. *Corry v. Sylvia y Cia*, 192 Ala. 550, 68 So. 891.

Prospective Issue of Stock, and Fraudulent Intention. — *King v. Livingston Mfg. Co.*, 180 Ala. 118, 60 So. 143. See the title FRAUD, § 31, vol. 7, p. 499.

§ 31½. — Reliance and Inducement and Action Thereon.

A complaint in an action for deceit must not only allege the making of a fraudulent representation of a material fact, but must show that thereby plaintiff acted to his injury. *Wall v. Graham*, 192 Ala. 396, 68 So. 298.

§ 31¾a. Damage from Fraud.

A complaint in an action for deceit which sets forth false representations as to the financial condition of a third person, but which does not disclose the third person's connection with plaintiff or how the false representations could have resulted in damage to him, is defective for failing to show that the fraud and the damage alleged sustained to each other the relation of cause and effect. *Wall v. Graham*, 192 Ala. 396. 68 So. 298.

In an action for fraud, whereby plaintiff was induced to purchase a note secured by a mortgage, the complaint need not negative the solvency of the maker or the indorser, since their solvency will not deprive plaintiff of his right to recover at least nominal damages for the deceit. *Moon v. Benton*, 13 Ala. App. 473, 68 So. 589.

§ 33. — Issues, Proof, and Variance.

Fraud is never presumed, but when relied upon must be distinctly alleged and proved. *Stuart v. Holt (Ala.)*, 73 So. 390.

One suing for false representations as to the financial standing of a third person need not to recover prove the amount of the third person's indebtedness, but

may prove the false representations by proof of other facts. *Wall v. Graham*, 192 Ala. 396, 68 So. 298.

In an action for breach of warranty and deceit, on a sale of horses, concerning their soundness, though the action was not based on any representations as to the age of the horses, evidence of their age was admissible as bearing upon the extent of the unsoundness and the extent to which it would affect or impair their value. *Stewart v. Riley*, 189 Ala. 519, 66 So. 488.

Conjunctive Allegations. — Where the complaint, in an action for deceit, alleged several false and fraudulent misrepresentations conjunctively, plaintiff, to recover, must prove all of the representations. *Hockensmith v. Winton*, 11 Ala. App. 670, 66 So. 954.

Variance.—In an action for deceit, there is no material variance between an allegation that defendant had sold freight to another and proof that he had assigned it as security for a draft for the entire amount. *Corry v. Sylvia y Cia*, 192 Ala. 550, 68 So. 891.

(C) EVIDENCE.

§ 34. Presumptions and Burden of Proof.

Presumption of Fraud.—*Morris & Co. v. Barton*, 180 Ala. 98, 60 So. 172. See the title FRAUD, § 34, vol. 7, p. 500.

The law does not presume fraud, and when a charge of fraud is made, it must be established by the evidence before relief can be had. *Wallace v. Crosthwait*, 196 Ala. 356, 71 So. 666; *Bruce v. Citizens' National Bank*, 185 Ala. 221, 64 So. 82.

Fraud can not be presumed, but must be proved. *Wilson v. Mullins (Ala.)*, 75 So. 900.

Fraud is never presumed, but must be proved by clear and satisfactory evidence, and when a transaction is fairly susceptible of two constructions, the one which will free it from the imputation of fraud will be adopted. *Henderson v. Gilliland*, 187 Ala. 268, 65 So. 793.

Plaintiff's Burden of Proof.—Under a count for deceit, in the form prescribed by Code 1907, § 5382, subsec. 21, the burden is on plaintiff to prove every ele-

ment of actionable deceit. *Cotry v. Sylvia y Cia*, 192 Ala. 550, 68 So. 891.

Same—Burden of Proof as to Amount of Indemnity.—Where a purchaser of an engine injured by false representations is entitled to recover certain items of repair, but not others, the burden of proof is on the plaintiff to show what part of the total expense of repair is necessary to indemnify him for the false representations. *Kilby Locomotive, etc., Works v. Lacey & Son*, 12 Ala. App. 464, 67 So. 754.

§ 35. Admissibility.

§ 36. — In General.

Range of Inquiry and Evidence Allowed.—*Hall v. Santangelo*, 178 Ala. 447, 60 So. 168. See the title FRAUD, § 36, vol. 7, p. 500.

§ 37. — Falsity of Representations.

Where plaintiff claimed that defendant, who sold him an interest in a stock of goods, made misrepresentations, evidence of the result of an inventory taken by the purchaser a year subsequent to the sale is admissible, where the amount of the goods purchased and sold during the interim was shown. *Hockensmith v. Winston*, 11 Ala. App. 670, 66 So. 954.

§ 39. — Damages.

Sale of Ship and Cargo.—In an action for deceit in the sale of a ship and her freight, which were incumbered by a disbursement draft, evidence that the draft was never presented for payment to the bank to which it was first indorsed, and by which it was indorsed to another, and that the next time the cashier saw it it was in the hands of plaintiff's attorney, was admissible as tending to show that plaintiff had paid the draft. *Corry v. Sylvia y Cia*, 192 Ala. 550, 68 So. 891.

In an action for breach of warranty and deceit on a sale of horses, though the inquiry was as to the condition of the horses when the trade was made, evidence as to their condition a day or two after the trade was admissible, where there was sufficient evidence justifying an inference that the injury or unsoundness existed before the trade was made, and was practically the same when the witness saw the horses as when they were

delivered. *Stewart v. Riley*, 180 Ala. 519, 66 So. 488.

A party induced to buy horses by false representations and a warranty as to their soundness was entitled to the difference between the value of the horses and their value as warranted or represented, regardless of a subsequent advantageous disposition of the horses by him, and evidence as to such disposition was properly excluded. *Stewart v. Riley*, 189 Ala. 519, 66 So. 488.

In an action for breach of warranty and deceit on a sale of horses, evidence as to the land which plaintiff obtained in exchange for the horses was not admissible as fixing the value of the horses, where there was no offer to show the value of the land. *Stewart v. Riley*, 189 Ala. 519, 66 So. 488.

§ 40. Weight and Sufficiency.

Necessity of View of Related Acts.—*Richter v. Richter*, 180 Ala. 218, 60 So. 880. See the title FRAUD, § 40 (1), vol. 7, p. 501.

Possession of Draft as Evidence of Payment.—In an action for deceit in the sale of a ship and freight without informing the buyer of a draft against them, the buyer's possession of the draft is prima facie evidence that he paid it. *Corry v. Sylvia y Cia*, 192 Ala. 550, 68 So. 891.

False Representations to Induce Assignment of Note.—Evidence held insufficient to show false representations, to induce assignment of notes. *Henderson v. Gilliland*, 187 Ala. 268, 65 So. 793.

(D) DAMAGES.

§ 41. Measure in General.

§ 41 (1) In General.

A person injured by fraudulent representations can recover all damages contemplated by the parties or which are the proximate consequences of the fraud. *Kilby Locomotive, etc., Works v. Lacey & Son*, 12 Ala. App. 464, 67 So. 754.

Where the purchaser of a secondhand locomotive, represented to have been overhauled and repaired until good as new, used the engine a year, and then had it repaired, in an action for deceit, the purchaser was not entitled to the cost of repair, occasioned by the year's use or

in making it conform to an act of congress passed after the sale, but was entitled to the cost of putting it in such shape otherwise as it was represented to be and for the hire of another engine made necessary by the repairs for which the seller was liable. *Kilby Locomotive, etc., Works v. Lacy & Son*, 12 Ala. App. 464, 67 So. 754.

§ 41 (2) Difference between Actual and Represented Value.

The proper measure of damages, in an action of deceit by a purchaser against the seller, is the difference between the actual value of the property at the time of the sale or exchange and its represented value. *Tillis v. Smith Sons Lumber Co.*, 188 Ala. 122, 65 So. 1015.

Ordinarily the measure of damages for fraud which induced the purchase of a note or other security is the difference between the actual value of the security at the time of sale and what its value would have been if it had been as represented. *Moon v. Benton*, 13 Ala. App. 473, 68 So. 589.

For fraudulent representations inducing the sale of personal property, where the purchaser retains the property, the measure of damages, in an action for deceit, is the difference between the actual value of the property at the time of sale and what its value would have been if the representations had been true, unless the actual damages are greater than this. *Kilby Locomotive, etc., Works v. Lacy & Son*, 12 Ala. App. 464, 67 So. 754.

Advantageous Disposition. — A party induced to buy horses by false representations and a warranty as to their soundness was entitled to the difference between the value of the horses and their value as warranted or represented, regardless of a subsequent advantageous disposition of the horses by him, and evidence as to such disposition was properly excluded. *Stewart v. Riley*, 189 Ala. 619, 66 So. 488.

(E) TRIAL, JUDGMENT, AND REVIEW.

§ 42. Questions for Jury.

In General.—In an action by purchaser for the deceit of his vendor in misrepresenting title to the property, the plea of

general issue with leave to give in evidence anything that could be properly pleaded raised an issue for the jury. *Berry v. Woody* (Ala. App.), 77 So. 942.

Matters of Opinion or Statements of Fact.—Where it is doubtful whether the representation is as to a matter of fact or a mere opinion, the question is for the jury. *Hockensmith v. Winton*, 11 Ala. App. 670, 66 So. 954.

Where there was evidence tending to show that one defendant gave another a note for a simulated indebtedness secured by a mortgage on an almost worthless lot, and that the payee transferred the note to plaintiff for value, representing that the property affected by the mortgage was of a certain value and was located in a good residence section of the city, it was a question for the jury whether the representations as to the value were made merely as matters of opinion, or were intended as a statement of fact. *Moon v. Benton*, 13 Ala. App. 473, 68 So. 539.

Whether representations by a vendee that bonds and preferred stock were "as good as gold," were "perfectly good," etc., were mere expressions of opinion or statements of facts, on which the vendor was entitled to rely, was a question for the jury. *Tillis v. Smith Sons Lumber Co.*, 188 Ala. 122, 65 So. 1015.

Reliance on Assurance.—If a purchaser, after an independent inquiry which proves unavailing or unsatisfactory, goes to the vendor demanding assurance, the question whether he relied on an assurance so obtained is for the jury. *Tillis v. Smith Sons Lumber Co.*, 188 Ala. 122, 65 So. 1015.

Inducement to Forbear Inquiry. — Whether an opinion of a vendor concerning the value of property has been elicited under such circumstances of confidence as to induce the purchaser to forbear independent inquiry is a question for the jury. *Tillis v. Smith Sons Lumber Co.*, 188 Ala. 122, 65 So. 1015.

Withdrawal of Representation by Lapse of Time.—*King v. Livingston Mfg. Co.*, 180 Ala. 118, 60 So. 143. See the title FRAUD, § 42 (1), vol. 7, p. 501.

Direction of Verdict as to One Defendant.—Where two defendants were jointly sued for damages for fraud in the transfer of a note secured by mortgage, the complaint containing a count for money had and received, an affirmative charge, which was requested on that issue only as to one of the defendants, was properly refused as likely to mislead the jury into believing that there was a difference in the liability of the two defendants, but if it had been requested as to both defendants, it should have been given. *Moon v. Benton*, 13 Ala. App. 473, 68 So. 589.

III. CRIMINAL RESPONSIBILITY.

§ 44. Offenses.

Under Code 1907, § 6239, providing that any person who shall knowingly sell or exchange any horse or mule subject to the disease known as "choking," or affected with glanders or other fatal contagious or infectious disease, must be punished as therein provided, an intent to defraud is an element of the offense, and must be alleged and proved, since the placing of the section in the article relating to offenses concerning domestic animals in the Code of 1907, instead of in the chapter relating to frauds, as in the Code of 1896, the inclusion of glanders or other fatal or contagious disease and the omission of the provision formerly contained therein giving justices of the peace concurrent jurisdiction, did not change the construction of the statute. *Jones v. State*, 10 Ala. App. 152, 65 So. 411.

Code 1907, § 6931, denouncing as a

crime the taking or destruction of wills, deeds, or conveyances of realty or personalty, with the intent to injure or defraud, and the receiving, concealing, or aiding in concealing such conveyances, knowing them to have been taken with the intent to injure or defraud, punishes the fraudulent suppression of evidence of the right or title to property in some person other than accused, and does not comprehend the act of accepting as grantee from a grantor a deed of conveyances, intentionally delivered to pass title to the grantee, though the grantee entertained the intent to injure or defraud. *Bell v. State* (Ala. App.), 75 So. 648.

§ 45. Prosecution and Punishment.

Under Code 1907, § 6239, providing that any person who shall knowingly sell or exchange any horse or mule subject to the disease known as "choking," or affected with glanders or other fatal contagious or infectious disease, must be punished as therein provided, an intent to defraud is an element of the offense, and must be alleged and proved, since the placing of the section in the article relating to offenses concerning domestic animals in the Code of 1907, instead of in the chapter relating to frauds, as in the Code of 1896, the inclusion of glanders or other fatal or contagious disease and the omission of the provision formerly contained therein giving justices of the peace concurrent jurisdiction, did not change the construction of the statute. *Jones v. State*, 10 Ala. App. 152, 65 So. 411.

FRAUDS, STATUTE OF.

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Cross References.

See the title FRAUDS, STATUTE OF, vol. 7, p. 503, and references there given.

I. AGREEMENTS IN CONSIDERATION OF MARRIAGE.

Parol promise or agreement in consideration of marriage is void under the statute of frauds so that the husband's execution of such an agreement after marriage is without legal consideration to support it, and is purely voluntary as to preexisting creditors of the husband. *London v. Anderson Brass Works*, 197 Ala. 16, 72 So. 359.

III. PROMISES TO ANSWER FOR DEBT, DEFAULT OR MISCARRIAGE OF ANOTHER.**§ 4. Statutory Provisions.**

The statute of frauds, forbidding a special promise to answer for the debt, default, or miscarriage of another unless in writing, etc., refers to contracts, not mere negotiations preceding contracts. *Gambill v. Fox Typewriter Co.*, 190 Ala. 36, 66 So. 655.

§ 7. Promise to Answer in General.

Where a mother indorsed notes pay-

able to herself to her son, to be used by him to secure his own notes to defendant, there was no promise by the mother to answer for the debt or default of the son, and hence the statute of frauds was inapplicable. *Henderson v. Gilliland*, 187 Ala. 268, 65 So. 793.

§ 9. Promise to Indemnify.

Promise of one to the other of co-sureties on a note to hold him harmless thereon is within the statute of frauds. *Posten v. Clem (Ala.)*, 78 So. 883.

§ 10. Original or Collateral Promises in General.

See post, "Credit Given to Promisor,"

§ 11.

§ 10 (1) In General.

Doctrine Stated.—*Dilworth v. Holmes Furniture, etc., Co.*, 183 Ala. 608, 62 So. 512. See the title FRAUDS, STATUTE OF, § 10 (1), vol. 7, p. 512.

Decisive Test.—Where an action is brought against one for the value of goods delivered to another, and defend-

ant pleads the statute of frauds, the decisive question is, To whom was the credit given? And if it appears that the credit was given solely to defendant (that is, if the goods were really sold to him, though delivered to another), the statute does not apply. *Day v. Adcock*, 11 Ala. App. 471, 66 So. 911.

"I will See It Paid."—That defendant's promise to pay for goods delivered to another was in the form, "I will see it paid," did not necessarily import a collateral, as distinguished from an original, promise. *Day v. Adcock*, 11 Ala. App. 471, 66 So. 911.

Guaranty of Contract to Sell for or Purchase Stock.—Where, wishing to sell corporate stock, defendant by indorsement on the contract guaranteed agreement by his associate to sell for or purchase, stock sold plaintiff, consideration of principal contract was sufficient to support contract of guaranty and take it without statute of frauds. *Miller v. Eubanks* (Ala.), 77 So. 740.

§ 10 (2) Construction Contracts.

See post, "Contracts to Pay for Property Sold," § 10 (3).

§ 10 (3) Contracts to Pay for Property Sold.

Where goods are sold and delivered to contractor for construction of owner's house, any promise of payment made by owner would be collateral and within the statute. *Shepherd v. Butcher Tool, etc., Co.* (Ala.), 73 So. 498.

§ 10 (4) Contracts to Pay for Services and Expenses.

Code 1907, § 4289, invalidating oral promises to answer for another's debt, is inapplicable to husband's original promise to pay attorney for defending wife's interests during litigation. *Lang v. Leith* (Ala. App.), 77 So. 445.

§ 11. Credit Given to Promisor.

See ante, "Original or Collateral Promises in General," § 10.

Where goods are sold and delivered to contractor for construction of owner's house, any promise of payment made by owner would be collateral and within the statute, but where the credit was given

to owner of the house, the contract was not within statute. *Shepherd v. Butcher Tool, etc., Co.* (Ala.), 73 So. 498.

Promise on Behalf of Injured Employee.—An employer's implied promise to pay for medical services rendered his servant is not within statute of frauds, where a physician performed the services solely upon the credit of the employer. *Weil v. Centerfit* (Ala.), 78 So. 885.

§ 12. Promise to Make, Accept, or Indorse Bill or Note.

A note indorsed by a bankrupt and signed by the corporation of which he was president is not invalid under the statute of frauds as being a promise to answer for the default of the corporation, and containing no written statement of the consideration therefor; the statute not being applicable to an accommodation indorsement or to any former written guaranty made upon a note or contract before it becomes effective by delivery to the payee. *Ducan v. Lum* (Ala.), 77 So. 718.

§ 13. Promise on Transfer of Bill or Note and Mortgage.

An agreement to pay a certain sum for an assignment of a note and mortgage is not a promise to answer for the debt or miscarriage of the maker of the note, within the statute of frauds. *Norman v. Bullock County Bank*, 187 Ala. 33, 63 So. 371.

Mere Contract to Pay Own Debt. — *Plott v. Foster*, 7 Ala. App. 402, 62 So. 299. See the title FRAUDS, STATUTE OF, § 13, vol. 7, p. 514.

§ 14. Discharge of Original Debtor.

Novation.—Where the buyer was entirely released and the obligation of one to whom he sold his property and business was substituted, a new debt was thereby created, binding on the substituted debtor without liability on the part of the original debtor, though the new obligation was not reduced to writing in accordance with the statute of frauds. *La Duke v. Barbee & Co.* (Ala.), 73 So. 472.

§ 15. New Consideration Beneficial to Promisor.

Where one who is indebted to another,

or will become so indebted upon the performance of an existing contract, promises, with the consent of his creditor, to pay to a third person the amount of such debt in return for some new consideration moving from the third person, the promise is not a promise to pay the debt of another, within the meaning of the statute of frauds (Code 1907, § 4289, subd. 3), but is in effect an assignment of the original debt. *Park-Robertson Hdw. Co. Copeland*, 11 Ala. App. 447, 66 So. 860.

What Is Sufficient Consideration.

Where a corporation in which defendant was interested was indebted to plaintiff for motor rental, lights, etc., and plaintiff at defendant's request removed the motor and installed it at defendant's new mill upon defendant's promise to pay the old debt of the corporation in installments, such debt became existent as a condition precedent to removal and installation of motor in new mill. *Cassels v. Alabama City, etc., R. Co.* (Ala.), 73 So. 494.

In a guaranty of performance of a timber contract, the expressed consideration that the grantor should have the necessary rights of way for spur tracks and roads over the lands of the guarantee for cutting and removing the timber was sufficient to take guaranty out of statute of frauds. *Baskett Lumber, etc., Co. v. Gravlee* (Ala. App.), 73 So. 291.

§ 16. Promise to Apply or Pay from Property of Debtor.

General Rule.—*Plott v. Foster*, 7 Ala. App. 402, 62 So. 299. See the title FRAUDS, STATUTE OF, § 16, vol. 7, p. 517.

Contractors' Ratification or Arrangement to Pay for Materials.—While an agreement by defendant to pay plaintiff for materials, with the proviso that her liability was limited to the amount due a contractor who had agreed to furnish all materials, was without consideration and voidable under the statute of frauds, as she was still liable to the contractor, who was still liable to plaintiff, where the contractor subsequently came into the arrangement, ratified it by acting upon it, accepted the materials furnished by plaintiff knowing that they were procured by negotiations between plaintiff

and defendant, and received partial payments from defendant, with instructions to apply them on plaintiff's bill, which he did, it was then as if he had consented in the beginning, and the agreement was not obnoxious to the statute of frauds, but was an agreement by defendant to pay her own debt in a particular way out of a particular fund; the debt due the contractor being merely a measure of her liability. *Beitman v. Birmingham Paint, etc., Co.*, 185 Ala. 313, 64 So. 600.

V. AGREEMENTS NOT TO BE PERFORMED WITHIN ONE YEAR.

§ 18. Nature and Subject-Matter.

Working for Percentage of Profits.

Code 1907, § 4289, subd. 1, requiring contracts not to be performed within one year to be in writing, does not apply to a contract of employment by the terms of which the employee was to be paid a percentage of the profits, even though the payment was not to be made until after the year expired, since that provision applies only to executory contracts, and the contract in question was entirely executed, except for the payment of the money. *Harris Transfer, etc., Co. v. Moor*, 10 Ala. App. 469, 63 So. 416.

Same—Assisting on Turpentine Farm.

—*Conoley v. Harrell*, 182 Ala. 243, 62 So. 511. See the title FRAUDS, STATUTE OF, § 18, vol. 7, p. 518.

§ 20. Possibility of Performance.

§ 21. — Dependent on Contingency.

Fraud is never presumed, but must be proved by clear and satisfactory evidence and, when a transaction is fairly susceptible of two constructions, the one which will free it from the imputation of fraud will be adopted. *Henderson v. Gilliland*, 187 Ala. 268, 65 So. 793.

§ 22. Commencement of Period.

A verbal contract, entered into in August or November, for the rental of land for one year from January 1st following, is obnoxious to the statute of frauds (Code 1907, § 4289, subd. 1), since it is not to be performed within 12 months from its making. *Phillips-Neely Mercantile Co. v. Banks*, 8 Ala. App. 549, 63 So. 31, cited in note in 49 L. R. A., N. S., 823.

VI. REAL PROPERTY AND ESTATES AND INTERESTS THEREIN.

§ 24. Creation of Estates or Interests in General.

Where a compromise and settlement of a will contest involved the transfer of title to certain land, a parol agreement of settlement without the passing of deeds was insufficient to vest title to the land in accordance with the settlement, under the statute of frauds. *Burleson v. Mays*, 189 Ala. 170, 66 So. 36.

Promise to Construct Dwelling. — A parol promise by a grantee that he will construct upon the land a dwelling house for himself is void under the statute of frauds. *Holloway v. Smith (Ala.)*, 73 So. 417.

Purchase of Interest in Partnership Consisting of Lands.—An oral agreement for the purchase of an interest in a partnership consisting wholly or partly of lands involves the title to real estate, and is in violation of the statute of frauds. *Reilly v. Woolbert*, 196 Ala. 191, 72 So. 10.

§ 25. Creation of Leases.

§ 26. — In General.

The statute of frauds has nothing to do with the question of a lease, taken in the name of a partner, being treated by equity as partnership assets; equity treating all partnership property as personalty, so far as partnership rights are concerned, and an implied trust being involved. *Dikis v. Likis*, 187 Ala. 218, 63 So. 398.

§ 28. Creation of Easements.

The right to take water from a reservoir on another's land using a dam to collect it and laying pipes to carry it away, is an easement rather than a personal license, and is of no effect unless granted by a writing or acquired by prescription. *Profile Cotton Mills v. Calhoun Water Co.*, 189 Ala. 181, 66 So. 50.

A parol agreement that the lower floor of a building should be used as a place of worship by "Christian denominations, Mormon and Catholic excepted," held in the nature of an easement in gross, and, not resting in grant, prescription, or es-

toppel in pais, was unenforceable. *Christian Church v. Littleville Camp*, No. 256, 185 Ala. 80, 64 So. 9.

§ 30. Assignment, Grant, or Surrender of Existing Estates, Interests, or Terms.

§ 31. — In General.

Parol Agreement to Release Tax Title Lien.—*Osborne v. Waddell*, 176 Ala. 232, 57 So. 698. See the title FRAUDS, STATUTE OF, § 31 (1), vol. 7, p. 522.

§ 31½. — Act or Operation of Law.

An agreement between the mortgagor and mortgagee that upon the sale of the mortgaged property the mortgagee will accept in payment of the debt shares of stock received by the mortgagor in payment of the purchase price is not within the statute of frauds, since a release would result by operation of law. *McKenzie v. Stewart*, 196 Ala. 241, 72 So. 109.

§ 34. Contracts for Sale.

§ 35. — In General.

The great controlling purpose of the statute of frauds is the requisition of written evidence of all contracts for the sale of lands. *Kyle v. Jordan*, 196 Ala. 509, 71 So. 417.

The statute of frauds has no application to an agreement relative to a house erected under circumstances whereby it remains personalty. *Clements v. Morton (Ala.)*, 76 So. 306.

§ 36. — Contracts to Devise.

Under Code 1907, § 4289, which is the statute of frauds, an oral agreement to make a will devising real estate, unaccompanied by payment of some valuable consideration and delivery of possession of the land to be devised, is void. *Mayfield v. Cook (Ala.)*, 77 So. 713.

Where bill of complaint to enforce a promise to devise land to complainant showed on its face that the promise was not in writing, and alleged no facts bringing the agreement within the excepting clause of the statute of frauds, demurrer was properly sustained. *Mayfield v. Cook (Ala.)*, 77 So. 713.

VII. SALES OF GOODS.**(A) CONTRACTS WITHIN STATUTE.****§ 48. Nature of Contract—Existence and Condition of Goods.**

Oral contract between seller and buyer of heating plant that the sale was conditional and that the title should not vest in buyer until full payment, being made with reference to personal property, did not violate statute of frauds. *Barbour Plumbing, etc., Co. v. Ewing* (Ala. App.), 77 So. 430.

VIII. REQUISITES AND SUFFICIENCY OF WRITING.**§ 48. Creation or Conveyance of Estates or Interests in Real Property.****§ 49. — Nature and Form of Instrument.**

Where a conveyance was not witnessed or acknowledged as required by statute so as to pass legal title, but was such that legal title would have passed had it been witnessed and acknowledged, it was not obnoxious to the statute of frauds. *Bethea v. McCullough*, 195 Ala. 480, 70 So. 680.

§ 55. Contents of Memorandum.**§ 58. — Statement of Consideration.**

A guaranty of payment on back of note containing expression "For value received" sufficiently expresses consideration. *Clark v. International Harvester Co.* (Ala.), 77 So. 692.

Under Code 1907, § 4289, subd. 1, written agreement to repurchase stock at purchaser's election within two years, expressing no consideration, held void and not relieved of the requirement as to consideration by § 3966, relating to presumption of consideration. *Rains v. Patton*, 191 Ala. 349, 67 So. 600, cited in notes in Ann. Cas. 1918A, 135, 136.

§ 58½. — Subject Matter in General.

Contract guaranteeing performance of agreement to sell for or purchase corporate stock sold to plaintiff is not invalid because the amount of stock to be sold for or repurchased from plaintiff was not specified, as that could be es-

tablished by parol. *Miller v. Eubanks* (Ala.), 77 So. 740.

§ 66. Separate Writings.

In General.—Where a contract may be gathered from writings, executed in the same transaction, but not contemporaneously, the writings may be construed together to prevent contract being invalidated by statute of frauds. *O'Barr v. Turner* (Ala. App.), 75 So. 271.

Writings Connected by Internal Reference.—Where a guaranty written on back of mortgage given to secure a note and title retention contracts guarantying "the payment of the within note and mortgage" was executed before delivery of the note and mortgage, the words "value received" in the mortgage note were sufficient to take the guaranty out of the statute of frauds. *Dillworth v. Holmes Furniture, etc., Co.* (Ala. App.), 73 So. 288.

Where copies of an assignment securing present and future advances were attached to notes given for such advances and the notes themselves referred to the assignment, the notes and assignment, construed together, held to comply with the statute of frauds. *O'Barr v. Turner* (Ala. App.), 75 So. 271.

IX. OPERATION AND EFFECT OF STATUTE.**§ 67. Operation as to Rights or Remedies in General.**

Purpose of the statute of frauds is to prevent fraud and perjury. *O'Barr v. Turner* (Ala. App.), 75 So. 271.

The statute of frauds does not avoid parol contracts, but merely lays down a rule of evidence by which contracts must be established, thus rendering them voidable at the election of the nonsubscribing party. *Wood v. Lett*, 195 Ala. 601, 71 So. 177.

The statute of frauds can not be invoked to defeat the rights which parties intended to create by instruments in writing which failed to accomplish their purpose. *Tumlin v. Tumlin*, 195 Ala. 457, 70 So. 254.

§ 70. Validity and Enforcement of Contracts in General.

An agreement violating the statute of

frauds of Alabama is void and not merely voidable. *Ex parte Banks*, 185 Ala. 275, 64 So. 74.

Applicable to Both Unilateral and Bilateral Agreements.—Code 1907, § 4289, subd. 1, requiring agreement not to be performed within one year to be in writing, stating consideration, etc., held applicable to both unilateral and bilateral agreements, so that a plaintiff to hold a defendant liable for breach must show agreement evidenced by such writing. *Rains v. Patton*, 191 Ala. 349, 67 So. 600.

Effect of Timely Acceptance of Offer to Buy.—Rule that offer to buy is binding if seasonably accepted before lapse held to operate only in subordination to statute of frauds, which presupposes an offer in such form that, if accepted, it would constitute a valid contract within the statute. *Rains v. Patton*, 191 Ala. 349, 67 So. 600.

§ 71. Writing Subsequent to Oral Agreement.

Mortgage Executed Pursuant to Parol Agreement. — *Minchener v. Henderson*, 181 Ala. 115, 61 So. 246. See the title FRAUDS, STATUTE OF, § 71, vol. 7, p. 539.

§ 72. Part Performance in General.

Contract to Assist on Turpentine Farm.—*Conoley v. Harrell*, 182 Ala. 243, 62 So. 511. See the title FRAUDS, STATUTE OF, § 72 (1), vol. 7, p. 339.

Sale of Land—Change of Possession.—There is such a change of possession as to constitute the putting of a purchaser of land under an oral contract in possession, satisfying the statute of frauds, where the purchaser, though at the time in possession as tenant of the vendor, on making the contract and the partial payment, proceeds to make valuable improvements by erection of buildings and clearing of the land. *Eason v. Roe*, 185 Ala. 71, 64 So. 55.

Same — Simultaneous Possession and Part Payment.—To take a parol agreement for the sale of lands out of the statute of frauds, the putting of the purchaser in possession and his part payment of the price need not be simultaneous. *Sherman v. Sherman*, 190 Ala. 446, 67 So. 255.

§ 73½. Modification of Contract.

A note secured by a real estate mortgage is a contract for the payment of money, and its terms may be modified by a subsequent parol agreement supported by a valid consideration. *McKenzie v. Stewart*, 196 Ala. 241, 72 So. 109, cited in note in L. R. A. 1917B, 146.

§ 76. Contracts Performed Only as to Part Not within Statute.

§ 79. — Agreements Relating to Real Property.

Where plaintiff's grantor was put in possession of certain land in controversy by defendant, pursuant to an oral compromise and settlement of a will contest, and remained in possession until she sold the land to plaintiff, the settlement agreement was executed, and not within the statute of frauds. *Burleson v. Mays*, 189 Ala. 107, 66 So. 36.

§ 81. Contracts Completely Performed.

A parol contract within the statute of frauds is not absolutely void, and when executed the statute is inapplicable. *Lan drum & Co. v. Wright*, 11 Ala. App. 406, 66 So. 892.

A verbal contract, voidable on account of the statute of frauds, when fully performed, becomes by the doctrine of relation a binding contract from its inception. *Phillips-Neely Mercantile Co. v. Banks*, 8 Ala. App. 549, 63 So. 31.

Execution of Contract to Hold Co-surety Harmless.—Under Code 1907, §§ 5384, 5385, stating liability of joint sureties and rights inter sese, the payment of note by one of the sureties is not an execution of his oral contract to hold the other surety harmless, within rule that statute of frauds is not available against executed contract. *Posten v. Clem* (Ala.), 78 So. 883.

Deed or Mortgage Pursuant to Agreement.—Although a parol contract to convey land is void under statute of frauds, if a deed or mortgage is subsequently made pursuant to parol agreement, such deed or mortgage can not be annulled on ground that original contract was in parol. *Cook v. Kelly* (Ala.), 75 So. 953.

Where a mortgage was executed pursuant to parol agreement of purchase and

improvement of land and vested legal title in accordance with such contract, the mortgage related back to the inception of contract and agreement, and was the execution of the contract, taking it out of statute of frauds. *Cook v. Kelly* (Ala.), 75 So. 953.

§ 84. Persons to Whom Statute Is Available.

A stranger to a lease, who was neither a party nor a privy to the contract, had no capacity to assert that it was in violation of the statute of frauds and invalid. *Ex parte Banks*, 185 Ala. 275, 64 So. 74:

X. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 87. Pleading Contract or Transaction within Statute.

§ 89. — Writing or Other Compliance with Statute.

Though a writing in conformity to the statute of frauds is necessary to support an action, it is not necessary to allege such a writing; the absence of such a writing being a matter of defense, unless affirmatively apparent on the face of the complaint. *Moore v. Whitmire*, 189 Ala. 615, 66 So. 601.

§ 90. Demurrer Raising Defense.

Sufficiency of Demurrer to Raise Defense.—A bill in equity, alleging a partnership in lands and praying for an accounting, is not demurrable on the ground that the partnership contract was not in writing, as required by the statute of frauds, where that fact does not appear upon the face of the pleading. *Reilly v. Woolbert*, 196 Ala. 191, 72 So. 10.

In assumpsit, where complaint contained common counts, and special count alleging merchandise sold to defendant through his agents acting within line and scope of their authority, demurrers on ground that basis of suit was an account made by another, or special promise to answer for debt, default, or miscarriage of another, and that no memorandum in writing signed by parties sought to be charged is alleged, were properly overruled. *Shepherd v. Butcher Tool, etc., Co.* (Ala.), 73 So. 498.

Pleadings Showing Noncompliance with Statute.—In case of a pleading relying on an agreement affirmatively disclosing that it is within the statute of frauds, the defense of the statute may be raised by demurrer. *Posten v. Clem* (Ala.), 78 So. 883; *Ex parte Banks*, 185 Ala. 275, 64 So. 74.

Rule Illustrated.—*Conoley v. Harrell*, 182 Ala. 243, 62 So. 511. See the title FRAUDS, STATUTE OF, § 90 (1), vol. 7, p. 549.

§ 91. Pleading Statute as Defense.

§ 92. — Necessity.

General Rule.—The defense that a contract sued on is in violation of the statute of frauds is unavailable unless pleaded. *Ex parte Banks*, 185 Ala. 275, 64 So. 74.

The defense of the statute of frauds must be pleaded; unless it affirmatively appears on the face of the complaint that the contract is within the statute. *Union Cemetery Co. v. Alexander*, 14 Ala. App. 217, 69 So. 251.

Rule Illustrated.—*Gachet v. Morton*, 181 Ala. 179, 61 So. 817. See the title FRAUDS, STATUTE OF, § 92 (1), vol. 7, p. 550.

Evidence of a parol agreement can not be properly excluded as showing a violation of the statute of frauds, in the absence of a plea claiming the benefit of such defense. *Kendrick v. Cunningham*, 9 Ala. App. 398, 63 So. 797.

Verbal Emendation of Written Description of Property.—In an action for breach of an agreement to exchange lands, whether the original agreement was defective or not with respect to the description, and whether a subsequent indorsement of a description on the writing satisfied the statute of frauds, plaintiff, in the absence of any plea of the statute of frauds, could prove and recover upon a verbal emendation of the written description made while the contract was still in fieri. *Moore v. Whitmire*, 189 Ala. 615, 66 So. 601.

§ 95. Evidence.

Burden of Proof.—When the issue is taken on a plea of the statute of frauds, the burden is on the plaintiff to show a

valid contract. *Forbes v. Plummer* (Ala.), 73 So. 451.

Parol proof is not admissible to establish title to land, though it is, to prove possession. *Townley v. Birmingham Fuel Co.* (Ala.), 77 So. 28.

§ 96. Questions for Jury.

Implied Promise to Pay for Medical Services.—Whether physician, suing defendant for medical services rendered a third party, performed such services upon the authorization of defendant and upon the credit of and faith in defendant's implied promise to pay therefor, are questions for the jury. *Weil v. Centerfit* (Ala.), 78 So. 885.

Original or Collateral Promise to Pay.

—In an action for goods alleged to have been delivered to others on defendant's promise to pay, whether the goods were delivered solely on defendant's promise to pay therefor, so as to take the case out of the statute of frauds, and whether defendant's promise was limited in amount, held for the jury. *Day v. Adcock*, 11 Ala. App. 471, 66 So. 911.

§ 97. Instructions.

In assumpsit, where the defense was that credit was given to another than defendant, and the statute of frauds was relied upon, an instruction that, if credit was given to defendant, the statute had no application, was proper. *Shepherd v. Butcher Tool, etc., Co.* (Ala.), 73 So. 498.

W.C.J.
7/18/21

